



Osborn v. Haley
 U.S., 2007.

Supreme Court of the United States
 Pat **OSBORN**, Petitioner,
 v.
 Barry **HALEY** et al.
No. 05-593.

Argued Oct. 30, 2006.
 Decided Jan. 22, 2007.

Background: Former employee of contractor to the United States Forest Service brought action in state court against employee of Forest Service, alleging that Forest Service employee tortiously interfered with contractor's employee's continued employment by influencing contractor to terminate her. The United States invoked the Westfall Act immunity on Forest Service employee's behalf, and action was removed to federal court. The United States District Court for the Western District of Kentucky, **Thomas B. Russell, J.**, denied the substitution of the United States as defendant for the Forest Service employee, and remanded to state court. The Forest Service employee and the United States appealed. The Sixth Circuit Court of Appeals, **Cook**, Circuit Judge, **422 F.3d 359**, vacated and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice **Ginsburg**, held that:

- (1) district court order rejecting the Attorney General's certification that federal employee named as defendant in state court action was acting within scope of his employment, and refusing to substitute the United States as defendant, was reviewable under collateral order doctrine;
- (2) federal statutory bar against appellate review of remand orders did not displace provision of the Westfall Act, which shielded from remand any action removed to federal court based upon Attorney General's certification;

- (3) once the Attorney General certified that federal employee named as defendant was acting within scope of employment and once cause of action was removed, district court has no authority to return case to state court on ground that the Attorney General's certification was unwarranted; and
- (4) Attorney General could validly certify that federal employee named as defendant was acting within scope of his employment, so as to warrant substitution of United States as defendant pursuant to the Westfall Act, even though the Attorney General's certification rested on understanding of facts that differed from plaintiff's allegations.

Affirmed.

Justice **Souter** concurred in part and dissented in part and filed opinion.

Justice **Breyer** concurred in part and dissented in part and filed opinion.

Justice **Scalia** dissented and filed opinion, in which Justice **Thomas** joined.

West Headnotes

[1] Removal of Cases 334 107(9)

334 Removal of Cases

334VII Remand or Dismissal of Case

334k107 Proceedings for Remand and Review Thereof

334k107(9) k. Review. **Most Cited Cases**

Federal district court order rejecting the Attorney General's certification that federal employee named as defendant in state court tort action was acting within scope of his employment, and refusing to substitute the United States as defendant once cause of action was removed pursuant to provision of the Westfall Act, was reviewable under collateral order doctrine; order conclusively decided an important,

549 U.S. 225, 127 S.Ct. 881, 166 L.Ed.2d 819, 75 USLW 4066, 25 IER Cases 769, 07 Cal. Daily Op. Serv. 809, 2007 Daily Journal D.A.R. 988, 20 Fla. L. Weekly Fed. S 51
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contested issue separate from merits of cause of action, and would be effectively unreviewable later in litigation. 28 U.S.C.A. § 2679(d)(1, 2).

[2] United States 393 ↪50.5(1)

393 United States

393I Government in General

393k50 Liabilities of Officers or Agents for Negligence or Misconduct

393k50.5 Immunity or Privilege in General

393k50.5(1) k. In General. [Most Cited Cases](#)

Westfall Act, in permitting the Attorney General to certify that federal employee named as defendant in tort action was acting within scope of his employment, and in providing for substitution of the United States as defendant for employee upon such certification, is designed to immunize covered federal employees, not simply from liability, but from suit. 28 U.S.C.A. § 2679(d)(1, 2).

[3] Removal of Cases 334 ↪107(9)

334 Removal of Cases

334VII Remand or Dismissal of Case

334k107 Proceedings for Remand and Review Thereof

334k107(9) k. Review. [Most Cited Cases](#)

Federal statutory bar against appellate review of remand orders did not displace provision of the Westfall Act, which shielded from remand any action removed to federal court based upon Attorney General's certification that federal employee named as defendant was acting within scope of his employment, and did not prevent federal appellate court from setting aside remand order that district court entered in violation of this provision of the Westfall Act. 28 U.S.C.A. §§ 1447(d), 2679(d)(2).

[4] Removal of Cases 334 ↪21

334 Removal of Cases

334II Origin, Nature, and Subject of Controversy

334k21 k. Actions Against or for Acts of United States Officers. [Most Cited Cases](#)

Removal of Cases 334 ↪102

334 Removal of Cases

334VII Remand or Dismissal of Case

334k101 Grounds for Remand

334k102 k. Want of Jurisdiction or of Cause for Removal. [Most Cited Cases](#)

Removal of Cases 334 ↪118

334 Removal of Cases

334VIII Proceedings in Case After Removal

334k118 k. Amendment of Pleading and Process, and Repleading. [Most Cited Cases](#)

Under certification provisions of the Westfall Act, once the Attorney General certifies that federal employee named as defendant in state court tort action was acting within scope of employment and once cause of action is removed to federal court based on that certification, district court has no authority to return case to state court on ground that the Attorney General's certification was unwarranted; though district court, if it determines post-removal that the Attorney General's scope-of-employment certification was incorrect, may resubstitute federal employee for the United States as defendant for purpose of trial, the Attorney General's certification is dispositive for purpose of removal. 28 U.S.C.A. § 2679(d)(2).

[5] Removal of Cases 334 ↪21

334 Removal of Cases

334II Origin, Nature, and Subject of Controversy

334k21 k. Actions Against or for Acts of United States Officers. [Most Cited Cases](#)

Removal of Cases 334 ↪111

334 Removal of Cases

334VIII Proceedings in Case After Removal

334k111 k. Jurisdiction Acquired by United States Court in General. [Most Cited Cases](#)

549 U.S. 225, 127 S.Ct. 881, 166 L.Ed.2d 819, 75 USLW 4066, 25 IER Cases 769, 07 Cal. Daily Op. Serv. 809, 2007 Daily Journal D.A.R. 988, 20 Fla. L. Weekly Fed. S 51
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Westfall Act's command that district court retain jurisdiction over state court action removed to federal court based upon the Attorney General's certification that federal employee named as defendant was acting within scope of his employment does not run afoul of Article III, even if district court ultimately determines that federal employee was acting outside scope of his employment and if only state law claims remain; cause of action raised significant federal question at the outset, i.e., whether federal employee had Westfall Act immunity, so as to be one "arising under" federal law as that term is used in Article III of the Constitution. [U.S.C.A. Const. Art. 3, § 1](#) et seq.

[6] Removal of Cases 334 ↪21

334 Removal of Cases

[334II](#) Origin, Nature, and Subject of Controversy

[334k21](#) k. Actions Against or for Acts of United States Officers. [Most Cited Cases](#)

Removal of Cases 334 ↪118

334 Removal of Cases

[334VIII](#) Proceedings in Case After Removal

[334k118](#) k. Amendment of Pleading and Process, and Repleading. [Most Cited Cases](#)

United States 393 ↪50.5(1)

393 United States

[393I](#) Government in General

[393k50](#) Liabilities of Officers or Agents for Negligence or Misconduct

[393k50.5](#) Immunity or Privilege in General

[393k50.5\(1\)](#) k. In General. [Most Cited Cases](#)

Attorney General could validly certify that federal employee named as defendant was acting within scope of his employment, so as to warrant substitution of United States as defendant pursuant to the Westfall Act, even though the Attorney General's certification rested on understanding of facts that

differed from plaintiff's allegations, i.e., on denial that the conduct alleged to be beyond scope of federal employee's employment had in fact occurred; federal government and federal employee named as defendant are not required to accept plaintiff's allegations as true for purposes of removal. [28 U.S.C.A. § 2679\(d\)\(1\)](#).

[7] United States 393 ↪50.5(1)

393 United States

[393I](#) Government in General

[393k50](#) Liabilities of Officers or Agents for Negligence or Misconduct

[393k50.5](#) Immunity or Privilege in General

[393k50.5\(1\)](#) k. In General. [Most Cited Cases](#)

Immunity granted to federal employee under the Westfall Act if employee was "acting within the scope of his office or employment at the time of the incident out of which the claim arose" encompasses an employee on duty at time and place of "incident" alleged in complaint who denies that the incident occurred. [28 U.S.C.A. § 2679\(d\)\(1, 2\)](#).

[8] United States 393 ↪50.5(1)

393 United States

[393I](#) Government in General

[393k50](#) Liabilities of Officers or Agents for Negligence or Misconduct

[393k50.5](#) Immunity or Privilege in General

[393k50.5\(1\)](#) k. In General. [Most Cited Cases](#)

Attorney General's certification under the Westfall Act that federal employee named as defendant was acting within scope of his employment is only the first, and not the final, word on whether employee is immune from suit; however, while district court may ultimately determine that employee was on frolic of his own and thus is not entitled to immunity, employee should have opportunity to present his version of facts to federal court. [28 U.S.C.A. § 2679\(d\)\(1, 2\)](#).

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[9] United States 393 ↪ **50.5(1)**

393 United States

393I Government in General

393k50 Liabilities of Officers or Agents for Negligence or Misconduct

393k50.5 Immunity or Privilege in General

393k50.5(1) k. In General. **Most Cited**

Cases

Upon certification by Attorney General under the Westfall Act that federal employee named as defendant was acting within scope of his employment, cause of action is deemed to be brought against the United States, unless and until the district court determines that the federal officer originally named as defendant was acting outside scope of his employment. 28 U.S.C.A. § 2679(d)(1, 2).

[10] Jury 230 ↪ **12(1.2)**

230 Jury

230II Right to Trial by Jury

230k12 Nature of Cause of Action or Issue in General

230k12(1.2) k. Sovereigns, Actions Against. **Most Cited Cases**

Seventh Amendment, which preserves right to jury trial in suits at common law, does not apply to proceedings against the sovereign. U.S.C.A. Const.Amend. 7.

[11] Jury 230 ↪ **12(1.2)**

230 Jury

230II Right to Trial by Jury

230k12 Nature of Cause of Action or Issue in General

230k12(1.2) k. Sovereigns, Actions Against. **Most Cited Cases**

Jury 230 ↪ **31.2(1)**

230 Jury

230II Right to Trial by Jury

230k30 Denial or Infringement of Right

230k31.2 Rights of Action and Procedure

in Civil Cases

230k31.2(1) k. In General. **Most Cited Cases**

Upon certification by Attorney General under the Westfall Act that federal employee named as defendant was acting within scope of his employment, and upon substitution of the United States as defendant, plaintiff has no right to jury trial, and district court can review the Attorney General's certification and uphold its correctness without violating plaintiff's Seventh Amendment rights. U.S.C.A. Const.Amend. 7; 28 U.S.C.A. § 2679(d)(1, 2).

[12] United States 393 ↪ **50.5(1)**

393 United States

393I Government in General

393k50 Liabilities of Officers or Agents for Negligence or Misconduct

393k50.5 Immunity or Privilege in General

393k50.5(1) k. In General. **Most Cited**

Cases

Westfall Act's core purpose is to relieve covered federal employees from cost and effort of defending lawsuit, and to place those burdens on government's shoulders. 28 U.S.C.A. § 2679.

[13] Officers and Public Employees 283 ↪ **119**

283 Officers and Public Employees

283III Rights, Powers, Duties, and Liabilities

283k119 k. Actions by or Against Officers and Employees. **Most Cited Cases**

Immunity-related issues should be decided at earliest opportunity.

884 Syllabus ^{FN}

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The federal statute commonly known as the West-

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fall Act accords federal employees absolute immunity from tort claims arising out of acts undertaken in the course of their official duties, [28 U.S.C. § 2679\(b\)\(1\)](#), and empowers the Attorney General to certify that a federal employee sued for wrongful or negligent conduct “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). Upon such certification, the United States is substituted as defendant in place of the employee, and the action is thereafter governed by the Federal Tort Claims Act. If the action commenced in state court, the Westfall Act calls for its removal to a federal district court, and renders the Attorney General's certification “conclusiv[e] ... for purposes of removal.” [§ 2679\(d\)\(2\)](#).

Plaintiff-petitioner Pat Osborn sued federal employee Barry Haley in state court. Osborn alleged that Haley tortiously interfered with her employment with a private contractor, that he conspired to cause her wrongful discharge, and that his efforts to bring about her discharge were outside the scope of his employment. The United States Attorney, serving as the Attorney General's delegate, certified that Haley was acting within the scope of his employment at the time of the conduct alleged in Osborn's complaint. She thereupon removed the case to a federal district court, where she asserted that the alleged wrongdoing never occurred. The District Court, relying in Osborn's allegations, entered an order that rejected the Westfall Act certification, denied the Government's motion to substitute the United States as defendant in Haley's place, and remanded the case to the state court. The Sixth Circuit vacated the District Court's order, holding that a Westfall Act certification is not improper simply because the United States denies the occurrence of the incident on which the plaintiff centrally relies. Based on [§ 2679\(d\)\(2\)](#)'s direction that certification is “conclusiv[e] ... for purposes of removal,” the Court of Appeals instructed the District Court to retain jurisdiction over the case.

Held:

1. The Attorney General's certification is conclusive for purposes of removal, *i.e.*, once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court, and that court may not remand the suit to the state court. Pp. 892 - 896.

(a) The Sixth Circuit had jurisdiction to review the order rejecting the Attorney General's certification and denying substitution of the United States as defendant. Under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, [337 U.S. 541](#), [69 S.Ct. 1221](#), [93 L.Ed. 1528](#), the District Court's ruling, which effectively denied Haley Westfall Act protection, ***885** qualifies as a reviewable final decision under [28 U.S.C. § 1291](#). Meeting *Cohen's* three criteria, the District Court's denial of certification and substitution conclusively decided a contested issue, the issue decided is important and separate from the merits of the action, and the District Court's disposition would be effectively unreviewable later in the litigation. [337 U.S.](#), at [546](#), [69 S.Ct. 1221](#). Pp. 892 - 893.

(b) The Sixth Circuit also had jurisdiction to review the District Court's remand order. Pp. 893 - 896.

(1) The Sixth Circuit had jurisdiction to review the District Court's remand order, notwithstanding [28 U.S.C. § 1447\(d\)](#), which states that “[a]n order remanding a case to the State court ... is not reviewable on appeal or otherwise” This Court held, in *Thermtron Products, Inc. v. Hermansdorfer*, [423 U.S. 336](#), [96 S.Ct. 584](#), [46 L.Ed.2d 542](#), that [§ 1447\(c\)](#) confines [§ 1447\(d\)](#)'s scope. Section [§ 1447\(c\)](#) provides that a case must be remanded “if ... it appears that the district court lacks subject matter jurisdiction.” Under *Thermtron*, “only remand orders issued under [§ 1447\(c\)](#) and invoking the [mandatory ground] specified therein ... are immune from review” under [§ 1447\(d\)](#). *Id.*, at [346](#), [96 S.Ct. 584](#). To determine whether *Thermtron's* reasoning controls here, the Westfall Act's design, particularly its prescriptions regarding the removal and remand of actions filed in state court, must be examined.

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When the Attorney General certifies that a federal employee named defendant in a state-court tort action was acting within the scope of his or her employment at the time in question, the action “shall be removed” to federal court and the United States must be substituted as the defendant. § 2679(d)(2). Of prime importance here, § 2679(d)(2) concludes with the command that the “certification of the Attorney General shall *conclusively establish scope of office or employment for purposes of removal.*” (Emphasis added.) This directive markedly differs from Congress’ instruction for cases in which the Attorney General “refuse[s] to certify scope of office or employment.” § 2679(d)(3). In that event, the defendant-employee may petition the court in which the action is instituted to make the scope-of-employment certification. If the employee so petitions in an action filed in state court, the Attorney General may, at his discretion, remove the action to federal court. If removal has occurred, and thereafter “the district court determines that the employee was not acting within the scope of his office or employment, the action ...*shall be remanded to the State court.*” *Ibid.* (emphasis added).

The Act’s distinction between removed cases in which the Attorney General issues a scope-of-employment certification and those in which he does not leads to the conclusion that Congress gave district courts no authority to return cases to state courts on the ground that the Attorney General’s certification was unwarranted. Section 2679(d)(2) does not preclude a district court from resubstituting the federal official as defendant for purposes of trial if the court determines, postremoval, that the Attorney General’s scope-of-employment certification was incorrect. For purposes of establishing a forum for adjudication, however, § 2679(d)(2) renders the Attorney General’s certification dispositive. Were it open to a district court to remand a removed action on the ground that the Attorney General’s certification was erroneous, § 2679(d)(2)’s final instruction would be weightless. Congress adopted the “conclusiv[e] ... for the purposes of removal” language to “foreclose needless

shuttling of a case from one court to another,”*886 *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 433, n. 10, 115 S.Ct. 2227, 132 L.Ed.2d 375. The provision assures that “once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system.” *Id.*, at 440, 115 S.Ct. 2227 (SOUTER, J., dissenting).

Thermtron held that § 1447(d) must be read together with § 1447(c). There is stronger cause to hold that § 1447(c) and (d) must be read together with the later enacted § 2679(d)(2). Both § 1447(d) and § 2679(d)(2) are antishuttling provisions that aim to prevent “prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.” *United States v. Rice*, 327 U.S. 742, 751, 66 S.Ct. 835, 90 L.Ed. 982. Once the Attorney General certifies scope of employment, triggering removal of the case to a federal forum, § 2679(d)(2) renders the federal court exclusively competent and categorically precludes a remand to the state court. By declaring certification conclusive as to the federal forum’s jurisdiction, Congress has barred a district court from passing the case back to state court based on the court’s disagreement with the Attorney General’s scope-of-employment determination. Of the two antishuttling commands, § 1447(d) and § 2679(d)(2), only one can prevail and the Court holds that the latter controls. Tailor-made for Westfall Act cases, § 2679(d)(2) “conclusively” determines that the action shall be adjudicated in the federal forum, and may not be returned to the state system. Pp. 893 - 896.

(2) The Westfall Act’s command that a district court retain jurisdiction over a case removed pursuant to § 2679(d)(2) does not run afoul of Article III. An Article III question could arise in this case only if, after full consideration, the District Court determined that Haley engaged in tortious conduct outside the scope of his employment. Because, at that point, little would be left to adjudicate as to his liability, and because a significant federal question (whether he has Westfall Act immunity) would have been

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raised at the outset, the case would “aris[e] under” federal law as that term is used in [Article III](#). Even if only state-law claims remained after resolution of the federal question, the District Court would have authority, consistent with [Article III](#), to retain jurisdiction. Pp. 895.

2. Westfall Act certification is proper when a federal officer charged with misconduct asserts, and the Attorney General concludes, that the incident or episode in suit never occurred. Pp. 896 - 900.

(a) Because the Westfall Act's purpose is to shield covered employees not only from liability but from suit, it is appropriate to afford protection to an employee on duty at the time and place of an “incident” alleged in a complaint who denies that the incident occurred. Just as the Government's certification that an employee “was acting within the scope of his employment” is subject to threshold judicial review, [Lamagno](#), 515 U.S., at 434, 115 S.Ct. 2227, so a complaint's charge of conduct outside the scope of employment, when contested, warrants immediate judicial investigation. Otherwise, a federal employee would be stripped of suit immunity not by what the court finds, but by what the complaint alleges. This position is supported by [Willingham v. Morgan](#), 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396, which concerned 28 U.S.C. § 1442, the federal officer removal statute. Section 1442 allows a federal officer to remove a civil action from state court if the officer is “sued in an official or individual capacity for any act under color of such office.” The Court held in [Willingham](#) that the language of § 1442 is “broad enough to *887 cover all cases where federal officers can raise a colorable defense arising out of the duty to enforce federal law.” 395 U.S., at 406-407, 89 S.Ct. 1813. There is no reason to conclude that the Attorney General's ability to remove a suit to federal court under § 2679(d)(2), unlike a federal officer's ability to remove under § 1442, should be controlled by the plaintiff's allegations. Pp. 897 - 899.

(b) Tugging against this reading is a “who decides” concern. If the Westfall Act certification must be

respected unless and until the District Court determines that Haley, in fact, engaged in conduct beyond the scope of his employment, then Osborn may be denied a jury trial. Upon the Attorney General's certification, however, the action is “deemed to be ... brought against the United States,” § 2679(d)(2), and the Seventh Amendment, which preserves the right to a jury trial in common-law suits, does not apply to proceedings against the sovereign. Thus, at the time the district court reviews the Attorney General's certification, the plaintiff has no right to a jury trial. The Westfall Act's core purpose—to relieve covered employees from the cost and effort of defending the lawsuit and to place those burdens on the Government—also bears on the appropriate trier of any facts essential to certification. Immunity-related issues should be decided at the earliest opportunity. See, e.g., [Hunter v. Bryant](#), 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (*per curiam*). Pp. 899 - 900.

[422 F.3d 359](#), affirmed.

[GINSBURG](#), J., delivered the opinion of the Court, in which [ROBERTS](#), C. J., and [STEVENS](#), [KENNEDY](#), and [ALITO](#), JJ., joined, in which [SOUTER](#), J., joined except for Parts II-B and II-C, and in which [BREYER](#), J., joined as to Parts I and II. [SOUTER](#), J., and [BREYER](#), J., filed opinions concurring in part and dissenting in part. [SCALIA](#), J., filed a dissenting opinion, in which [THOMAS](#), J., joined.

[Eric Grant](#), Sacramento, CA, for petitioner.

[Douglas Hallward-Driemeier](#), Washington, D.C., for respondents.

[Andrea M. Miller](#), Nageley, Meredith & Miller, Inc., Sacramento, CA, [Eric Grant](#), Counsel of Record, Attorney at Law, Sacramento, CA, for petitioner.

[Paul D. Clement](#), Solicitor General, Counsel of Record, [Peter D. Keisler](#), Assistant Attorney General, [Edwin S. Kneedler](#), Deputy Solicitor General, [Douglas Hallward-Driemeier](#), Assistant to the Solicitor General, [Barbara L. Herwig](#), [Mark W. Pennak](#), Attorneys Department of Justice, Washington,

D.C., [C. Thomas Miller](#), Counsel of Record, [J. Duncan Pitchford](#), [Richard C. Roberts](#), Whitlow, Roberts, Houston & Straub, PLLC, Paducah, KY, Counsel for Respondents. For U.S. Supreme Court briefs, see: 2006 WL 2048300 (Pet. Brief) 2006 WL 2569963 (Resp. Brief) 2006 WL 2570994 (Resp. Brief) 2006 WL 2882686 (Reply. Brief)

Justice [GINSBURG](#) delivered the opinion of the Court.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. See [28 U.S.C. § 2679\(b\)\(1\)](#). When a federal employee is sued for wrongful or negligent conduct, the Act empowers the Attorney General to certify that the employee “was acting within the *888 scope of his office or employment at the time of the incident out of which the claim arose.” [§ 2679\(d\)\(1\)](#), (2). Upon the Attorney General’s certification, the employee is dismissed from the action, and the United States is substituted as defendant in place of the employee. The litigation is thereafter governed by the Federal Tort Claims Act (FTCA), 60 Stat. 842. If the action commenced in state court, the case is to be removed to a federal district court, and the certification remains “conclusiv[e] ... for purposes of removal.” [§ 2679\(d\)\(2\)](#).

In [Gutierrez de Martinez v. Lamagno](#), 515 U.S. 417, 420, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995), we held that the Attorney General’s Westfall Act scope-of-employment certification is subject to judicial review. Today, we address three further questions regarding the Westfall Act’s operation: (1) Is Attorney General certification proper when a federal officer denies the occurrence of the tortious conduct alleged by the plaintiff; (2) does [§ 2679\(d\)\(2\)](#), by rendering the Attorney General’s certification “conclusiv[e] ... for purposes of removal,” bar remand even if the federal court determines that the United States should not be substituted as defendant in place of the federal employee; and (3) does [28 U.S.C. § 1447\(d\)](#)’s bar on appellate review of re-

mand orders override [§ 2679\(d\)\(2\)](#)’s direction that, for purposes of removal, the Attorney General’s certification is conclusive. The first two questions were advanced in the petition for certiorari; in our order granting review, we asked the parties to address the impact of [§ 1447\(d\)](#) on this case.

Pat Osborn, plaintiff-petitioner in the civil action now before the Court, sued federal employee Barry Haley in a Kentucky state court. She alleged that Haley tortiously interfered with her employment with a private contractor and conspired to cause her wrongful discharge. Osborn further alleged that Haley’s efforts to bring about her discharge were outside the scope of his employment. The United States Attorney, serving as the Attorney General’s delegate, countered Osborn’s allegations by certifying that Haley “was acting within the scope of his employment ... at the time of the conduct alleged in [Osborn’s] complaint.” App. to Brief in Opposition 23 (hereinafter *Luber App.*). Based on this certification, the case was removed to the United States District Court for the Western District of Kentucky, as [§ 2679\(d\)\(2\)](#) instructs.

In the federal forum, the United States Attorney denied the tortious conduct Osborn attributed to Haley, asserting that the wrongdoing she alleged never occurred. Accepting Osborn’s allegations as true, the District Court entered an order that rejected the Attorney General’s Westfall Act certification, denied the Government’s motion to substitute the United States as defendant in place of Haley, and remanded the case to the state court. On appeal, the Sixth Circuit vacated the District Court’s order, and instructed that court to retain jurisdiction over the case.

We affirm the Court of Appeals’ judgment. On the merits, we agree with the Sixth Circuit that the District Court, in denying substitution of the United States as defendant in lieu of Haley, misconstrued the Westfall Act. Substitution of the United States is not improper simply because the Attorney General’s certification rests on an understanding of the facts that differs from the plaintiff’s allegations.

The United States, we hold, must remain the federal defendant in the action unless and until the District Court determines that the employee, *in fact*, and not simply as alleged by the plaintiff, engaged in conduct beyond the scope of his employment. On the jurisdictional issues, we hold that the Attorney General's certification is conclusive*889 for purposes of removal, *i.e.*, once certification and removal are effected, exclusive competence to adjudicate the case resides in the federal court, and that court may not remand the suit to the state court. We also hold that § 1447(d)'s bar on appellate review of remand orders does not displace § 2679(d)(2), which shields from remand an action removed pursuant to the Attorney General's certification.

I

Petitioner Pat Osborn worked for Land Between the Lakes Association (LBLA), a private company that contracted with the United States Forest Service to provide staff for the Land Between the Lakes National Recreation Area in Kentucky.^{FN1} While employed by LBLA, Osborn applied for a trainee position with the Forest Service. Respondent Barry Haley, a Forest Service officer, was responsible for the Service's hiring process. At a meeting with LBLA employees, Haley announced that he had hired someone else for the job Osborn sought. Osborn asked why Haley did not inform her before the meeting, and she made a joke at Haley's expense. After the meeting, Osborn's supervisor told her to apologize to Haley; she refused.

FN1. We draw this account of the facts from the District Court's opinion and order denying reconsideration, supplemented by the allegations in Osborn's complaint.

A few weeks later, Osborn filed a complaint with the United States Department of Labor, asking the Department to investigate whether the Forest Service, in its hiring decision, had given appropriate consideration to the veterans' preference points to which she was entitled. The Department's investig-

ator, Robert Kuenzli, after interviewing Haley, concluded that the hiring procedure had been handled correctly. Kuenzli so informed Osborn, who then asked him to close her complaint. On the same day LBLA's executive director, respondent Gaye Luber, summoned Osborn and demanded that she apologize to Haley for "not being a good Forest Service partner." Complaint ¶ 18, Luber App. 4. Osborn again refused. Two days later, she was fired.

Osborn filed suit against Haley, Luber, and LBLA in a Kentucky state court. She alleged that Haley tortiously interfered with her employment relationship with LBLA and conspired to cause her wrongful discharge. Specifically, she charged that Haley maliciously induced Luber to fire her, and that Haley did so in retaliation for Osborn's Department of Labor complaint requesting a veterans' preference inquiry. Complaint ¶ 29, Luber App. 7. In response the local United States Attorney, invoking the Westfall Act, certified on behalf of the Attorney General that Haley "was acting within the scope of his employment with the U.S. Forest Service at the time of the conduct alleged in [Osborn's] complaint." Luber App. 23. As is customary, the certification stated no reasons for the determination.^{FN2}

FN2. The certification read:

"I, Monica Wheatley, Acting United States Attorney, Western District of Kentucky, acting pursuant to the provisions of 28 U.S.C. § 2679(d)(2), and by virtue of the authority vested in me by the Appendix to 28 C.F.R. § 15.3 (1990), hereby certify that the Office of the United States Attorney has reviewed the available facts in this matter. On the basis of the information now available to me with respect to the allegations in the complaint, I find that the named federal defendant, Barry Haley, was acting within the scope of his employment with the U.S. Forest Service, at the time of the conduct alleged in the complaint." Luber App. 23.

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In the Westfall Act, Congress instructed:

“Upon certification by the Attorney General that the defendant employee *890 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.*” 28 U.S.C. § 2679(d)(2) (emphasis added).

Citing this provision, as well as the federal officer removal statute, § 1442,^{FN3} the United States removed the case to the United States District Court for the Western District of Kentucky. The United States Attorney notified the District Court that the United States should be substituted for Haley as defendant, and filed a motion to dismiss on the ground that Osborn had not exhausted administrative remedies, as required by the FTCA.

FN3. The federal officer removal statute provides that “[a] civil action or criminal prosecution commenced in a State court against” “any officer ... of the United States ... sued in an official or individual capacity for any act under color of such office” “may be removed ... to the district court of the United States for the district and division embracing the place wherein it is pending.” § 1442(a), (a)(1), (b).

Osborn opposed the substitution and the motion to dismiss. She argued that Haley's conduct was outside the scope of his employment, hence the West-

fall Act afforded him no immunity. As support for her opposition, Osborn submitted a memorandum of understanding between the LBLA and the Forest Service, which cautioned Forest Service employees against involvement in LBLA employment decisions.

Apparently under the impression that the United States, at that preliminary stage, did not dispute Osborn's factual allegations, the District Court declined to conduct an evidentiary hearing. Under Kentucky law, the court observed, if Osborn's allegations were true, Haley had acted outside the scope of his employment. In the District Court's view the closeness in time of Osborn's request for a Department of Labor investigation, Kuenzli's call to Haley, and Luber's demand for an apology justified an inference that Haley interfered with Osborn's employment in violation of the LBLA-Forest Service memorandum of understanding. So reasoning, the District Court overruled the Westfall Act certification and denied substitution. Under this ruling, the United States was no longer before the court. Furthermore, the parties were not of diverse citizenship and no federal law was at issue. The District Court therefore held that it lacked subject-matter jurisdiction over the case.^{FN4} Invoking § 1447(c),^{FN5} the court concluded that the case must be remanded to the state court.

FN4. The District Court did not address the propriety of removal under § 1442. See *infra*, at ---20, n. 11.

FN5. Section 1447(c) provides:

“A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and

any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.”

*891 The United States moved for reconsideration, urging that, contrary to the District Court's impression, the Government did contest Osborn's factual allegations. Recalling that it had denied Osborn's allegations in its answer to her complaint, the United States submitted sworn declarations from Haley and Luber. Haley's stated that he was not in communication with Luber between the time of Kuenzli's investigation and Osborn's firing. Luber's declaration stated that Osborn's request for an investigation regarding her veterans' preference points could not have had any bearing on Osborn's termination, for Luber was unaware of the request at the relevant time. Absent contrary evidence, the Government maintained, these declarations sufficed to support the certification and the continuance of the United States as defendant in place of Haley. In the alternative, the Government sought discovery.^{FN6}

^{FN6}. The District Court refused to entertain the alternative argument that, if a relevant Haley-Luber conversation did occur, Haley was acting within the scope of his employment. Because Haley had declared, under oath, that he did not communicate with Luber, the court was unwilling to allow discovery on the question whether, if Haley did contact Luber, he was acting within the scope of his employment. But cf. *Fed. Rule Civ. Proc. 8(e)(2)* (subject to Rule 11 obligations, parties may plead claims or defense “alternately or hypothetically”). We express no opinion on the propriety of the District Court's refusal to consider the Government's alternative pleading.

The District Court denied the Government's recon-

sideration motion. The Haley and Luber declarations, the court said, clarified that the controversy centered on whether there had been any communication between Haley and Luber influencing Luber's decision to fire Osborn. The Westfall Act would have shielded Haley, the Court suggested, had the United States admitted a Haley-Luber communication but defended its content as within the scope of Haley's employment. Westfall Act certification was improper, the court concluded, because the United States did not admit, but instead denied, the occurrence of the event central to proof of Osborn's claim. The District Court acknowledged disagreement among the Circuits on the availability of a Westfall Act certification when the United States “den[ies] the occurrence of the basic incident charged.” *Wood v. United States*, 995 F.2d 1122, 1124 (C.A.1 1993) (en banc). Compare *ibid.* and *McHugh v. University of Vermont*, 966 F.2d 67, 74-75 (C.A.2 1992) (prohibiting incident-denying certifications), with *Heuton v. Anderson*, 75 F.3d 357, 360 (C.A.8 1996); *Kimbrow v. Velten*, 30 F.3d 1501, 1508 (C.A.D.C.1994); and *Melo v. Hafer*, 13 F.3d 736, 746-747 (C.A.3 1994) (allowing incident-denying certifications). Choosing to follow the First Circuit's opinion in *Wood*, the District Court adhered to its prior ruling that the Westfall Act certification in this case was invalid.

On appeal, the Sixth Circuit vacated the District Court's order denying certification and substitution. 422 F.3d 359, 365 (2005). The Court of Appeals, in accord with *Heuton*, *Kimbrow*, and *Melo*, held that a Westfall Act certification is not improper simply because the United States denies the occurrence of the incident on which the plaintiff centrally relies. 422 F.3d, at 364. Rather, the court held, 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.”*892 *Ibid.* (quoting *Melo*, 13 F.3d, at 747).

The Sixth Circuit also vacated the District Court's

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order remanding the case to the state court. Section 2679(d)(2), the Court of Appeals stressed, instructs that the “certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.” The court read that instruction to proscribe shuttling cases back to state courts and, instead, to require district court adjudication of the controversy even when a Westfall Act certification is rejected and, correspondingly, substitution of the United States as defendant is denied. 422 F.3d, at 365. On that issue too, the Court of Appeals noted a division among the Circuits. Compare *Borneman v. United States*, 213 F.3d 819, 826 (C.A.4 2000); *Garcia v. United States*, 88 F.3d 318, 325-327 (C.A.5 1996); and *Aliota v. Graham*, 984 F.2d 1350, 1356 (C.A.3 1993) (holding that a district court lacks authority to remand a case removed under § 2679(d)(2)), with *Haddon v. United States*, 68 F.3d 1420, 1427 (C.A.D.C.1995); and *Nasuti v. Scannell*, 906 F.2d 802, 814, n. 17 (C.A.1 1990) (holding remand proper when district court rejects the Attorney General's certification). We granted certiorari. 547 U.S. 1126, 126 S.Ct. 2017, 164 L.Ed.2d 778 (2006).

II

We consider first the Court of Appeals' jurisdiction to review the District Court's disposition of this case. We address in turn the questions whether the appellate court had jurisdiction to review (1) the order rejecting the Attorney General's certification and denying substitution of the United States as defendant, and (2) the order remanding the case to the state court.

A

[1][2] The District Court's rejection of certification and substitution effectively denied Haley the protection afforded by the Westfall Act, a measure designed to immunize covered federal employees not simply from liability, but from suit. See § 2(a)(5), 102 Stat. 4563; *Lamagno*, 515 U.S., at 425-426,

115 S.Ct. 2227; H.R.Rep. No. 100-700, p. 4 (1988), U.S.Code Cong. & Admin.News, 1988, p. 5945. Under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), this ruling qualifies as a reviewable final decision within the compass of 28 U.S.C. § 1291.^{FN7}

FN7. Section 1291 provides that “[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts.”

Meeting the three criteria of *Cohen*, the District Court's denial of certification and substitution conclusively decided a contested issue, the issue decided is important and separate from the merits of the action, and the District Court's disposition would be effectively unreviewable later in the litigation. 337 U.S., at 546, 69 S.Ct. 1221. See *Mitchell v. Forsyth*, 472 U.S. 511, 525-527, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (holding that district court rejection of a defendant's qualified immunity plea is immediately appealable under the *Cohen* doctrine because suit immunity “is effectively lost if a case is erroneously permitted to go to trial” against the immune official). As cogently explained by the Fifth Circuit in *Mitchell v. Carlson*, 896 F.2d 128, 133 (1990), retaining the federal employee as a party defendant

“effectively denie[s][him] immunity from suit if [he] was entitled to such immunity *893 under the Westfall Act. Under the Act, once the United States Attorney certifies that the federal employee acted within the scope of [his] employment, the plaintiff properly can proceed only against the United States as defendant. The federal employee remains immune from suit. By [rejecting the Attorney General's certification], the district court subject[s] [the employee] to the burden of defending a suit ..., a burden from which [the Westfall Act spares him].”

Tellingly, the Courts of Appeals are unanimous in holding that orders denying Westfall Act certifica-

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tion and substitution are amenable to immediate review under *Cohen*. See *Woodruff v. Covington*, 389 F.3d 1117, 1124 (C.A.10 2004); *Mathis v. Henderson*, 243 F.3d 446, 448 (C.A.8 2001); *Borneman*, 213 F.3d, at 826 (C.A.4); *Lyons v. Brown*, 158 F.3d 605, 607 (C.A.1 1998); *Taboas v. Mlynczak*, 149 F.3d 576, 579 (C.A.7 1998); *Coleman v. United States*, 91 F.3d 820, 823 (C.A.6 1996); *Flohr v. Mackovjak*, 84 F.3d 386, 390 (C.A.11 1996); *Kimbro*, 30 F.3d, at 1503 (C.A.D.C.); *Aliota*, 984 F.2d, at 1354 (C.A.3); *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865, 873 (C.A.9 1992); *McHugh*, 966 F.2d, at 69 (C.A.2); *Carlson*, 896 F.2d, at 133 (C.A.5). We confirm that the Courts of Appeals have ruled correctly on this matter.

B

In our order granting certiorari we asked the parties to address, in addition to the issues presented in the petition, this further question: Did the Court of Appeals have jurisdiction to review the District Court's remand order, notwithstanding 28 U.S.C. § 1447(d)'s declaration that “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise”? In answering this question, we also resolve the second question presented in the petition for certiorari—whether the Westfall Act's rule against remanding actions removed pursuant to § 2679(d)(2) applies when the federal court determines that the United States should not be substituted as defendant in place of the federal employee. Our disposition is informed by, and tracks, the Third Circuit's reasoning in *Aliota*, 984 F.2d, at 1354-1357.

[3] We begin with the provision we asked the parties to address: § 1447(d). That provision states in relevant part: “An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise” In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), we held that the preceding subsection, § 1447(c), confined § 1447(d)'s scope. Under § 1447(d), the Court ex-

plained, “only remand orders issued under § 1447(c) and invoking the [mandatory] grounds specified therein—that removal was improvident and without jurisdiction—are immune from review.” *Id.*, at 346, 96 S.Ct. 584.^{FN8} *Thermtron* had been properly removed to the federal court. The sole reason the District Court gave for remanding it was that court's crowded docket. This Court held the remand order reviewable, observing that § 1447(c) could not sensibly be read to confer on the district courts “carte blanche authority ... to revise the federal statutes governing removal.” *Id.*, at 351, 96 S.Ct. 584. See also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996)*894 (holding abstention-based remand order immediately appealable). But see *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (1977)(*per curiam*) (holding unreviewable a remand order purporting to rest on a ground within the scope of § 1447(c)).

FN8. At the time *Thermtron* was decided, § 1447(c) required a district court to remand a case if it appeared that the case had been “removed improvidently and without jurisdiction.” 28 U.S.C. § 1447(c) (1970 ed.). Section 1447(c) now provides that a case must be remanded if “it appears that the district court lacks subject matter jurisdiction.”

The United States urges us to apply *Thermtron* and hold the remand order in this case reviewable because that order was not based on a ground specified in § 1447(c). To determine whether *Thermtron* controls, we must start with an examination of the Westfall Act's design, particularly its prescriptions regarding the removal and remand of actions filed in state court.

As earlier noted, see *supra*, at 887 - 888, the Act grants the Attorney General authority to certify that a federal employee named defendant in a tort action was acting within the scope of his or her employment at the time in question. § 2679(d)(1), (2). If the action is commenced in a federal court, and the

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Attorney General certifies that the employee “was acting within the scope of his office or employment at the [relevant] time,” the United States must be substituted as the defendant. § 2679(d)(1). If the action is launched in a state court, and the Attorney General makes the same certification, the action “shall be removed” to the appropriate federal district court, and again the United States must be substituted as the defendant. § 2679(d)(2). Of prime importance to our decision, § 2679(d)(2) concludes with the command: “Th[e] certification of the Attorney General shall *conclusively establish scope of office or employment for purposes of removal.*” (Emphasis added.)

This directive markedly differs from Congress' instruction for cases in which the Attorney General “refuse[s] to certify scope of office or employment.” § 2679(d)(3). In that event, the defendant employee may petition the court in which the action was instituted to make the scope-of-employment certification. If the complaint was filed in a state court, the Attorney General *may* remove the case to the appropriate federal court, but he is not obliged to do so. *Ibid.* If the court, state or federal, issues the certification, “the United States shall be substituted as the party defendant.” *Ibid.* If removal has occurred, and thereafter “the district court determines that the employee was not acting within the scope of his office or employment, the action ...shall be remanded to the State court.” *Ibid.* (emphasis added).

[4] The Act's distinction between removed cases in which the Attorney General issues a scope-of-employment certification, and those in which he does not, leads us to conclude that Congress gave district courts no authority to return cases to state courts on the ground that the Attorney General's certification was unwarranted. Absent certification, § 2679(d)(3) directs that the case must be remanded to the state court in which the action commenced. In contrast, when the Attorney General certifies scope of employment, his certificate “conclusively establish[es] scope of office or employment for

purposes of removal.” § 2679(d)(2) (emphasis added). Section 2679(d)(2) does not preclude a district court from resubstituting the federal official as defendant *for purposes of trial* if the court determines, postremoval, that the Attorney General's scope-of-employment certification was incorrect. For purposes of establishing a forum to adjudicate the case, however, § 2679(d)(2) renders the Attorney General's certification dispositive.^{FN9}

FN9. As explained by the Third Circuit in *Melo v. Hafer*, 912 F.2d 628, 641 (1990), “[t]here are significant policy reasons why Congress would choose to give the government an unchallengeable right to have a federal forum for tort suits brought against its employees.” But Congress' endeavor to secure that right does not mean that Congress also intended to render unreviewable substitution of the United States as defendant in place of the employee. See *ibid.*; cf. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430-434, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995).

*895 Were it open to a district court to remand a removed action on the ground that the Attorney General's certification was erroneous, the final instruction in § 2679(d)(2) would be weightless. The Attorney General's certification would not “conclusively establish scope of office or employment” for either trial or removal. Instead, the Attorney General's scope certification would supply only a tentative basis for removal, rather than a conclusive one. In *Lamagno*, the Court unanimously agreed that Congress spoke unambiguously on this matter: Congress adopted the “conclusiv[e] ... for purposes of removal” language to “foreclose needless shuttling of a case from one court to another.” 515 U.S., at 433, n. 10, 115 S.Ct. 2227; see *id.*, at 440, 115 S.Ct. 2227 (SOUTER, J., dissenting) (“[T]here is nothing equivocal about [§ 2679(d)(2)'s] provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state sys-

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tem.”).

With the Westfall Act's provisions on removal of actions filed in state court in clear view, we return to the question whether an order remanding a case removed pursuant to § 2679(d)(2) is reviewable. *Thermtron* held that § 1447(d) must be read together with § 1447(c). There is stronger cause, we conclude, to hold that § 1447(c) and (d) must be read together with the later enacted § 2679(d)(2). Both § 1447(d) and § 2679(d)(2) are antishuttling provisions. Each aims to prevent “prolonged litigation of questions of jurisdiction of the district court to which the cause is removed.” *United States v. Rice*, 327 U.S. 742, 751, 66 S.Ct. 835, 90 L.Ed. 982 (1946). Section 2679(d)(2) is operative when the Attorney General certifies scope of employment, triggering removal of the case to a federal forum. At that point, § 2679(d)(2) renders the federal court exclusively competent and categorically precludes a remand to the state court.

The command that the Attorney General's certification “shall conclusively establish scope of office or employment for purposes of removal,” § 2679(d)(2), differentiates certified Westfall Act cases from the typical case remanded for want of subject-matter jurisdiction. Ordinarily, when the plaintiff moves to remand a removed case for lack of subject-matter jurisdiction, the federal district court undertakes a threshold inquiry; typically the court determines whether complete diversity exists or whether the complaint raises a federal question. In Attorney General certified Westfall Act cases, however, no threshold determination is called for; the Attorney General's certificate forecloses any jurisdictional inquiry. By declaring the Attorney General's certification “conclusive” as to the federal forum's jurisdiction, Congress has barred a district court from passing the case back to the state court where it originated based on the court's disagreement with the Attorney General's scope-of-employment determination.

Our decision that § 2679(d)(2) leaves the district court without authority to send a certified case back

to the state court scarcely means that whenever the district court misconstrues a jurisdictional statute, appellate review of the remand is in order. Such an exception would, of course, collide *896 head on with § 1447(d), and with our precedent. See, e.g., *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-128, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995). Only in the extraordinary case in which Congress has ordered the intercourt shuttle to travel just one way—from state to federal court—does today's decision hold sway.

In short, of the two antishuttling commands, § 1447(d) and § 2679(d)(2), only one can prevail. We hold that § 2679(d)(2) controls. Tailor-made for Westfall Act cases, § 2679(d)(2) is a forum-selecting rule Congress made “conclusive,” beyond the ken of district courts to revise. See *Thermtron*, 423 U.S., at 351, 96 S.Ct. 584.

C

[5] In *Lamagno*, the Court considered, but did not definitively resolve, the question whether Article III permits “[t]reating the Attorney General's certification as conclusive for purposes of removal but not for purposes of substitution.” 515 U.S., at 434, 115 S.Ct. 2227. It was argued in that case that if certification is rejected and substitution denied “because the federal court concludes that the employee acted outside the scope of his employment, and if the tort plaintiff and the [defendant-employee] are not of diverse citizenship, ... then the federal court will be left with a case without a federal question to support the court's subject-matter jurisdiction.” *Id.*, at 434-435, 115 S.Ct. 2227. *Lamagno* was an action commenced in federal court on the basis of diversity of citizenship, so there was in that case “not even the specter of an Article III problem.” *Id.*, at 435, 115 S.Ct. 2227.

In the case before us, the question would arise only if, after full consideration, the District Court determines that Haley in fact engaged in the tortious

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conduct outside the scope of his employment charged in Osborn's complaint. At that point, however, little would be left to adjudicate, at least as to Haley's liability. Because a significant federal question (whether Haley has Westfall Act immunity) would have been raised at the outset, the case would "aris[e] under" federal law, as that term is used in Article III. See *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493, 103 S.Ct. 1962, 76 L.Ed.2d 81 (1983). Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction. See *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350-351, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) (when federal character of removed case is eliminated while the case is *sub judice*, court has discretion to retain jurisdiction, to remand, or to dismiss); cf. *Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (pendent jurisdiction may be exercised when federal and state claims have a "common nucleus of operative fact" and would "ordinarily be expected to [be tried] all in one judicial proceeding"). See also 28 U.S.C. § 1367 ("Supplemental jurisdiction"). "[C]onsiderations of judicial economy, convenience and fairness to litigants," *Gibbs*, 383 U.S., at 726, 86 S.Ct. 1130, make it reasonable and proper for a federal court to proceed to final judgment, once it has invested time and resources to resolve the pivotal scope-of-employment contest. Thus, under the precedent that guides us, the Westfall Act's command that a district court retain jurisdiction over a case removed pursuant to § 2679(d)(2) does not run afoul of Article III.

III

[6] With the jurisdictional issues resolved, we reach the principal question raised by petitioner Osborn: whether the United States Attorney validly certified *897 that Haley "was acting within the scope of his employment ... at the time of the conduct alleged in the complaint." Luber App. 23. We note first that the certificate is formally in order; it closely tracks

the language of the Westfall Act. See § 2679(d)(2) (authorizing 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"). In *Lamagno*, we held that the Attorney General's certification is "the first, but not the final word" on whether the federal officer is immune from suit and, correlatively, whether the United States is properly substituted as defendant. 515 U.S., at 432, 115 S.Ct. 2227. A plaintiff may request judicial review of the Attorney General's scope-of-employment determination, as Osborn did here.

As earlier recounted, see *supra*, at 890, the District Court initially accepted Osborn's allegations as true because it believed that the United States did not dispute them. Applying Kentucky law, that court determined that "Haley's alleged actions occurred outside the scope of his employment." App. to Pet. for Cert. 24a. In a motion for reconsideration, the Government clarified that, far from admitting Osborn's allegations, it disputed the very occurrence of the harm-causing conduct Osborn alleged. In support of the motion, the Government submitted affidavits from Haley and Luber denying that they engaged in the conduct ascribed to them in Osborn's complaint. The Government contended that Haley remained within the proper bounds of his employment at the relevant time and place because the wrongdoing Osborn alleged never happened.

The Government's reconsideration motion asked the District Court to resolve the factual dispute, *i.e.*, to determine whether, as the complaint alleged, Haley prevailed upon Luber to discharge Osborn, or whether, as Haley asserted, he never communicated with Luber about Osborn's LBLA employment. The court did not grant the Government's request for resolution of the factual dispute. Instead, it held the Westfall Act certification invalid precisely because the Government denied that Haley engaged in harm-causing conduct.

Two Courts of Appeals have held that Westfall Act certification is improper when the Government

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denies the occurrence of the alleged injury-causing action or episode. See *Wood*, 995 F.2d, at 1123 (C.A.1); *McHugh*, 966 F.2d, at 74-75 (C.A.2). The Sixth Circuit, in this case, and several other Courts of Appeals have held that a plaintiff's allegation of conduct beyond the scope of a federal official's employment does not block certification where the Government contends that the alleged tortious conduct did not occur. See *Heuton*, 75 F.3d, at 360 (C.A.8); *Kimbrow*, 30 F.3d, at 1508 (C.A.D.C.); *Melo*, 13 F.3d, at 746-747 (C.A.3). We agree that Westfall Act certification is proper when a federal officer charged with misconduct asserts, and the Government determines, that the incident or episode in suit never occurred.

A

[7] The Westfall Act grants a federal employee suit immunity, we reiterate, when “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). That formulation, we are persuaded, encompasses an employee on duty at the time and place of an “incident” alleged in a complaint who denies that the incident occurred. See *Wood*, 995 F.2d, at 1134 (joint opinion of Coffin, Selya, and Boudin, JJ., dissenting) (“[S]urely the statute applies with the same force whether a postal service driver says that he did not hit the *898 plaintiff's car or that he did so but was not at fault.”); *Melo*, 13 F.3d, at 747. And just as the Government's certification that an employee “was acting within the scope of his employment” is subject to threshold judicial review, *Lamagno*, 515 U.S., at 434, 115 S.Ct. 2227, so a complaint's charge of conduct outside the scope of employment, when contested, warrants immediate judicial investigation. Were it otherwise, a federal employee would be stripped of suit immunity not by what the court finds, but by what the complaint alleges.^{FN10}

^{FN10}. In an opinion resembling his majority opinion in *Wood v. United States*, 995 F.2d 1122 (C.A.1 1993) (en banc), Justice

BREYER takes the view that the Attorney General may issue a Westfall Act certification if he contests the plaintiff's account of the episode-in-suit, but he must “assume some kind of incident” in order to certify. *Post*, at 903. Thus he would not permit “purely incident-denying certifications,” and he places the certification here in that category. *Ibid*. We agree with the *Wood* dissenters' appraisal of Justice BREYER's distinction between incident-denying and incident-recharacterizing certifications: That approach would require district courts “to engage in difficult, time-wasting controversies ... about precisely *which facts* pertaining to the scope of employment issue are for the district judge and which are for the jury.” 995 F.2d, at 1136, and n. 7 (joint opinion of Coffin, Selya, and Boudin, JJ., dissenting). Accord *Kimbrow v. Velten*, 30 F.3d 1501, 1507 (C.A.D.C.1994) (“[I]t would be impossible ... to draw a distinction between a characterization of an incident and whether or not it actually occurred.”).

In sum, given the purpose of the Westfall Act to shield covered employees not only from liability but from suit, it is altogether appropriate to afford protection to a “negligent ... employee ... as a matter of course.” *Wood*, 995 F.2d, at 1135 (joint opinion of Coffin, Selya, and Boudin, JJ., dissenting). But it would make scant sense to read the Act as leaving an employee charged with an intentional tort^{FN11} to fend for himself when he denies wrongdoing and asserts he “engaged only in proper behavior occurring wholly within the scope of his office or employment.” *Ibid*. See also *Heuton*, 75 F.3d, at 360 (“[I]t is illogical to assume that Congress intended to protect guilty employees but desert innocent ones.”).^{FN12}

^{FN11}. See *id.*, at 1505 (observing that the question here presented “tend[s] to arise in cases of alleged intentional torts”).

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FN12. Under Justice BREYER's view, when, in fact, “*nothing* involving the employee happened at all ... no Westfall Act immunity would be available.” *Post*, at 905 - 906. He thinks this “is just as it should be.” *Post*, at 906. We disagree. Congress did not, and sensibly should not, command that innocent employees be left outside the Westfall Act's grant of suit immunity. “Congress' statute and its policy,” we agree, “both look in the opposite direction.” *Wood*, 995 F.2d, at 1136 (joint opinion of Coffin, Selya, and Boudin, JJ., dissenting).

Willingham v. Morgan, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969), in which the Court construed the federal officer removal statute, 28 U.S.C. § 1442, supports our reading of the Westfall Act.^{FN13} Section 1442(a)(1) allows an officer of the United States to remove a civil action commenced in state court if the officer is “sued in an official or individual capacity for any act under color of such office.” In *Willingham*, a federal inmate sued two federal prison officials in state court, alleging that they had assaulted, beaten, and tortured him. 395 U.S., at 403, 89 S.Ct. 1813. The defendants removed pursuant to § 1442(a)(1), and the District Court upheld their defense of official immunity. The Tenth Circuit reversed, reading *899 § 1442(a)(1) to permit removal only when a defendant “exclude[s] the possibility that the suit is based on acts or conduct not justified by his federal duty.” *Morgan v. Willingham*, 383 F.2d 139, 141 (1967). We rejected that narrow construction of the statute and held § 1442 “broad enough to cover all cases where federal officers can raise a colorable defense arising out of the duty to enforce federal law.” 395 U.S., at 406-407, 89 S.Ct. 1813.

FN13. The notice of removal in this case invoked § 1442 as well as § 2679. In the Sixth Circuit, however, the Government did not urge § 1442 as a separate ground for reversing the District Court.

The plaintiff in *Willingham* disputed that the defendant federal officials had acted under color of office. He alleged that they “had been acting on a frolic of their own which had no relevancy to their official duties as employees or officers of the United States.” *Id.*, at 407, 89 S.Ct. 1813 (internal quotation marks omitted). The Court held that the officers “should have the opportunity to *present their version of the facts* to a federal, not a state, court.” *Id.*, at 409, 89 S.Ct. 1813 (emphasis added).

[8] We see no reason to conclude that the Attorney General's ability to remove a suit to federal court under § 2679(d)(2), unlike a federal officer's ability to remove under § 1442, should be controlled by the plaintiff's allegations. In *Willingham*, the federal officer's “relationship to [the plaintiff] derived solely from their official duties.” *Ibid.* Similarly here, Haley interacted with Osborn and Luber only through his employment as a Forest Service officer.^{FN14} For purposes of removal under § 1442(a), the defendants in *Willingham* were not required to accept the truth of the plaintiff's allegations that they were “on a frolic of their own,” *id.*, at 407, 89 S.Ct. 1813 (internal quotation marks omitted), and had tortured plaintiff “out of malice,” 383 F.2d, at 140 (internal quotation marks omitted). So here, for purposes of removal under § 2679(d)(2), Haley and the Government were not required to accept as true Osborn's allegations that Haley “maliciously induced” her dismissal from LBLA “in retaliation for plaintiff filing a veterans' preference inquiry.” Complaint ¶ 29, Luber App. 7. Haley, like the defendant in *Willingham*, may have been on frolic of his own as Osborn alleged, and *900 therefore may not be entitled to immunity. But like the officers in *Willingham*, he should have the opportunity to “present [his] version of the facts to a federal ... court.” 395 U.S., at 409, 89 S.Ct. 1813.

FN14. In the context of § 1442, we have held that, to qualify for removal, a federal official must show “a nexus ... between the charged conduct and asserted official au-

thority.” *Jefferson County v. Acker*, 527 U.S. 423, 431, 119 S.Ct. 2069, 144 L.Ed.2d 408 (1999) (citations and internal quotation marks omitted). We need not today decide whether qualification for Westfall Act immunity is similarly limited, for in this case, a nexus plainly exists connecting the incident Osborn alleged and Haley's federal employment. We note, however, that nothing in our opinion commits the Court to the view that Westfall Act immunity is available in fanciful situations like the one Justice BREYER hypothesizes, *post*, at 902 - 903, in which the plaintiff's allegations are wholly unrelated to the defendant's federal employment.

Justice BREYER posits the case of a Yellowstone Park forest ranger accused of misdeeds at Coney Island. He says we would find Westfall Act immunity—more accurately, we would uphold Westfall Act certification—even if the ranger's “presen[ce] on Coney Island must have been ... on a frolic of his own.” *Post*, at 902 - 903. If Justice BREYER is imagining a case in which the ranger was in fact on a frolic at Coney Island, but the Attorney General nevertheless issued a Westfall Act certificate, we would not approve the certification. In that imaginary case, there would be no sense in which the ranger was acting within the scope of his employment *at the time* of the incident charged in the plaintiff's complaint. If, instead, Justice BREYER has in mind a ranger accused of frolicking at Coney Island, when all the while he stayed close to his desk at Yellowstone Park, then Justice BREYER is correct: Westfall Act immunity might be available under our approach. If such a case ever shows up in a federal court, however, the district judge might be called upon to determine whether remov-

al and substitution under § 2679(d)(2) are limited by a nexus requirement similar to the one that limits removal under § 1442.

B

Tugging against our reading of the Westfall Act, we recognize, is a “who decides” concern. If the Westfall Act certification must be respected unless and until the District Court determines that Haley, *in fact*, engaged in conduct beyond the scope of his employment, then Osborn may be denied a jury trial. Compare *Wood*, 995 F.2d, at 1126, 1130, with *id.*, at 1134-1138 (joint opinion of Coffin, Selya, and Boudin, JJ., dissenting). Should the District Court find that Haley did not maliciously induce Luber to discharge Osborn, but instead interacted with Luber and Osborn only within the proper bounds of his employment, Osborn will lose on the merits with no access to a jury of her peers.^{FN15}

“This is not a small objection,” for the issue “that goes to the heart of the merits, as well as to the validity of the certificate,” will likely turn on the credibility of Osborn, Haley, and Luber, and credibility “may be well suited for jury resolution.” See *id.*, at 1136-1137.^{FN16}

^{FN15}. The overlap of certification validity and the merits of the plaintiff's claim, evident here, is uncommon. It is unlikely to occur when the plaintiff alleges negligent conduct. The question whether a federal driver was acting within the scope of his employment at the time of an accident, for example, can generally be answered without simultaneously determining whether the federal employee drove negligently or carefully. And even when the plaintiff alleges an intentional tort, it may be possible to resolve the scope-of-employment question without deciding the merits of the claim. If a plaintiff charges a federal employee with sexual assault, for example, upon determining that there was sexual contact, a district court

could find that the employee acted outside the scope of his duties, leaving the question whether the contact was consensual for jury resolution.

FN16. But cf. 995 F.2d, at 1137 (observing that “[i]n the ordinary tort claim arising when a government driver negligently runs into another car, jury trial is precisely what is lost to a plaintiff when the government is substituted for the employee”).

[9][10][11] Under the Westfall Act, however, Congress supplanted the jury in covered cases. See § 2679(d)(1)-(3). Upon certification, the action is “deemed to be ... brought against the United States,” *ibid.*, unless and until the district court determines that the federal officer originally named as defendant was acting outside the scope of his employment. The Seventh Amendment, which preserves the right to a jury trial in suits at common law, we have held, does not apply to proceedings against the sovereign. *Lehman v. Nakshian*, 453 U.S. 156, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). See also § 2402 (actions against the United States ordinarily “shall be tried by the court without a jury”). Thus, at the time the district court reviews the Attorney General’s certification, the plaintiff has no right to a jury trial. See *Kimbrow*, 30 F.3d, at 1509, n. 4.^{FN17}

FN17. We do not address the case in which the Attorney General refuses certification. In that event, § 2679(d)(3) allows the named defendant to “petition the court to find and certify that [he] was acting within the scope of his ... employment.” However, the Westfall Act gives the named defendant no right to remove an uncertified case. But see 28 U.S.C. § 1442(a)(1). That right is accorded to the Attorney General only. Because the scope determination would be made in such a case before any substitution of the United States as defendant takes place, it is arguable that a jury trial of that issue would be required if the case is be-

fore a federal court. If the case was brought in a state court and the Attorney General declines to remove, the Seventh Amendment would not figure in the case, for it is inapplicable to proceedings in state court. *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, 217, 36 S.Ct. 595, 60 L.Ed. 961 (1916).

[12][13] The Westfall Act’s core purpose also bears on the appropriate trier of *901 any facts essential to certification. That purpose is to relieve covered employees from the cost and effort of defending the lawsuit, and to place those burdens on the Government’s shoulders. See *supra*, at 892 - 893. Immunity-related issues, the Court has several times instructed, should be decided at the earliest opportunity. See, e.g., *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (*per curiam*) (“Immunity ordinarily should be decided by the court long before trial.”); *Anderson v. Creighton*, 483 U.S. 635, 646, n. 6, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (“[I]mmunity questions should be resolved at the earliest possible stage of litigation.”).^{FN18}

FN18. Justice BREYER suggests that, with respect to immunity defenses, our “reading of the Westfall Act works a major change in th[e] [ordinary] fact/law relationship.” *Post*, at 904 - 905. Nothing in our opinion touches on that relationship in the typical case in which a defendant official raises a defense of absolute or qualified immunity. We simply observe that the Westfall Act grants federal employees a species of immunity, and that, under our jurisprudence, immunity-related questions should be resolved at the earliest opportunity. Justice BREYER is right, however, to this extent. We recognize that judges have a greater factfinding role in Westfall Act cases than they traditionally have in other immunity contexts. The Act makes that inevitable. When Westfall Act immunity is in dispute,

a district court is called upon to decide who the proper defendant is: the named federal employee, or the United States. That decision cannot be left for jury resolution late in proceedings without undermining the Westfall Act's very purpose: to shift the burden of defending the suit to the United States whenever the defendant-employee was, at the relevant time, acting within the scope of his employment.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Sixth Circuit is

Affirmed.

Justice SOUTER, concurring in part and dissenting in part.

I join the Court's opinion except for Parts II-B and II-C. Title 28 U.S.C. § 1447(d) provides, with one exception not relevant here, that “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.” In sanctioning appellate review notwithstanding § 1447(d), the Court relies on its determination that Congress, through § 2679(d)(2), has prohibited remand in cases like this one, in order to give effect to the conclusive character of the Attorney General's certification on the issue of removal jurisdiction. But as we recently held, “‘review is unavailable no matter how plain the legal error in ordering the remand.’” *Kircher v. Putnam Funds Trust*, 547 U.S. 633, ----, 126 S.Ct. 2145, 2154, 165 L.Ed.2d 92 (2006) (quoting *Briscoe v. Bell*, 432 U.S. 404, 414, n. 13, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977)). Thus, rather than allowing § 2679(d)(2) to trump § 1447(d), I would reaffirm the rule that a district court's remand order is unreviewable even if it is based on an erroneous understanding of the district court's jurisdiction.^{FN1} But I would not otherwise limit the Attorney General's (or the employee's) efforts to give the intended effect to the certification *902 prior to any remand that might be ordered.

FN1. The exception to § 1447(d) created in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), for remands not authorized by § 1447(c) does not apply here because the District Court remanded the case for lack of subject matter jurisdiction, a ground enumerated in § 1447(c).

I agree with the Court, therefore, that the Court of Appeals had jurisdiction to review the District Court's order resubstituting Haley as defendant. That order was not “[a]n order remanding a case to the State court from which it was removed,” so by its own terms § 1447(d) does not apply to review of that decision. Allowing review of a resubstitution order makes good on the promise of the Westfall Act: by permitting disaggregation of a remand order from a substantive determination about substitution that preceded it (in the manner exemplified by *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934)), it gives an employee-defendant a right to appeal any denial of the benefit of substituting the Government as defendant in costly litigation arising out of the employee's federal service.^{FN2} The circumstances in which the Westfall Act was adopted, responding as it did to a series of our decisions that Congress saw as having “seriously eroded the common law tort immunity previously available to Federal employees,” 102 Stat. 4563, note following 28 U.S.C. § 2671, point to the importance Congress placed on giving a federal employee a full opportunity to seek this protection. Incidentally, of course, my reading of the statutes can give an appellate court the opportunity to correct a district court's erroneous understanding of the legitimacy of removal before any remand is effected, making it very unlikely that a mistakenly premised remand order will be carried out. If a district court resisted edification, however, the remand order would be conclusive against appeal, in accord with § 1447(d). See *Kircher, supra*, at ----, 126 S.Ct., at 2154.

FN2. The circumstances of this case make

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it clear that *Waco* ought to endure as an exception to § 1447(d), a question left open in *Kircher v. Putnam Funds Trust*, 547 U.S. 633, ---, n. 13, 126 S.Ct. 2145, 2156, n. 13, 165 L.Ed.2d 92 (2006). A contrary rule would preclude appellate review not only of the remand order itself, but also of the refusal to substitute the Government as defendant.

In sum, my resolution of this case is a pair of half-loaves. The policy of avoiding litigation over remands is tempered by allowing appeals on the important matter of substitution. The policy behind making the Attorney General's certification conclusive is qualified by insulating a remand order from review, no matter how erroneous its jurisdictional premise. Neither policy has it all, but each gets something.

I would remand this case to the Court of Appeals for proceedings consistent with this understanding.

Justice BREYER, concurring in part and dissenting in part.

I agree with the Court's jurisdictional analysis and its disposition of the District Court's remand order and so join Parts I and II of the Court's opinion. But I dissent from Part III. I continue to believe that the Westfall Act permits the Attorney General to certify only when accepting, at least conditionally, the existence of some kind of "incident." But where the incident, if it took place at all, *must have* fallen outside the scope of employment, the Act does not permit certification. See *Wood v. United States*, 995 F.2d 1122 (C.A.1 1993) (en banc).

Here, the Attorney General did claim, in the alternative, that *if* an incident took place (*i.e.*, if the federal employee Haley spoke to Osborn's employer with respect to Osborn's employment), any such incident would have fallen within the scope of Haley's employment. But, for procedural reasons, that alternative claim is not before*903 us. *Ante*, at 891, n. 6. Hence I must consider this case as if it were quite a different kind of case, one in which

what took place was either an incident *outside the scope of employment* or no incident at all. Consider, for example, an aggravated sexual assault, a theft of personal property, or an auto accident on Coney Island where the Government employee, say a Yellowstone Park forest ranger, if present on Coney Island must have been there on a frolic of his own. The majority's approach finds Westfall Act immunity in cases of this kind. I would not.

For one thing, the Act's language suggests that it does not apply in such circumstances. The statute says that the Attorney General must certify that the employee "was acting within the scope of his office or employment *at the time of the incident out of which the claim arose.*" 28 U.S.C. § 2679(d)(2) (emphasis added). The italicized words, read naturally, assume some kind of incident, the *characterization* of which (*e.g.*, as within the scope of employment) determines whether immunity attaches. By way of contrast, permitting purely incident-denying certifications, as the majority does, can only be squared with the Act's text if the Attorney General is required to supply the reviewing court with proof of what the employee *was* doing (and that such activities *were* within the scope of employment) "at the time of the incident"—a showing that would prove quite difficult in a case such as this, where the plaintiff has alleged that the tort was committed at some unknown time over a period of days, or weeks, or even longer.

For another, there is nothing to suggest the Westfall Act sought to provide immunity for tort claims necessarily falling outside the scope of federal employment. As its popular name suggests, the Act focused upon *Westfall v. Erwin*, 484 U.S. 292, 108 S.Ct. 580, 98 L.Ed.2d 619 (1988), an earlier case in which the Court considered whether, to obtain immunity from state-law tort suits, a federal official had to show not just that his conduct was "within the scope of [his] employment," but also that it was "*discretionary in nature.*" *Id.*, at 295, 108 S.Ct. 580 (emphasis added). The Court answered "yes." It held that a federal employee was *not* immune from

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a state-law tort suit, even for simple negligence, unless the employee could also show that his conduct was discretionary.

The Westfall Act basically seeks to overturn this holding. As this Court has said, “[w]hen Congress wrote the Westfall Act ..., the legislators had one purpose firmly in mind [namely] to override *Westfall v. Erwin*.” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425, 115 S.Ct. 2227, 132 L.Ed.2d 375 (1995). The House Judiciary Committee wrote that the Act’s “functional effect ... is to return Federal employees to the status they held prior to the *Westfall* decision.” H.R.Rep. No. 100-700, p. 4 (1988), U.S.Code Cong. & Admin.News, 1988, pp. 5945, 5947. And that “status,” many thought, was an immunity that applied to nondiscretionary, as well as discretionary, actions that fell “within the scope” of the employee’s “office or employment.” 28 U.S.C. § 2679(b)(1); H.R.Rep. No. 100-700, at 4.

In a word, the Act seeks to *maintain* the scope of pre-*Westfall* immunity *minus Westfall*’s “*discretionary function*” limitation. That purpose does not encompass an extension of immunity to all-or-nothing conduct, *i.e.*, those serious assaults or personal “frolics” that, *if they took place at all*, could not possibly have fallen within the scope of the employee’s “office or employment.”

Further, to try to bring the latter type of conduct within the scope of the Act’s immunity creates a series of anomalies. *904 As the Court recognizes, its interpretation may limit the plaintiff’s ability to obtain jury consideration of factual matters critical to his or her case. Indeed, *any* Government employee defendant, including a defendant whom the Attorney General does *not* want to defend, can ask the judge to issue a certificate. § 2679(d)(3). On the Court’s view of the statute, the issuance of the certificate could depend upon whether, for example, the aggravated sexual assault took place at all or whether the defendant was at Yellowstone or Coney Island at the relevant times. And, in deciding these questions (as the judge would have to do to

determine whether the certificate should issue), the judge, not the jury, would decide the main issue in the case. (The Court declines to address the effect of its analysis on § 2679(d)(3). *Ante*, at 900, n. 17. But the relevant language in this provision is virtually identical to the language at issue in this case, see § 2679(d)(2), so one cannot seriously suggest that the Act by its own terms affords employees any narrower a basis for seeking certification than it affords the Attorney General.)

It is highly unusual to permit special, speedy judge factfinding where immunity is at issue. Ordinarily, when a party asserts an immunity defense, *i.e.*, an “entitlement not to stand trial *under certain circumstances*,” *Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985) (emphasis added), special immunity-related procedures focus, not upon factfinding, but upon the proper *legal characterization* of the facts as given. Where the parties’ immunity-related disagreement amounts to a dispute about the *law*, namely whether the particular set of facts alleged by the plaintiff does, or does not, fall within the immunity’s legal scope, the defendant is entitled to a quick determination of the legal question by the trial judge and, if necessary, an immediate interlocutory appeal. *Id.*, at 526, 530, 105 S.Ct. 2806. See *Nixon v. Fitzgerald*, 457 U.S. 731, 742-743, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); see also *Helstoski v. Meanor*, 442 U.S. 500, 507-508, 99 S.Ct. 2445, 61 L.Ed.2d 30 (1979). But where that disagreement amounts to a dispute about the *facts*, immunity law does *not* ordinarily entitle the defendant to special procedural treatment. Rather, the defendant must take the *facts* as the plaintiff asserts them. Like any other defendant, he can move for summary judgment. *Mitchell, supra*, at 526, 105 S.Ct. 2806; *Anderson v. Creighton*, 483 U.S. 635, 646-647, n. 6, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). But if the plaintiff provides sufficient evidence to survive summary judgment, the defendant must win the case at trial.

Thus ordinarily an immunity defense provides special procedural treatment only for a defendant’s leg-

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al claim that the facts *taken as the plaintiff asserts them* (or *taken as the assertions have survived a motion for summary judgment*) fall within the scope of the immunity. It does not provide special treatment for disputes about the facts. See, e.g., *Johnson v. Jones*, 515 U.S. 304, 319-320, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995) (defendant raising immunity defense “may not appeal a district court’s summary judgment order insofar as that order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact for trial”). The Court’s reading of the Westfall Act works a major change in this fact/law relationship. Under the Court’s reading, the defendant will have the right to ask the judge to determine the facts, *i.e.*, to determine whether the events plaintiff says occurred did in fact happen. And that is so *even where the plaintiff has enough evidence to bring the case to the jury.*

The Court’s reading of the Act proves even more anomalous in the case of a *905 federal employee claiming an assault that violates both (a) state tort law and (b) federal civil rights law. Suppose that the defendant’s sole defense is “mistaken identity.” The defendant argues that nothing took place between him and the plaintiff, that at the relevant time he was working peacefully at his desk. Under the Court’s reading, the defendant is entitled to have the *judge* decide the factual question; and, should the judge decide in his favor (in respect to the state-law tort claim), collateral estoppel likely means an end of the matter in respect to the federal civil rights claim, as well. Yet the Westfall Act explicitly *exempts* from its scope any claim of “violation of a federal statute” or the Federal Constitution. 28 U.S.C. § 2679(b)(2).

The Court rests much of its analysis on *Willingham v. Morgan*, 395 U.S. 402, 89 S.Ct. 1813, 23 L.Ed.2d 396 (1969), but I do not think that case offers much support. *Willingham* addressed *only* a federal officer’s right to remove a case to federal court (via § 1442(a)(1)). *Id.*, at 403, 89 S.Ct. 1813. Once there, the officer could pursue traditional immunity defenses, *i.e.*, based on the facts as alleged

by the plaintiff or as they survived summary judgment; that is all the Court could have meant when it said that officers “should have the opportunity to present their version of the facts to a federal, not a state, court,” *id.*, at 409, 89 S.Ct. 1813. Moreover, in *Mesa v. California*, 489 U.S. 121, 139, 109 S.Ct. 959, 103 L.Ed.2d 99 (1989), this Court held that “[f]ederal officer removal under 28 U.S.C. § 1442(a) must be predicated upon averment of a federal defense.” Because the federal employee defendants in *Mesa* “ha[d] not and could not present an official immunity defense” to the charges against them, removal was improper under § 1442(a)(1). *Id.*, at 133, 109 S.Ct. 959. The majority reads the Westfall Act much more broadly than this Court read § 1442(a) in *Mesa*, permitting removal in cases where there is unquestionably no official immunity defense available (at least as such defenses have been understood by this Court until today). And in so doing, the majority opens wide the door not just to removal, which was all that was at issue in *Willingham* and *Mesa*, but, much more consequentially, to substituting a judge’s factfinding for a plaintiff’s jury trial right.

I do not claim that my own reading of the Westfall Act will totally eliminate the difficulties I have mentioned. But an interpretation that reads the Act’s language more literally will minimize them, while also largely mitigating the problem of clever pleading with which the majority is rightly concerned, *ante*, at 898. The Act says the “Attorney General” must certify that the “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)(2) (emphasis added). As I have said, that language prevents the Attorney General from denying that any “incident” at all occurred without at least adding in the alternative that any incident the plaintiff might be able to show falls within the employee’s scope of employment regardless.

Thus, if a plaintiff claims an *intentional* touching (outside the scope of employment), the Attorney General is free to claim (a) there was no touching

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but (b) were the evidence to show a touching, it was accidental (within the scope of employment). Yet if the plaintiff accuses the employee, a Yellowstone Park ranger, of negligent driving on Coney Island, the Attorney General could not make a similar claim. (Nor could he likely do so in respect to an employee whom the plaintiff claims committed a serious sexual assault.) That is because if these latter incidents did happen, they must have fallen outside the scope of employment, while if they did not *906 happen, then *nothing* involving the employee happened at all. In such cases no Westfall Act immunity would be available. And that is just as it should be.

This approach resembles, but differs in important respects from that of the First Circuit in *Wood*. In *Wood*, the First Circuit held that a judge reviewing a Westfall Act certificate could resolve factual conflicts as to “incident-describing and incident-characterizing facts,” but must leave for the jury (if it came to that) disputes over whether any incident occurred at all. 995 F.2d, at 1129. Here, I offer a compromise between *Wood* and the majority’s more extreme approach. I would permit a judge reviewing a Westfall Act certificate to resolve *any* factual disputes relevant to whether the defendant was “acting within the scope of his office or employment,” including, when necessary, determining whether the incident occurred at all. But I would only permit the judge to fulfill this factfinding function in those cases where the Attorney General (or the defendant employee, under § 2679(d)(3)) can offer *some* plausible explanation of the alleged incident that would bring the defendant’s actions within the scope of his federal office or employment.

The majority’s approach, absent some undefined constraint that might be imposed in future cases, *ante*, at 899, n. 14, would permit factfinding by a judge (and, where the Attorney General requests, removal to federal court) in *any* state-law tort case involving a federal employee. I would permit judges to fulfill this rather extraordinary factfinding

function only in those cases where the “injury or loss of property, or personal injury or death” for which the plaintiff seeks recovery *might* have “aris[en] or result[ed] from the negligent or wrongful act or omission of [the federal employee] while acting within the scope of his office or employment”-*i.e.*, where there is *some chance* the injury (if any) was caused by the kinds of actions for which the Act expressly grants employees immunity, under § 2679(b)(1). This approach protects the innocent employee as well as the guilty, *ante*, at 898, but only in the class of law suits the Act can plausibly be read to cover.

Because the Court of Appeals interpreted the Act as does the Court, I would vacate its judgment. I would, however, permit the Court of Appeals to consider the Government’s alternative assertion of immunity (including whether it was properly barred by the trial court), and to determine whether Westfall Act immunity applies on that basis.

For these reasons, I dissent from Part III of the Court’s opinion.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Few statutes read more clearly than 28 U.S.C. § 1447(d): “An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise”^{FN1} That bar to appellate review is a venerable one, dating back to 1887, see *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 343, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976). It is, moreover, not just hortatory; it is jurisdictional. *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-128, 116 S.Ct. 494, 133 L.Ed.2d 461 (1995). Yet beginning in 1976, this Court has repeatedly eroded § 1447(d)’s mandate and expanded the Court’s jurisdiction. Today’s opinion eviscerates*907 what little remained of Congress’s Court-limiting command.

FN1. The remaining clause of § 1447(d) provides an exception that is not applicable here: “except that an order remanding a

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case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.”

I

The first narrowing of § 1447(d) occurred in *Thermtron Products*, over the dissent of Justice Rehnquist joined by Chief Justice Burger and Justice Stewart (only eight Justices sat in the case). *Thermtron Products* held that remand orders are reviewable if they are based on any grounds other than the mandatory ground for remand set forth in § 1447(c)—namely, that “ ‘the case was removed im-providently and without jurisdiction.’ ” ^{FN2} 423 U.S., at 342, 96 S.Ct. 584. That result followed, the Court said, because subsections (c) and (d) are “*in parimateria* ” and “must be construed together.” *Id.*, at 345, 96 S.Ct. 584. Thus, the unlimited phrase “[a]n order remanding a case” magically became “an order remanding a case under this section”—changing prior law, under which the Court had held that the predecessors of § 1447(d) prohibited review of all remand orders. See *id.*, at 354-356, 96 S.Ct. 584 (Rehnquist, J., dissenting). Since, in *Thermtron Products*, the District Court had remanded solely because of its crowded docket, we accepted review and issued a writ of mandamus compelling reconsideration of the order. See also *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 710-712, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (reviewing a remand order predicated on abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943)). ^{FN3}

FN2. Section 1447(c) has since been amended, specifying as grounds for mandatory remand that “the district court lacks subject matter jurisdiction.”

FN3. The *Thermtron Products* limitation upon the § 1447(d) bar to appellate review does not affect this case. As the Court recognizes, *ante*, at 905, the District Court was perfectly clear that its remand to state

court was based on its lack of jurisdiction.

The next phase in § 1447(d)'s erosion came just last Term, in *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 126 S.Ct. 2145, 165 L.Ed.2d 92 (2006). There, as here, the District Court had remanded to state court “on the ground that [it] lacked subject matter jurisdiction on removal.” *Id.*, at ----, 126 S.Ct., at 2148. That should have been the end of the matter, but it was not. The *Kircher* majority embarked on a searching inquiry into whether the District Court's *real reason* for remand was lack of jurisdiction. See *id.*, at ----, 126 S.Ct., at 2154-2158. In my concurrence, I warned that “[r]eview of the sort engaged in ... threatens to defeat the purpose of § 1447(d),” which was “ ‘to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues.’ ” *Id.*, at ---- - ----, 126 S.Ct., at 2148 (quoting *Thermtron Products*, *supra*, at 351, 96 S.Ct. 584).

“Such delay can be created just as easily by asking whether the district court correctly characterized the basis for its order as it can by asking whether that basis was correct Whether the District Court was right or wrong—even if it was so badly mistaken that it misunderstood the true basis for its orders—it *purported* to remand for lack of jurisdiction, and § 1447(d) bars any further review.” *Kircher*, 547 U.S., at ---- - ----, 126 S.Ct., at 2148.

Today's opinion goes even further than *Kircher*. Whereas that case at least *claimed* to be applying our precedents, see, *e.g.*, *id.*, at ---- - ----, 126 S.Ct., at 2154-2155 (citing *Briscoe v. Bell*, 432 U.S. 404, 413-414, n. 13, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977)), today's opinion makes no such pretense. Having recognized, as it must, that the District Court in this case *908 invoked § 1447(c) and remanded for lack of subject-matter jurisdiction, *ante*, at 896, the Court nevertheless reaches the amazing conclusion that § 1447(d) does not “contro[ll]” whether the remand order is reviewable on appeal. *Ante*, at 895 - 896.

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How can that be? How can a statute explicitly eliminating appellate jurisdiction to review a remand order not “contro[ll]” whether an appellate court has jurisdiction to review a remand order? The Court says the answer to this riddle lies in 28 U.S.C. § 2679(d)(2). But that section says only that the Attorney General’s certification is “conclusiv[e] ... for purposes of *removal*” (emphasis added); it says absolutely nothing about the reviewability of remand orders. Thus, the most § 2679(d)(2) can prove is that the District Court should not have remanded the case; that its remand order was erroneous. But our precedents make abundantly clear that § 1447(d)’s appellate-review bar applies with full force to erroneous remand orders. Just last Term we acknowledged that “a remand premised on an erroneous conclusion of no jurisdiction is unappealable.” *Kircher, supra*, at ---, 126 S.Ct., at 2155. See also *Thermtron Products, supra*, at 343, 96 S.Ct. 584 (“If a trial 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 by appeal, by mandamus, or otherwise”) (quoting § 1447(c) (1975 ed.) (emphasis added)); *Briscoe, supra*, at 414, n. 13, 97 S.Ct. 2428 (where a remand order is based on one of the grounds enumerated in § 1447(c), “review is unavailable no matter how plain the legal error in ordering the remand”). Today’s opinion repudiates that principle. The *only* basis for its holding is that § 2679(d)(2) renders the remand erroneous. This utterly novel proposition, that a remand order can be set aside when it is contrary to law, leaves nothing remaining of § 1447(d). Determination of an order’s lawfulness can only be made upon review—and it is precisely review that § 1447(d) forbids.^{FN4}

FN4. Like the Court, I need not address whether allowing the case to remain in federal court after declining to substitute the United States as defendant would create an Article III problem. Unlike the Court, however, I choose not to address the point in dicta. See *ante*, at 895 - 896 (noting that

“the question would only arise if” certain events take place, yet answering the question anyway).

Congress knows how to make remand orders reviewable when it wishes to do so. See, e.g., 12 U.S.C. § 1441a(l)(3)(C) (“The Corporation may appeal any order of remand entered by a United States district court”); § 1819(b)(2)(C) (same); 25 U.S.C. § 487(d) (“[T]he United States shall have the right to appeal from any order of remand in the case”). Even § 1447(d) itself exempts certain remand orders from its own appellate-review bar. See n. 1, *supra*. “Absent a clear statutory command to the contrary, we assume that Congress is aware of the universality of th[e] practice of denying appellate review of remand orders when Congress creates a new ground for removal.” *Things Remembered*, 516 U.S., at 128, 116 S.Ct. 494 (internal quotation marks omitted). As the Court recognized in *Kircher*, “[t]here is no such ‘clear statutory command’ here, and that silence tells us we must look to 28 U.S.C. § 1447(d) to determine the reviewability of remand orders under the Act.” 547 U.S., at ---, n. 8, 126 S.Ct., at 2154, n. 8. Were the Court in this case to look to § 1447(d), instead of looking for a way around § 1447(d), the answer would be abundantly clear.

II

Respondents argued that, even if the remand order is unreviewable on appeal, *909 the District Court’s rejection of the Attorney General’s certification should be reviewable as a logically distinct determination, citing *Waco v. United States Fidelity & Guaranty Co.*, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1934). See *ante*, at 901 - 902 (SOUTER, J., concurring in part and dissenting in part) (adopting this argument).

The continuing vitality of *Waco* is dubious in light of more recent precedents, see *Kircher, supra*, at ---, n. 13, 126 S.Ct., at 2156, n. 13. We need not address that question here, however, since *Waco* is

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patently inapposite. There, removal had been premised on diversity jurisdiction. The District Court dismissed the party whose citizenship was alleged to supply the requisite diversity, finding that party's joinder improper, and thus remanded the case for lack of jurisdiction. We found the dismissal order to be reviewable on appeal, even though the remand order was not. 293 U.S., at 143, 55 S.Ct. 6. But there is a crucial distinction between that case and this one: In *Waco*, reversal of the dismissal would not have subverted the remand. There was *no question* that the suit would proceed in state court regardless of whether the diverse party was rightfully or wrongfully dismissed. Nowhere did the *Waco* Court so much as hint that the District Court might need to reexamine its remand order; to the contrary, it was clear that the remand would occur, no matter what: "If the District Court's [dismissal] order stands, the cross-action will be no part of the case which is remanded to the state court A reversal cannot affect the order of remand, but it will at least, if the dismissal of the petitioner's complaint was erroneous, remit the entire controversy, with the [diverse party] still a party, to the state court for such further proceedings." *Id.*, at 143-144, 55 S.Ct. 6 (emphasis added). In other words, the remand order and the dismissal order were truly "separate orders," *id.*, at 142, 55 S.Ct. 6; we could review-even reverse-the dismissal order without affecting the remand or its impact on the case.

Today's case far more closely resembles *Kircher*. There, the remand order had been predicated upon a finding that the cause of action was not a "covered" class-action suit as defined by the Securities Litigation Uniform Standards Act of 1998 (SLUSA), 112 Stat. 3227, and therefore that the federal courts lacked jurisdiction. The District Court remanded so the suit could continue in state court, outside the confines of SLUSA. If the suit had been "covered," SLUSA would have precluded the action from going forward in any court, state or federal. 15 U.S.C. § 77p(b). We therefore determined that neither the remand itself *nor the determination of SLUSA inap-*

plicability was reviewable on appeal: "The District Court's remand order here cannot be disaggregated as the *Waco* orders could, and if [we were to find the suit to be covered by SLUSA], there [would be] nothing to remand to state court." 547 U.S., at ----, n. 13, 126 S.Ct., at 2156, n. 13. That is precisely the situation in this case: The remand here is predicated upon a finding that the United States should not be substituted as a defendant under the Westfall Act. If we were to disagree with the District Court and substitute the United States as a defendant, while at the same time recognizing (as § 1447(d) requires) that there is nothing we can do about the remand order, the case would go back to state court as an action under the Federal Tort Claims Act (FTCA), see *ante*, at 888, and the remanded case would be styled *Osborn v. United States*. But the state court would have to dismiss such a case at once, since federal courts have exclusive jurisdiction over FTCA suits. 28 U.S.C. § 1346(b)(1). Thus, as in *Kircher*, but unlike *Waco*, the *910 District Court's decision on the preliminary matter—here, Westfall Act certification; in *Kircher*, SLUSA applicability—is inextricably intertwined with the remand order. Since that is so, there is no jurisdiction to review either determination.

* * *

In an all-too-rare effort to reduce the high cost of litigation, Congress provided that remand orders are completely unreviewable "on appeal or otherwise." Section 1447(d) effectuated a tradeoff of sorts: Even though Congress undoubtedly recognized that some remand orders would be entered in error, it thought that, all in all, justice would better be served by allowing that small minority of cases to proceed in state courts than by subjecting every remanded case to endless rounds of forum disputes. "[B]y denying any form of review of an order of remand," "Congress ... established the policy of not permitting interrupting of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*,

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327 U.S. 742, 751, 66 S.Ct. 835, 90 L.Ed. 982 (1946). Today, in its uncompromising pursuit of technical perfection at all costs, this Court has repealed the tradeoff. One might suggest that Congress should restore it, but it is hard to imagine new statutory language accomplishing the desired result any more clearly than § 1447(d) already does.

I would vacate the Sixth Circuit's judgment in its entirety, since that court, like this one, plainly lacked jurisdiction.

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For Opinion See [127 S.Ct. 881](#), [126 S.Ct. 2017](#)

U.S., 2006.

Supreme Court of the United States.

Pat OSBORN, Petitioner,

v.

Barry HALEY, et al.

No. 05-593.

September 1, 2006.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

Brief for Respondents, Gaye Verdi f/k/a Gaye Luber and Land Between the Lakes Association, Inc.

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QUESTIONS PRESENTED

1. Whether a federal employee is entitled to have the district court determine the truth of the plaintiff's controverted allegations before denying immunity to the employee based solely on the nature of the conduct or tort alleged, once the Attorney General has certified 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," under the Federal Employees Liability Reform and Tort Compensation Act of 1988 (Westfall Act), [28 U.S.C. § 2679\(d\)](#).

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

3. Whether the court of appeals had jurisdiction to

review the district court's remand order, notwithstanding [28 U.S.C. § 1447\(d\)](#).

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is under review are Pat Osborn, Barry Haley, Gaye Verdi, f/k/a as Gaye Luber (hereinafter "Verdi"), and Land Between the Lakes Association, Inc. (hereinafter "LBLA").

Pursuant to Sup. Ct. R. 29.6, Respondent Land Between the Lakes Association, Inc., states that it is not the subsidiary of any other corporate entity, and no publicly held corporation owns more than ten percent (10%) of its stock.

West Headnotes

[1] **United States 393**  **50.5(1)**

[393](#) United States

[393I](#) Government in General


[393k50](#) Liabilities of Officers or Agents for Negligence or Misconduct

[393k50.5](#) Immunity or Privilege in General

[393k50.5\(1\)](#) k. In General. [Most Cited](#)

Cases

Is a defendant federal employee entitled to have a district court determine the truth of the plaintiff's controverted allegations before denying immunity to the employee based solely on the nature of the conduct or tort alleged, once the Attorney General has certified, pursuant to the Westfall Act, that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose," thus permitting the substitution of the United States for the employee as the defendant and the removal of the case to federal court? [28 U.S.C.A. § 2679\(d\)](#).

[2] **Removal of Cases 334**  **21**

[334](#) Removal of Cases

[334II](#) Origin, Nature, and Subject of Controversy
[334k21](#) k. Actions Against or for Acts of United States Officers. [Most Cited Cases](#)
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[3] Removal of Cases 334 107(9)

[334](#) Removal of Cases

[334VII](#) Remand or Dismissal of Case

[334k107](#) Proceedings for Remand and Review Thereof

[334k107\(9\)](#) k. Review. [Most Cited Cases](#)

Did a Court of Appeals have jurisdiction to review a district court order remanding an action to state court upon concluding that the Attorney General's purported certification was not authorized by the Westfall Act, notwithstanding the statute generally providing that remand orders are "not reviewable on appeal or otherwise"? [28 U.S.C.A. §§ 1447\(d\), 2679\(d\)\(2\)](#).

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*1 STATUTORY PROVISIONS INVOLVED

This matter involves interpretation of the Federal Employees Liability Reform and Tort Compensation Act of 1988, also known as the Westfall Act, [28 U.S.C. § 2679\(d\)](#), the full text of which appears as App. A hereto; the general remand statute, [28 U.S.C. § 1447](#), attached as App. B hereto; and the federal officer removal statute, [28 U.S.C. § 1442](#), attached as App. C. [28 C.F.R. §§ 15.3](#) and [15.4](#) are also referenced herein and attached as App. D.

STATEMENT OF THE CASE

Petitioner Osborn contends Respondent LBLA terminated her employment because she filed an inquiry with the United States Department of Labor to determine whether a separate entity, the nearby U.S. Forest Service office, had considered her “veterans' preference points” before rejecting her application for federal employment. (Compl., App. A to Verdi's Br. in Opp'n 1-5.) Osborn sued LBLA and its Executive Director, Respondent Verdi, in state court for common law wrongful discharge and related torts, and sued Respondent Haley, the Forest Service's Business Manager, for interfering with Osborn's employment relationship with LBLA. (*Id.* 1-15.) Petitioner asserts that the United States, after removing the case to federal court, conceded that its employee Barry Haley's alleged conduct was outside the scope of his federal employment, so that the only question in dispute was whether these allegations were true. This seriously misconstrues the district court record as it applies to the issues before this Court.

*2 The United States' Notice of Removal pointed out that Osborn alleged: (1) that she was a Volunteer Coordinator employed by LBLA, a contractor to the U.S. Forest Service; (2) that she was terminated for "not being a good Forest Service partner;" and (3) that Haley was employed as Business Manager for the Forest Service "at all times relevant" to her complaint. (Notice of Removal, R. 1; *see* Compl., App. A to Verdi's Br. in Opp'n 2, 4.) The Acting U.S. Attorney (by her authority delegated from the Attorney General under the Westfall Act)^[FN1] had certified that the named federal defendant was acting within the scope of employment at the time of the alleged conduct. (Certification, App. C to Verdi's Br. in Opp'n 23.) Accordingly, the United States asserted the defense of immunity on Haley's behalf and requested removal to federal court under the federal officer removal statute, [28 U.S.C. § 1442](#), as well as the Westfall Act, [28 U.S.C. § 2679](#). (Notice of Removal, R. 1.)

FN1. Congress authorized the Attorney General to make such certifications. [28 U.S.C. §§ 2679\(d\)\(1\) and \(2\)](#). The Attorney General has delegated this authority by regulation to United States Attorneys, who make certification decisions in consultation with the Department of Justice. *See* [28 C.F.R. §§ 15.3, 15.4 \(2005\)](#).

In its Answer, the United States specifically denied the allegations that Haley acted outside the scope of his employment. *Compare* Compl. ¶¶ 29, 34, 41, App. A to Verdi's Br. in Opp'n 7, 8, 10, *with* U.S.'s Answer ¶¶ 14 (denying ¶ 29 of the Complaint), 16 (denying ¶ 34 of the Complaint), 19 (denying ¶ 41 of the Complaint), App. B to Verdi's Br. in Opp'n 18-19.) The U.S. Attorney's Certification contained no further explanation and no concession that Haley's alleged actions would have been outside the *3 scope of his employment even if they had occurred. (Certification, App. C to Verdi's Br. in Opp'n 23.) The United States then filed a Notice of Proposed Substitution seeking to substitute the Government as defendant (Notice of Proposed Substitution, R. 11), and moved to dismiss Osborn's Complaint, citing her need to exhaust administrative remedies under the Federal Tort Claims Act, [28 U.S.C. §§2671](#)*et seq.*, before proceeding against the United States. (*See* U.S.'s Mot. to Dismiss, App. D to Verdi's Br. in

Opp'n 24-29.) Like the United States' Answer, the Motion contains no concession that Haley's alleged acts would have been outside the scope of his employment if they occurred. (*See id.*)

Osborn responded to the Motion by arguing that the following alleged facts demonstrated Haley acted outside the scope of his employment: (1) the Complaint alleges that Haley "induced, persuaded, or coerced defendant Gaye Luber [now Verdi] to discharge plaintiff of her job ..."; (2) a Memorandum of Understanding between the U.S. Forest Service and the LBLA stated that Forest Service employees would not participate in any LBLA decision concerning "hiring or firing" LBLA employees; and (3) Robert Kuenzli, a Department of Labor investigator, stated in a letter that Petitioner was fired because Kuenzli called Haley. (*See* Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 17-20.) However, in addition to presenting double hearsay, the same letter described a meeting wherein Osborn drew a "big laugh" by criticizing Haley in the workplace in front of nearly 80 people, resulting in her boss's request that she apologize to Haley; all before Kuenzli ever contacted Haley. (Ex. C to Pl.'s Resp. to U.S.'s Mot. to Dismiss, App. E to Verdi's Br. in Opp'n 30-33.) The letter also stated that Osborn told Kuenzli that her boss, Tamara *4 Newkum, said that Haley had demanded she terminate Osborn for insubordination. (*Id.*) Further, when Kuenzli asked Osborn what caused the insubordination, "she explained that it was the comment she made at the staff meeting to Mr. Haley." (*Id.*) Thus, Kuenzli's own account indicates Osborn's termination resulted from the comment made at the staff meeting - before Kuenzli's phone call - and that Osborn understood this.

In reply, the United States pointed out that the Petitioner never alleged any facts showing that Haley acted outside the scope of his employment; rather, the Complaint (at ¶ 6) stated that Haley was "employed by the Forest Service at all times related to the complaint." (U.S.'s Reply to Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 35, 37.) The allegations that Haley "wrongfully and maliciously induced, persuaded, or coerced defendant Gaye Luber [now Verdi] to discharge plaintiff" were merely conclusory, the Government argued, and presented no facts supporting the contention that Haley acted outside the scope of his employment; i.e., there were no specific allegations that Haley even attempted to affect

Osborn's employment. (*Id.*, J.A. 38.) Nowhere in its Reply did the Government concede that Haley's alleged acts were outside the scope of his employment if they occurred. Instead, the Reply merely pointed out that the Petitioner failed to meet her burden of proving Haley acted outside his federal employment. (*Id.*, J.A. 36.)^[FN2]

FN2. The courts of appeal agree this burden shifts to the plaintiff upon certification by the Attorney General. (*See* U.S.'s Reply, J.A. 36 (citing [Borneman v. United States](#), 213 F.3d 819, 827 (4th Cir. 2000), cert. denied, 531 U.S. 1070 (2001); [Day v. Mass. Air Nat'l Guard](#), 167 F.3d 678, 685 (1st Cir. 1999); [Taboas v. Mlynczak](#), 149 F.3d 576, 581 (7th Cir. 1998); [Palmer v. Flaggman](#), 93 F.3d 196, 198 (5th Cir. 1996); [Flohr v. Mackovjak](#), 84 F.3d 386, 390 (11th Cir. 1996); [Billings v. United States](#), 57 F.3d 797, 800 (9th Cir. 1995); [Richman v. Straley](#), 48 F.3d 1139, 1145 (10th Cir. 1995); [Kimbrow v. Velten](#), 30 F.3d 1501, 1505 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995); [Melo v. Hafer](#), 13 F.3d 736, 747 (3d Cir. 1994).)

*5 When the district court then issued its Memorandum and Order overruling the Certification, the court mistakenly concluded that the United States does not deny any of the factual allegations contained in Ms. Osborn's complaint, i.e., that Mr. Haley talked with Ms. Luber regarding Ms. Osborn's complaint to the Department of Labor. Instead, the United States only disputes her legal conclusion that Mr. Haley was acting in his individual capacity during the relevant times.

(D. Ct. Mem. & Order, App. D to Pet. Cert. 22a.) To be precise, the United States could not literally have denied such a specific factual allegation, because Osborn never made it. As set forth above, however, the United States did point out the absence of such, and specifically denied Osborn's conclusory allegation that Haley induced her termination - in addition to denying that Haley acted outside the scope of his employment.

The district court apparently recognized that a plaintiff cannot defeat a motion to dismiss after the United States substitutes itself as a defendant merely

by relying upon the factual allegations in his complaint. (*Id.*, App. D 21a-22a (citing [Gilbar v. United States](#), 108 F. Supp. 2d 812, 816-17 (S.D. Ohio 1999), *aff'd*, 229 F.3d 1151 (unpublished table opinion), 2000 WL 1206538 (6th Cir. 2000).) *6 Nonetheless, the district court concluded that no evidentiary hearing was needed because there was no conflicting evidence as to a material fact, noting that "Ms. Osborn need not provide additional proof of an undisputed fact absent any challenge to those facts by the United States." (*Id.*, App. D 22a, 23a n.2.) The court then ruled the alleged conduct, if it occurred, was outside the scope of Haley's employment under Kentucky law, in part because "there is no indication - or even argument - that any of Mr. Haley's actions, if proven, furthered the Forest Services' goals." (*Id.*, App. D 23a.) The court accordingly overruled the Attorney General's "declaration of substitution and/or certification," resubstituted Haley as a defendant,^[FN3] and remanded the case to state court. (*Id.*, App. D 24a, 25a; D. Ct. Order, App. C to Pet. Cert. 17a.)

FN3. The court did not designate its action as "resubstitution," but this was its practical effect given the automatic substitution of the United States following certification. [See](#) 28 U.S.C. § 2679(d)(2) (directing that the United States "shall be substituted as the party defendant" upon certification).

Contrary to her present argument that remand following such a ruling was required, Osborn had not requested remand in opposing the United States' Motion. Instead, she asked the court to lift the stay on discovery so that the case could move forward against Haley in federal court. (Pl.'s Resp. to U.S.'s Mot. to Dismiss, J.A. 20; Tendered Order attached to Pl.'s Resp., R. 15.)

In its Motion to Reconsider, the United States reminded the court that it had indeed vigorously contested Petitioner's allegations, and further attached Declarations from the individual defendants stating that they had never discussed Osborn's "veterans' preference" inquiry. *7 (U.S.'s Mot. to Recons., J.A. 40-45, 51-54.) Thus, the United States was compelled to supplement the record with specific, sworn statements refuting allegations that the Petitioner had never specifically made. At the same time, assuming "for the sake of argument only" that Haley and Verdi "interacted regarding plaintiff's employment," the

United States argued that Haley's alleged conduct in causing Osborn's firing could be construed as furthering his employer's goal of "partnering with competent contract employees in a healthy and productive work environment" (*Id.*, J.A. 47.)

In responding to the United States' Motion to Reconsider, Osborn merely repeated her allegations that (1) Verdi met with her to discuss problems with her employment on the same day that Haley learned she had filed a complaint with the Department of Labor, and (2) she was terminated by Verdi two days later. (Pl.'s Resp. to U.S.'s Mot. to Recons., R. 23.) Again, she failed to allege any contacts between Haley and Verdi regarding her employment.

Finally, in its order denying the United States' Motion to Reconsider, the district court accepted that it is "highly unlikely," in light of Haley's affidavit, that Osborn could develop proof demonstrating that Haley "interacted with Verdi regarding Osborn's employment." (D. Ct. Order, App. B to Pet. Cert. 14a.) Nevertheless, the district court further explained that it could neither decide the basic question of whether the communication occurred at all, nor consider the United States' alternative legal argument that inducing Osborn's termination could have benefitted Haley's employer and been within the scope of his employment, as this would contradict Haley's declaration under oath. (*Id.*, App. D 14a-15a.)

***8** Thus, having previously overruled the Certification without a hearing because the United States had supposedly failed to deny the underlying "allegations," the district court later held that it must sustain its ruling without a hearing because it could not consider the United States' proof refuting the underlying "allegations." Further, the district court simply declined to consider the alternative legal argument that a Forest Service representative could conceivably act within the scope of his employment in attempting to influence a contractor to provide cooperative employees. Inherent in this rationale is the court's conclusion that Haley's involvement in Osborn's termination for any reason, whether related to the Department of Labor inquiry or otherwise, would have necessarily been outside the scope of his employment as a matter of law.

In summary, the United States never conceded that Petitioner's conclusory allegations, or her implied but

never-stated underlying factual allegations, described conduct outside the scope of Barry Haley's employment. This is not the "simple and stark" case Petitioner suggests, as when the parties agree that the defendant/employee's alleged conduct was necessarily outside the scope of his employment under any version of the facts which could be presented. Rather, this is a case in which the federal employee has been denied immunity even though matters relevant to both the characterization of his alleged conduct and whether it occurred at all have not yet been fully heard.

SUMMARY OF ARGUMENT

The Westfall Act provides, without qualification, that the Attorney General's certification shall "conclusively" establish scope of office or employment for purposes of removal only. The Court should give effect to this plain declaration, and thereby reconcile all legal principles and authorities pertinent to this dispute. Congress has effectively foreclosed judicial review of removal jurisdiction, while allowing judicial review of the question of scope of employment - i.e. immunity - as determined by [*Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 \(1995\)](#). This approach satisfies the Constitution because the distinctly federal question of immunity is present in these cases from the outset, even when the underlying facts are in dispute.

Question 1:

Petitioner contends the Attorney General had no authority under the Westfall Act to deny her factual allegations but simultaneously certify that Respondent Haley acted within the scope of his employment. The Attorney General's authority, however, is unrestricted by the statute. The relevant question is not the scope of the Attorney General's authority to issue a certification, but the proper scope of judicial review of that certification when the underlying facts are in dispute. Petitioner asks the Court to preclude judicial review in such cases, automatically denying immunity even to federal employees who are falsely accused, based solely on the nature of the conduct alleged. The purpose and language of the Westfall Act prohibit this approach. Under the statutory scheme, once the Attorney General certified Respondent Haley was acting within the scope of his federal employment, Haley

was entitled to have the district court determine the truth of the plaintiff's controverted allegations before deciding his immunity.

Congress made no exception in the Westfall Act for so-called "incident-denying" certifications, and the Court should not create one. The legislative history shows Congress intended to restore, to federal employees who acted within the scope of their employment, the immunity and protection against having to "subject their personal resources to the lottery of a jury trial" that they had enjoyed before the holding in [Westfall v. Erwin](#), 484 U.S. 292 (1988). To preclude removal, certification and substitution for falsely-accused employees would automatically deny them judicial review of the scope of employment question due solely to the wording of the complaint - even though they necessarily acted within the scope of their employment at all times. Yet the same exception would guarantee judicial review only for those employees who actually committed the alleged conduct and may therefore have acted beyond the scope of their employment.

Lamagno held that judicial review is indispensable before a final determination of immunity. This should be no less true for defendants than it is for plaintiffs; otherwise, the plaintiff, rather than the district court, will become "sole judge in her own cause." *Lamagno* itself involved an "incident-denying" certification, and the opinion recognizes that judicial review will include determinations of fact. Such determinations are distinct from resolving the merits. They are nonetheless prerequisite to resolving the absolute immunity defense raised in Westfall Act cases, because the court cannot decide the legal question of whether the defendant acted within the scope of his employment without first determining what he actually did at the time of the incident alleged.

If the government employee must try the case to disprove facts relevant to scope of employment, as Petitioner advocates, then his immunity has already been lost. This reality distinguishes Westfall Act cases from qualified immunity cases, in which the court can typically decide at the beginning of the case, from the pleadings and published law alone, whether the plaintiff claims a violation of "clearly established law." This Court's pre-*Westfall* holdings allowed government employee defendants to deny the allegations and challenge the lack of supporting

evidence relevant to immunity through summary judgment motions. Since Congress sought to restore federal employees' immunity to its pre-*Westfall* status, it is not reasonable to interpret the Westfall Act as destroying the employees' right to put plaintiffs to their proof.

[Section 2679\(d\)\(3\)](#) has been interpreted to allow judicial determination of the underlying facts during review of the Attorney General's refusal to certify. Logically, when the Attorney General has certified that a federal employee was acting within the scope of his employment, the employee should be entitled to the same factual review before having the certification overturned and his immunity revoked.

The "scope of employment" analysis under [§ 2679\(d\)](#) is also analogous to the "color of office" inquiry under the federal officer removal statute, which allows removal if the officer's relationship to the plaintiff derived from his official duties; the officer need not admit the plaintiff's allegations in order to establish federal jurisdiction. Petitioner's own court filings establish such a relationship with Respondent Haley.

As illustrated by the district court proceedings in this case, the "incident denial" exception Petitioner asks the Court to read into the statute would also deny falsely-accused federal employees their right under the Civil Rules to deny the allegations but plead in the alternative that a complaint describes conduct which, even if it were true, falls within the scope of employment. By contrast, interpreting the statute as written will impose no "burden" on plaintiffs, other than having to accept a federal judicial determination of the federal issue of the scope of a federal worker's employment - just as they do when an employee has challenged the Attorney General's refusal to certify.

Question 2:

Congress made the Attorney General's certification "conclusive" only for purposes of removal, while remaining silent as to judicial review of the question of scope of employment. Congress thus declared its intent to foreclose remand of such cases under any circumstances, even if the proceedings ultimately establish the federal defendant acted beyond the scope of employment. By contrast, Congress specifically required remand for "beyond the scope"

cases removed without the Attorney General's certification. By omitting this requirement for Attorney General-certified removals, Congress made clear that such cases are to remain in federal court.

This Court has already determined, in the context of the federal officer removal statute, that the Constitution allows Congress to provide a federal forum for claims against federal employees, if the employee raises the federal defense of immunity from the outset. Federal defendant Haley did so here, removing the case pursuant to both the officer removal statute and the Westfall Act. Accordingly, he was entitled to the federal forum Congress provided to him, consistent with Article III. The *Lamagno* plurality correctly concluded that Congress acted in accordance with Article III in prohibiting remand following the Attorney General's certification, as the significant federal question of immunity is present from the outset in such cases. Petitioner's attempt to portray the certification and removal of this case as somehow "unauthorized" has no support in the statute or the record. Even if the certification had been based solely on denial of the facts asserted by Petitioner, the Attorney General would still have been certifying that Haley acted within the scope of his employment - meaning the purely federal question of Haley's immunity would still have been present from the outset.

Question 3:

The court of appeals had jurisdiction to review this matter. The order resubstituting Haley as a defendant was immediately appealable under the collateral order doctrine as a conclusive denial of governmental immunity, an important issue separate from the merits and effectively unreviewable on appeal from a final judgment. The resubstitution order was also reviewable under *City of Waco v. U.S. Fid. & Guar. Co.*, 293 U.S. 140 (1934), as it logically preceded and could be "disaggregated" from the order remanding the case to state court. Unlike in *Kircher v. Putnam Funds Trust*, 547 U.S. , 126 S. Ct. 2145 (2006), in which the district court's order of dismissal pursuant to the Securities Litigation Uniform Standards Act resolved all claims, here state law claims against Haley and these Respondents remain to be tried.

The remand order is reviewable as well under the exception to [28 U.S.C. § 1447\(d\)](#) explained in

[Thermtron Prods., Inc. v. Hermansdorfer](#), 423 U.S. 336 (1976). This provision protects from appellate review only those remand orders invoking the grounds specified in [§ 1447\(c\)](#); i.e., that removal was "improvident and without jurisdiction." A district court cannot remand a properly removed case on grounds it has no authority to consider. Here, unlike in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) and *Kircher*, Congress had foreclosed any issue of removal jurisdiction through its "clear statutory command" that the Attorney General's certification would be conclusive for purposes of removal. Respondents' appeal was not a challenge to a district court's mere legal error in denying jurisdiction. Instead, Respondents maintain the district court lacked statutory authority to question its jurisdiction or to remand at all following certification. Allowing the district court to override Congress' statutory directive with impunity would effectively void [§ 2679\(b\)\(2\)](#). Enforcing this provision would not weaken [§ 1447\(d\)](#), which never comes into play when Congress has specifically acted to foreclose any jurisdictional disputes. Denying effect to the statute would also threaten the underpinnings of *Lamagno*; while enforcing it will reconcile the Court's prior holdings with the issues now at hand.

Petitioner's three arguments depend ultimately on the same two premises: (1) the Attorney General's certification in this case was based solely on denial of the underlying allegations; and (2) the scope of employment issue, and therefore the question of immunity, is never reached when the certification merely denies the allegations. For the reasons stated herein, each premise is false. This is not merely an "incident-denying" case. Rather, this case involves the need for the district court to determine facts and hear legal arguments relative to the truth, characterization and effect of the defendant/federal employee's alleged conduct under Kentucky law defining scope of employment. Even if nothing were left to decide but the truth of the allegations, the court's ruling would still determine whether Haley is entitled to immunity, a federal question which has been present from the outset. For these reasons, the certification was authorized, the statutory prohibition of remand following certification is constitutional, and the district court acted beyond its authority in remanding the case to the state court, rendering its order subject to appellate review. This Court should exercise its jurisdiction to review the issues raised by

Petitioner, and uphold Congress' constitutional power to provide a federal forum for claims against all federal officers and employees - including those who may be falsely accused.

ARGUMENT

I. The District Court Should Have Determined the Truth of the Plaintiff's Controverted Allegations Before Deciding Haley's Immunity.

A. Congress made no exception to the Westfall Act for so-called "incident-denying" certifications.

Under [28 U.S.C. § 2679\(d\)\(2\)](#), the Attorney General may certify that the defendant employee was acting within the scope of his office or employment "at the time of the incident" from which the claim arose, upon which the *16 action shall be removed, or he may choose not to so certify. Congress imposed no qualification or restriction whatsoever on the Attorney General's authority to admit, deny, or consider the facts underlying the plaintiff's allegations in reaching this certification decision. Had it intended to do so, Congress might have used a phrase such as "when committing the conduct" instead of "at the time of the incident," as the latter wording leaves open the possibility that the employee may have been "on the job" when an incident occurred without participating in the specific conduct alleged. So long as the federal employee is acting in the course and scope of employment "at the time of the incident" - whether as described by the plaintiff or otherwise - the Attorney General may issue the Westfall Act certification.

To support her separate argument that federal jurisdiction was never present, Petitioner nevertheless misconstrues Congress' choice not to specifically authorize a so-called "incident-denying" certification as a limitation on the Attorney General's authority to certify. In fact, as illustrated above, the absence of an express limitation means exactly that. By mandating removal without qualification when the certification is in the employee's favor, Congress necessarily contemplated that the Attorney General would exercise judgment in making a certification in each case.

However, as the Court concluded in [Gutierrez de Martinez v. Lamagno](#), 515 U.S. 417 (1995), this does

not mean that the Attorney General's certification, once made, is conclusive, except for purposes of removal as specifically stated in [§ 2679\(d\)\(2\)](#). Thus, Congress left the accuracy of the certification - i.e. the question of the defendant's immunity from suit - open for judicial review. *Id.* As the *17 Sixth Circuit concluded, it is the scope of this judicial review, and specifically the district court's freedom to resolve factual disputes before denying immunity to the federal employee, which is properly at issue - not the Attorney General's authority to make the certification and remove the case to federal court. (See 6th Cir. Opinion, App. A to Pet. Cert. 4a, available at [Osborn v. Haley](#), 422 F.3d 359 (6th Cir. 2005), cert. granted, 126 S. Ct. 2017 (2006).) Under Petitioner's approach, there in effect would be no judicial review for falsely-accused federal employees, because the district court's inquiry would stop upon the defendant's denial of the plaintiff's allegations.

B. Interpreting the Act to exclude the underlying facts from judicial review would unfairly deny immunity to falsely-accused federal employees.

Petitioner contends that district courts should simply assume the truth of the plaintiff's underlying allegations in all cases, and deny immunity to the defendant if the nature of the alleged acts is such that they would necessarily fall outside the scope of employment if they occurred. This argument overlooks the point that a defendant who did not commit the alleged "beyond the scope" conduct was necessarily acting "within the scope" of his employment at the time of the incident. It follows that under Petitioner's approach, a falsely-accused defendant who was entitled to immunity would not get immunity. He would still be entitled to defend the underlying claims, and of course would avoid liability if successful, but only at his own considerable expense. This is not immunity. Literally, it is denial of immunity without judicial review. Accordingly, it *18 would defeat the purpose and express provisions of the Westfall Act.

The legislative history shows Congress intended to restore, to federal employees who act within the scope of their employment, the immunity and protection against having to "subject their personal resources to the lottery of a jury trial" that they had enjoyed before the *Westfall* holding. See [H.R. Rep. No. 100-700 \(1988\)](#), reprinted in 1988 U.S.C.C.A.N.

5945, 5947. The exception Petitioner seeks would undo this remedy and discriminate unfairly against federal employees falsely accused of any type of conduct or tort. Yet the same exception would illogically guarantee judicial review for those who actually committed the alleged conduct, and may therefore have acted beyond the scope of their employment. By contrast, interpreting the statute as written will impose no “burden” on plaintiffs, other than having to accept a federal judicial determination (now available to them pursuant to *Lamagno*) of the federal issue of the scope of a federal worker's employment, and try their underlying claims in federal court.

C. *Lamagno's* reasoning that judicial review is indispensable before a final determination of the immunity question should apply equally to defendants and plaintiffs.

Precluding removal, certification, and substitution for falsely-accused employees, as Petitioner advocates, would automatically deny them immunity without judicial review. In *Lamagno*, this Court essentially found that to protect the plaintiff, judicial review was indispensable before a final and binding determination granting immunity to the federal employee: “Thus, absent judicial review *19 and court rejection of the certification, *Lamagno* would be released from the litigation....” [Lamagno, 515 U.S. at 422](#). The determination is no less final and binding for the falsely-accused employee, and judicial review is therefore no more dispensable. In *Lamagno*, this Court declined to cast district court judges into the role of “petty functionaries,” by insulating the Attorney General's certification from review and making her delegate “sole judge” with regard to the employee's immunity. *See id.* at 426, 429. Petitioner's approach would cast the hypothetical plaintiff, instead of the Attorney General, as “sole judge” in her own cause, by allowing her to decide immunity unilaterally through false accusations of torts that are by definition beyond the scope of employment, while requiring the district judge to act as a “petty functionary” in remanding such claims without first assessing the facts.

As Petitioner recognized, scope of employment “sets the line” according to *Lamagno*: If *Lamagno* is inside that line, he is not subject to petitioners' suit; if he is outside the line, he is

personally answerable. The sole question, then, is *who decides* on which side of the line the case falls: the local United States Attorney, unreviewably or, when that official's decision is contested, the court.

Id. at 423-24. Applying this rationale here, it is irrelevant whether the defendant or the Attorney General denied the plaintiff's allegations. What matters is whether Barry Haley acted within the scope of his employment and who will decide whether he did so. This decision literally cannot be made without deciding the relevant facts, since they are in dispute. The Court in *Lamagno* declined to transfer the final scope of employment determination from *20 the district court to the United States Attorney as an interested party, absent an express directive from Congress to do so. By the same logic, it should not transfer the final determination to the plaintiff, who could then control the result through false allegations and/or artful pleading.

D. The Court's prior holdings suggest that judicial review in immunity cases may include factual determinations.

The Court inherently recognized in *Lamagno* that the district courts' review of certifications will include factual determinations: “In adjudicating the scope-of-federal-employment question ‘at the very outset,’ the court inevitably will confront facts relevant to the alleged misconduct, matters that bear on the state tort claims against the employee.” [Lamagno, 515 U.S. at 435](#); *see also id.* at 442 (Souter, J., dissenting) (“[L]itigating the question whether an employee's allegedly tortious acts fall within the scope of employment will, of course, always require some evidence to show what the acts were.”). “Second, when a Government official's determination of a fact or circumstance - for example, ‘scope of employment’ - is dispositive of a court controversy, federal courts generally do not hold the determination unreviewable.” *Id.* at 424. “The key question presented - scope of employment - however contestable in fact, would receive no judicial audience [under the defendant's interpretation].” *Id.* at 429.

Indeed, *Lamagno* involved an “incident-denying certification” revealed through the “crucible of litigation,” as defined by Petitioner. (*See Petr.'s Br.* 19 n.5.) The scope of employment question before

the Court involved allegations that the federal defendant, Lamagno, was intoxicated while driving, and that his passenger, an unidentified woman, *21 was not a federal employee. Lamagno, 515 U.S. at 420-21. The Fourth Circuit's more detailed description, on appeal following remand, confirms these allegations were in dispute. See Gutierrez de Martinez v. Drug Enforcement Admin., 111 F.3d 1148, 1156-1159 (4th Cir. 1997), cert. denied, 522 U.S. 931 (1997). Lamagno's brief as Respondent also indicates that the Government had denied many of the Petitioner's allegations. See Brief For Respondent Dirk A. Lamagno at 2-3, Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) (No. 94-167), 1995 WL 39033, at *6-7. In requiring judicial review of such an "incident-denying" certification, the Court must have contemplated that the district court's inquiry would include resolving factual determinations pertinent to the scope of Lamagno's employment.

Petitioner correctly contends that determining immunity is distinct from resolving the merits of the case. This does not mean that determining immunity cannot include determination of facts relevant to immunity. Factual determinations are prerequisite to resolving the absolute immunity defense raised in Westfall Act cases, because the court cannot decide the legal question of whether the defendant acted within the scope of his employment without first determining what the defendant actually did. If the employee must try the case to disprove facts relevant to scope of employment as Petitioner advocates, then his immunity has already been lost.

In the qualified immunity cases upon which Petitioner so heavily relies, the court can typically decide at the beginning of the case, from the pleadings and published law alone, whether the plaintiff has claimed a violation of "clearly established law." Certainly, both absolute and qualified immunity cases ultimately involve questions of *22 law that must be decided before trial. Orders denying both are effectively unreviewable on appeal from a final judgment, because immunity is "effectively lost if a case is erroneously permitted to go to trial," and orders denying both are therefore appealable before final judgment. See Mitchell v. Forsyth, 472 U.S. 511, 525-30 (1985); see also *infra* Part III(A)(1) (discussing collateral order doctrine). But this does

not alter the fact that the court must consider the plaintiff's factual allegations in resolving the immunity issue. Mitchell, 472 U.S. at 529. In so doing, prior to Westfall v. Erwin, 484 U.S. 292 (1988), the district courts would grant summary judgment on grounds of immunity if the plaintiff could tender no competent evidence of conduct beyond the scope of the immunity; the fact that the defendant needed to contest the plaintiff's merits allegations to establish his immunity did not preclude summary judgment in his favor. Melo v. Hafer, 13 F.3d 736, 744-745 (3d Cir. 1994) (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982); Anderson v. Creighton, 483 U.S. 635 (1987)). "If the defendant did not qualify for immunity on the facts alleged in the complaint, however, this did not mean the defendant had to go to trial." *Id.* at 745. Since Congress specifically sought to restore the early resolution of immunity which had been available before *Westfall*, it is not reasonable to suggest that Congress intended for the Westfall Act to destroy the federal employee's opportunity to deny the plaintiff's allegations relevant to immunity, and challenge the lack of supporting evidence thereof. See *id.* at 744 (citing H.R. No. 100-700 (1988), reprinted in 1988 U.S.C.C.A.N. 5945, 5946). Even in qualified immunity cases in which the complaint adequately alleges acts that violate clearly established law, the defendant is entitled to summary judgment if discovery fails to create a genuine issue of fact regarding the alleged conduct. *23 Mitchell, 472 U.S. at 526. This is necessary to protect the defendant's "entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability...." *Id.* Nothing in the line of qualified immunity cases Petitioner cites supports her argument that defendants who deny the allegations in the complaint automatically forfeit their immunity.

E. Section 2679(d)(3) allows judicial determination of the underlying facts when the Attorney General has refused to certify the employee was within the scope of employment, and it would be illogical to omit such determination when the Attorney General has so certified.

The four circuits that directly rejected the approach

of Wood v. United States, 995 F.2d 1122 (1st Cir. 1993) (en banc) (Breyer, J.) compared § 2679(d)(2) with § 2679(d)(3), which does not contain the “time of the incident” clause upon which the First Circuit relied. See 6th Cir. Opinion, App. A to Pet. Cert. 6a-7a, available at Osborn v. Haley, 422 F.3d 359, 363-64 (6th Cir. 2005), cert. granted, 126 S. Ct. 2017 (2006); Heuton v. Anderson, 75 F.3d 357, 360 (8th Cir. 1996); Kimbrow v. Velten, 30 F.3d 1501, 1508 (D.C. Cir. 1995), cert. denied, 515 U.S. 1145 (1995); Melo v. Hafer, 13 F.3d 736, 746-47 (3d Cir. 1994). Section 2679(d)(3) merely requires the district court, when petitioned by the employee following the Attorney General's refusal to certify, to “find and certify [prior to substitution] that the employee was acting within the scope of his office *24 or employment.” These courts pointed out that it is unlikely that Congress intended the Attorney General, in deciding whether to certify pursuant to (d)(2), to be more circumscribed by the plaintiff's allegations than the district court, in deciding whether to certify pursuant to (d)(3). See *id.* Petitioner does not contend that § 2679(d)(3) excludes the underlying facts from judicial review, and Respondents can find no case that so holds. The First and Ninth Circuits have recognized that the district court's role in reviewing challenges to the Attorney General's refusal to certify, brought pursuant to § 2679(d)(3), includes fact finding. See Lyons v. Brown, 158 F.3d 605 (1st Cir. 1998); Green v. Hall, 8 F.3d 695 (9th Cir. 1993) (per curiam); Wang v. United States, 947 F.2d 1400 (9th Cir. 1991); cf. Snodgrass v. Jones, 957 F.2d 482 (7th Cir. 1992) (holding that no hearing required prior to district court's determination under (d)(3) where not explicitly required by statute, and no facts were in dispute). The Court having now ruled in *Lamagno* that judicial review is available under (d)(2) as well as (d)(3), it would be even less logical to allow the district court to resolve factual disputes only when reviewing the Attorney General's refusal to certify that an employee was not “within the scope” of federal employment, and not when the Attorney General has certified that the employee was “within the scope.” In each situation the district court will finally decide the question of the employee's immunity, and it should resolve any factual disputes before doing so. Nothing in either provision of the statute commands otherwise.

*25 F. The analogous federal officer removal statute does not require the defendant to admit the plaintiff's allegations to secure removal.

By analogy, under the federal officer removal statute, 28 U.S.C. § 1442(a)(1) (App. C hereto), the federal officer need not admit the plaintiff's allegations to secure removal. Willingham v. Morgan, 395 U.S. 402, 408 (1969) (citation omitted). Rather, in this civil suit alleging assault by prison officials, the “color of office” test of § 1442(a) was met when the federal officer merely showed that his relationship to the plaintiff derived solely from his official duties. *Id.* at 409. The Court further explained:

Past cases have interpreted the “color of office” test to require a showing of a “causal connection” between the charged conduct and asserted official authority. “It is enough that [petitioners'] acts or [their] presence at the place in performance of [their] official duty constitute the basis, though mistaken or false, of the state prosecution.” In this case, once petitioners had shown that their only contact with respondent occurred inside the penitentiary, while they were performing their duties, we believe that they had demonstrated the required “causal connection.” The connection consists, simply enough, of the undisputed fact that petitioners were on duty, at their place of federal employment, at all the relevant times. If the question raised is whether they were engaged in some kind of “frolic of their own” in relation to respondent, then they should have the opportunity to present their version of the facts to a federal, not a state, court. This is exactly what the removal statute was designed to accomplish.

Id. at 409 (citations omitted) (alterations in original).

*26 Citing *Willingham*, a district court has held that a United States Navy superintendent was acting under color of his office in contacting a private employer concerning the prospective employment of a Navy civilian employee, and accordingly that a claim against him for tortious interference with contract was properly removed to federal court under § 1442(a)(1). Areskog v. United States, 396 F. Supp. 834 (D. Conn. 1975).

The “scope of employment” analysis under § 2679(d) is analogous to the “color of office” inquiry under § 1442(a). See 14C Charles Alan Wright and Arthur R. Miller, Federal Practice & Procedure § 3727 (3d ed. 1998). Here, like in *Areskog*, Petitioner's own filings - including her pleading that Haley was employed as Business Manager for the Forest Service “at all times

relevant” to her complaint - effectively established that her relationship with Haley derived solely from his official duties. Her mere conclusory allegation that he nonetheless acted for his own purposes in affecting her employment should not be enough to deny Haley the opportunity to present his own version of the facts to a federal court, before it finally decides whether he is entitled to immunity.

G. Under the Civil Rules, federal defendants are entitled to simultaneously deny the plaintiff's allegations and challenge their characterization as beyond the scope of employment.

As illustrated in Mr. Haley's case, the exception Petitioner seeks would also deny falsely-accused federal employees the opportunity to contest “incident-characterizing” facts or allegations. That is, it would deny employees the opportunity to make the legal argument that a complaint *27 describes conduct that may fall within the scope of employment as a matter of law, depending on the ultimate facts showing the context of the incident. Such a defense is no different than pleading hypothetically or in the alternative, which is specifically sanctioned in [Fed. R. Civ. P. 8\(e\)\(2\)](#). Even the holdings in [Wood v. United States, 995 F.2d 1122 \(1st Cir. 1993\)](#) (en banc) (Breyer, J.), and [McHugh v. Univ. of Vt., 966 F.2d 67, 74 \(2d Cir. 1992\)](#), the sexual harassment cases upon which Petitioner primarily relies, carefully distinguished challenges to the context or characterization of the defendant's alleged conduct which go beyond simple denials:

The context of the alleged act that is relevant to the scope of employment issue is a matter of fact to be determined by the district court, however, after an appropriate factual hearing. Whenever scope of employment is disputed, substitution should be made only if the court finds that the alleged acts were within the scope of employment.

[McHugh, 966 F.2d at 74-75.](#)

The *Wood* court, whose primary conclusion Respondents believe was flawed, conceded that “the certificate need not accept the plaintiff's version of just *how* it occurred.” [Wood, 995 F.2d at 1123](#). In response to the defendant's concern that “Driver A” who admits negligence would receive immunity while less culpable “Driver B,” who denies that any

accident occurred, would not, the *Wood* court explained that “it could be so only where Driver A can claim that the underlying incident is job-related, while Driver B cannot make this claim, even hypothetically for argument's sake.” *Id.* at 1127. Addressing the concern that a plaintiff might transform a job-related tort into a non-job-related tort simply by alleging *28 an “off-duty” state of mind or alleging that a negligent action was carried out intentionally, the court stated:

Rather, we insist that the certificate assume some kind of harm-causing incident, while leaving the Attorney General free to dispute characterization of the incident and subsidiary immunity-related facts. The Second Circuit held the same in [McHugh, 966 F.2d at 74](#). Moreover, we previously held that the Attorney General's certificate may contest a plaintiff's incident-describing and incident-characterizing facts and that the court may resolve any such factual conflicts, relevant to immunity, prior to trial.

Id. at 1129.^[FN4]

FN4. By way of illustration, the *Wood* court noted that in its earlier case, [Nasuti v. Scannell, 906 F.2d 802 \(1st Cir. 1990\)](#), the plaintiff had alleged that a federal employee intentionally injured him by driving fast in order to jostle him and throw him from side-to-side in the back of a truck. The court explained: “We assumed that these factual allegations, if true, would have placed Scannell's actions outside the ‘scope of his employment’ ... but, we held the immunity certificate valid, pending a pre-trial evidentiary hearing that would resolve the key immunity-related factual dispute, namely whether Scannell intended to harm Nasuti.” [Wood, 995 F.2d at 1129](#) (citing [Nasuti, 906 F.2d at 808](#)).

Remand of this case to the district court for an evidentiary hearing on the scope of employment issue is consistent even with *McHugh* and *Wood*. Unlike in those cases, the Petitioner has not alleged conduct - such as sexual assault or rape - which is clearly not entitled to the protection of immunity if it occurred and would clearly be beyond the scope of employment under state law under any version of events. Instead, Osborn alleged torts that the district court correctly ruled are not actionable if undertaken

with a “purpose to serve the employer.” (D. Ct. *29 Mem. & Order, App. D to Pet. Cert. 23a (citing [Am. Gen. Life & Accid. Ins. Co. v. Hall](#), 74 S.W.3d 688, 692 (Ky. 2003)).) See also [Areskog v. United States](#), 396 F. Supp. 834, 839-840 (D. Conn. 1975) (holding the naval superintendent immune as “within the outer perimeter of [his] line of duty” under [Barr v. Matteo](#), 360 U.S. 564, 575 (1959) (plurality opinion), even though he committed the acts plaintiff characterized as tortious interference). Even criminal assault has been deemed within the scope of employment under Kentucky law, when intended to further the employer's purpose. [Patterson v. Blair](#), 172 S.W.3d 361 (Ky. 2005).

Further, the United States articulated motives that could have justified Haley's alleged attempt to influence Osborn's employment as serving his employer. Osborn herself put forth documentation that she was fired because she engaged in public ridicule of a Forest Service official as a contractor's employee, pointedly undermining that official's (Haley's) attempt to address the quality of communications between the two organizations. This is hardly analogous to a case in which the only matter in dispute is whether the defendant committed a rape or sexual assault.

The instant matter also does not involve a situation in which the United States has merely denied the factual “allegations.” Instead, the United States attempted to put the Petitioner to her proof, and then argued that even if Petitioner's allegations that Haley interfered with her employment were hypothetically true, Haley was entitled to a hearing to determine his intent or motive. Consistent with [Wood](#) and [Nasuti](#), Haley should have been given the opportunity to contest Osborn's “incident-describing” and “incident-characterizing” allegations, which were merely *30 conclusory and did not even allege specific conduct. Paraphrasing the language of [Wood](#), 995 F.2d at 1129, the district court should have considered all facts and arguments relevant to the context of Haley's alleged conduct, which could have been consistent with a legitimate business purpose.

Indeed, Petitioner effectively conceded that her claims against Haley describe conduct which can fall within the scope of employment under Kentucky law. Petitioner's claims against Respondent Verdi were essentially identical to those against Haley: she

accused Verdi of discharging her in violation of public policy, conspiring to wrongfully discharge her, conspiring to interfere with her employment relationship, and committing outrageous conduct, all alleged to have been carried out in a “malicious, oppressive, and intentional manner in order to injure and damage plaintiff.” (Compl., App. A to Verdi's Br. in Opp'n 1-15.) In each instance, Osborn specifically alleged that Verdi acted within the scope of her employment as Executive Director of the defendant LBLA while performing these acts. (*Id.* ¶¶ 24, 26, 37, 38, 44, 45, 52, 53 and 61, App. A 6-7, 9-11, 13-14.) Yet Petitioner in her later court filings characterized the same purported conduct as beyond the scope of Haley's employment. At the least, the Attorney General should be entitled to challenge Petitioner's self-serving re-characterization of these conclusory allegations.

*31 II. Congress' Prohibition of Remand Following Certification is Consistent with Article III.

A. Congress clearly precluded remand by making the Attorney General's certification conclusive only for purposes of removal.

The Westfall Act provides that the Attorney General's certification “shall conclusively establish scope of office or employment for purposes of removal” of the suit from state court. [28 U.S.C. § 2679\(d\)\(2\)](#). By making the certification conclusive only for removal, Congress clearly signaled its intent to preclude remand and provide a federal forum to federal employees in such cases, even when a district court finds the Attorney General's determination to be incorrect. Nine justices apparently recognized this in deciding [Gutierrez de Martinez v. Lamagno](#), 515 U.S. 417 (1995). The majority reasoned that Congress likely omitted the Drivers Act provision authorizing remand, “because it had decided to foreclose needless shuttling of a case from one court to another - a decision evident also in the Westfall Act language making certification ‘conclusiv[e] ... for purposes of removal.’ ” *Id.* at 434 n.10. Assessing the same provision, the dissent stated: “The Court recognizes that there is nothing equivocal about the Act's provision that once a state tort action has been removed to a federal court after a certification by the Attorney General, it may never be remanded to the state system...” *Id.* at 440 (Souter, J., dissenting). The four-circuit majority of appellate courts

addressing the issue agreed, holding that the statute deprives the district court of authority to remand. *See* 6th Cir. Opinion, App. A to Pet. Cert. 10a, *available at* [Osborn v. Haley](#), 422 F.3d 359, 365 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2017 (2006); [Borneman v. United States](#), 213 F.3d 819, 826 (4th Cir. 2000), *cert. denied*, *32531 U.S. 1070 (2001); [Garcia v. United States](#), 88 F.3d 318, 325 (5th Cir. 1996); [Aliota v. Graham](#), 984 F.2d 1350, 1356 (3d Cir.) (Alito, J.), *cert. denied*, 510 U.S. 817 (1993).

B. Congress did not violate Article III by prohibiting remand, since the Attorney General's certification raises the significant federal question of immunity from the outset.

The practical question before the Court, then, is whether Article III of the United States Constitution will allow the Court to give effect to Congress' plain language and intent. The split among the circuits on this question of remand is grounded squarely in Article III concerns. Petitioner cites [Nasuti v. Scannell](#), 906 F.2d 802, 814 (1st Cir. 1990), and [Haddon v. United States](#), 68 F.3d 1420, 1427 (D.C. Cir. 1995), for the proposition that a district court cannot retain jurisdiction after concluding that the defendant acted outside the scope of his employment. Both courts cited constitutional concerns (although *Nasuti* pre-dates the published ruling in *Lamagno*). *See* [Haddon](#), 68 F.3d at 1427; [Nasuti](#), 906 F.2d at 814. Of the four circuits barring remand, only the Fifth Circuit in *Garcia v. United States* directly analyzed the Article III question, essentially adopting the *Lamagno* plurality's rationale in concluding that retaining jurisdiction after rejecting the Attorney General's certification was constitutional. [Garcia v. United States](#), 88 F.3d 318, 325 (5th Cir. 1996).

The plurality in *Lamagno* did not view the posed Article III problem as a grave one, reasoning (in paraphrase) as follows: (1) a case that raises a substantive question of federal law at the outset clearly "arises under" federal law within the meaning of Article III, *33 [Lamagno](#), 515 U.S. at 435 (citing [Verlinden B.V. v. Cent. Bank of Nigeria](#), 461 U.S. 480, 493 (1983)); (2) the scope of a federal employee's employment is a significant federal question, and the Westfall Act was designed to assure that it could be aired in a federal forum, *id.*; and (3) considerations of judicial economy and convenience and fairness to litigants make it reasonable and

proper to proceed beyond the federal question to final judgment, *id.* At this stage, the court will have invested time and resources on the initial scope-of-employment question, during which it "inevitably will confront facts relevant to the alleged misconduct, matters that bear on the state tort claims against the employee." *Id.* (citing [United Mine Workers of Am. v. Gibbs](#), 383 U.S. 715, 725 (1966)). As the constitutional question is now squarely before the Court, *see id.* at 437 (O'Connor, J., concurring), the Court should now affirm this portion of the *Lamagno* opinion.

Respondents acknowledge the *Lamagno* dissenters' concern that to use the inevitable intermingling of evidence bearing on both scope of employment and liability to justify retaining jurisdiction is "tantamount to saying the authority to determine whether a court has jurisdiction over the cause of action supplies the very jurisdiction that is subject to challenge." *Id.* at 442 (Souter, J., dissenting). But this view incorrectly characterizes the determination the district court must make. The district courts have no "authority to determine ... jurisdiction" following the Attorney General's certification. Congress conclusively prohibited them from doing so, via [§ 2679\(d\)\(2\)](#). *See infra* Parts III(B)(1) and (2). Rather, the judicial review recognized by *Lamagno* entails determining whether to override the Attorney General's conclusion, speaking as the federal employer, that its employee was acting within the scope of *34 his employment. This is the question that becomes "intermingled" with the merits of the underlying claims, and it is a question of federal immunity, not jurisdiction. The involvement of this federal question from the outset does indeed justify Congress' decision to leave jurisdiction with the district court following its resolution. As the *Lamagno* plurality noted, if the plaintiff necessarily relies on federally-created legal relationships, her claim should be treated as one arising under federal law within the meaning of Article III. [Lamagno](#), 515 U.S. at 436 (citation omitted). Since Congress further "federalized" the question by involving the United States Attorney General in the scope of employment determination, the matter falls within Congress' unquestioned Article III power to create federal questions by statute, thereby creating federal jurisdiction.

Even the Petitioner agrees that the majority

interpretation of [§ 2679\(d\)\(2\)](#) as prohibiting remand is “eminently reasonable” with respect to certifications that are “authorized by the Westfall Act,” as this “gives effect to the adverb *conclusively*, and it ‘foreclose[s] needless shuttling of a case from one court to another.’ ” (Petr.’s Br. 38 citing [Lamagno, 515 U.S. at 433 n.10.](#)) Perhaps this is why Petitioner never requested remand before the court ordered it, asking the court instead to lift the stay on discovery so that the case could move forward against Haley in federal court. (Tendered Order attached to Pl.’s Resp., R. 15.)

C. Questions of law and fact relevant to Haley’s immunity created federal jurisdiction over this case from the outset.

Nonetheless, Petitioner now attempts to contrast the present case as involving an “unauthorized” certification *35 and removal. Thus, Petitioner argues, there was never any dispute for the district court to resolve other than whether the alleged incident did in fact occur, and accordingly, the court never had federal subject matter jurisdiction and was required to remand under [28 U.S.C. § 1447\(c\)](#) (App. C hereto). As demonstrated above, this is simply not correct. First, there is no such thing as an “unauthorized” certification under the statute. Second, as demonstrated in the Statement of the Case, questions of law were intertwined with the facts relating to the scope of Respondent Haley’s employment.

Even if Petitioner were correct, then in deciding solely a factual dispute, the district court would still be deciding whether the incident occurred for the very purpose of determining whether the federal employee acted within the scope of his federal employment. This decides the distinctly federal question of immunity. Again, since scope of employment “sets the line” according to [Lamagno, 515 U.S. at 423](#), the key question is not whether the defendant or the Attorney General denied the plaintiff’s allegations; it is whether Barry Haley acted within the scope of his employment, and is therefore entitled to immunity. This is a uniquely federal question. Accordingly, the basis for federal jurisdiction was present since the Attorney General’s certification, if not from the very moment the allegations were filed. To conclude otherwise would be to accept the unworkable premise that falsely-

accused employees are simply not entitled to immunity.

*36 D. Federal jurisdiction was also present from the outset under the federal officer removal statute.

Additionally, the United States preserved a separate basis for federal jurisdiction by requesting removal to federal court under the federal officer removal statute, [28 U.S.C. § 1442](#) (App. C hereto), as well as the Westfall Act. (Notice of Removal 1-3, R. 1.) As explained in detail above, this Court has already determined that a federal officer need not admit the plaintiff’s allegations to secure removal. [Willingham v. Morgan, 395 U.S. 402, 408 \(1969\)](#) (citing [Maryland v. Soper, 270 U.S. 9, 32-33 \(1926\)](#)). Further, the “color of office” test of [§ 1442\(a\)](#) and *Willingham’s* required “causal connection” of the allegations to the defendant’s official duties are easily met here, where Petitioner’s own filings effectively established that her relationship with Haley derived solely from his official duties.

III. The Court of Appeals Had Jurisdiction to Review the District Court’s Decisions.

A. The court of appeals enjoyed jurisdiction to review the order of resubstitution under the doctrines established by this Court in *Cohen* and *Waco*.

1. The district court’s resubstitution order is reviewable under the collateral order doctrine announced in *Cohen*, as a ruling denying governmental immunity.

Appellate jurisdiction typically arises from a “final and appealable order” of a district court; i.e., appellate review is barred until the trial court finally adjudicates all of the issues presented to it by the litigants. See *3728 [U.S.C. § 1291](#); [Behrens v. Pelletier, 516 U.S. 299, 305 \(1996\)](#). An exception to this rule exists, however, for those orders that “(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) [are] effectively unreviewable on appeal from a final judgment.” [Will v. Hallock, 546 U.S. 345, 126 S. Ct. 952, 958 \(2006\)](#) (citations omitted). While the Court has stated that these conditions must be applied in a “stringent” manner to avoid upsetting the finality requirement contained in [§ 1291](#), see [Digital Equip. Corp. v.](#)

Desktop Direct, Inc., 511 U.S. 863, 868 (1994), certain classes of orders, by their very nature, automatically fall within this so-called “collateral order doctrine.”

Among these are orders denying governmental employees the benefits of absolute immunity, Nixon v. Fitzgerald, 457 U.S. 731, 742 (1982), and qualified immunity, Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). The purpose of the congressionally-established substitution process, as set forth above, is to afford certain federal employees the benefits of governmental immunity. The order entered by the district court overturning the substitution decision of the Attorney General under 28 U.S.C. § 2679(d)(2) and resubstituting Respondent Haley as a party defendant in his individual capacity effectively denied Respondent Haley the protection of governmental immunity under the Federal Tort Claims Act. The resubstitution order of the district court, therefore, falls within the category of cases where immediate, interlocutory appellate review is available under Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949).^[FN5]

FN5. The courts of appeal unanimously agree that a government employee has a right of immediate appeal from an order of resubstitution under the Westfall Act. See Woodruff v. Covington, 389 F.3d 1117, 1123-24 (10th Cir. 2004) (citing Mathis v. Henderson, 243 F.3d 446, 448 (8th Cir. 2001); Cuoco v. Moritsugu, 222 F.3d 99, 105-06 (2d Cir. 2000); Lyons v. Brown, 158 F.3d 605, 607 (1st Cir. 1998); Rodriguez v. Sarabyn, 129 F.3d 760, 764 (5th Cir. 1997); Coleman v. United States, 91 F.3d 820, 823 (6th Cir. 1996); Flohr v. Mackovjak, 84 F.3d 386, 390 (11th Cir. 1996); Melo v. Hafer, 13 F.3d 736, 741 (3d Cir. 1994); Kimbrow v. Velten, 30 F.3d 1501, 1503 (D.C. Cir. 1994), cert. denied, 515 U.S. 1145 (1995); Pelletier v. Fed. Home Loan Bank of San Francisco, 968 F.2d 865, 870 (9th Cir. 1992)) (finding that a resubstitution order falls within the Cohen doctrine and that “every circuit court follows” the collateral order doctrine in reviewing such orders).

*38 2. Will v. Hallock permits review of the resubstitution order, as a ruling denying governmental immunity.

The recent opinion of this Court in Will v. Hallock, 546 U.S. 345, 126 S. Ct. 952 (2006), does not alter the established rubric for immediate appellate review of orders denying governmental immunity. In Will, the respondent first brought suit against the United States under the FTCA, alleging negligence by government agents in the search of her home. See Will, 126 S. Ct. at 956. The district court dismissed the action, finding it barred under an exception in the FTCA. *Id.* The respondent, during the pendency of the FTCA action, brought a second claim against the officers pursuant to Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971), asserting the agents' conduct violated her rights of due process secured by the Fifth Amendment. Asserting the judgment bar of the FTCA, see 28 U.S.C. § 2676, the agents sought dismissal of the Bivens claim once the district court entered its order on the initial FTCA claim. Will, 126 S. Ct. at 956. The district court denied this request, and the Government appealed. *Id.*

*39 While the Second Circuit affirmed the court below, this Court ordered reversal for want of jurisdiction in the court of appeals. Finding that the FTCA bar more accurately equated to the common law doctrine of res judicata or claims preclusion than to a denial of governmental immunity, the Court determined that rejection of the FTCA claim bar did not rise to the level of a collateral order under Cohen. See Will, 126 S. Ct. at 960.

The explanation offered by the Court in Will to support this conclusion demonstrates the inapplicability of its holding to the case at bar. The protections for government employees that Congress established in the Westfall Act do not constitute the “avoidance of litigation for its own sake,” but rather demonstrate an unequivocal judgment by the legislative branch that employees of the federal government are entitled to absolute immunity for actions performed in the scope of their employment. *Id.* This immunity protection is not “procedural in nature”; rather, it is “timely from the moment” of the certification by the Attorney General. *Id.* It depends not on some prior action involving the same facts and circumstances - indeed, it is not qualified on any precondition at all, as the immunity protection is absolute and immediate. See Lamagno, 515 U.S. at 423; cf. Will, 126 S. Ct. at 960 (noting that application

of the judgment bar is dependent upon the bringing of a prior action under the FTCA and a finding in favor of the Government in the earlier action). The question is not one of procedure, but one of immunity.

Like the purpose of qualified immunity is to encourage governmental employees to act without fear of constitutional liability when an issue of law is unclear, the purpose of the Westfall Act is to encourage governmental employees to carry out their duties without fear of common law tort *40 liability. [Will, 126 S. Ct. at 960](#). In the preamble to the Westfall Act, Congress set forth its express desire to accomplish just this task, stating that “the purpose of this Act [is] to protect Federal employees from personal liability for common law torts committed within the scope of their employment....” Federal Employees Liability Reform and Tort Compensation Act of 1988, [Pub. L. No. 100-694, § 2\(b\)](#) (1988). Quick resolution of the substitution question is therefore “essential” to further the policy which undergirds the immunity scheme established by the Act. [Will, 126 S. Ct. at 960](#).^[FN6]

FN6. One can argue, as the Government did in *Will*, that application of the FTCA judgment bar is similarly “essential” to further the immunity policies of that statute. However, such an argument improperly juxtaposes the questions of immunity and judgment. The issue of substitution goes to the heart of the question of immunity: if substitution is proper the employee is immune; if not, there is no immunity. The question of the judgment bar, by contrast, goes to the ultimate question of the effect of a judgment, which can only arise after the question of immunity has been finally answered. Once a judgment has been entered, the congressional policy of affording immunity has already been served, or one would not be discussing an FTCA judgment at all.

3. The order of resubstitution was reviewable as a separate, precedent order under *Waco*.

Although Respondents contend, *infra*, that the express language of the Act afforded the court of appeals jurisdiction to review both the order of remand and the order of resubstitution, jurisdiction to review the latter also arose from the decision of this

Court in [City of Waco v. U.S. Fid. & Guar. Co., 293 U.S. 140 \(1934\)](#). *Waco* arose from a district court's decision dismissing a party's cross-claim and, then determining that the dismissal destroyed *41 the court's diversity jurisdiction, entering an order remanding the action to Texas state court. *See id.* at 141-42. This Court found appellate jurisdiction to review the dismissal of the cross-claim, notwithstanding the bar of the then in effect version of [28 U.S.C. § 1447](#), on grounds that the “decree of dismissal preceded that of remand” and would be conclusive on the parties upon their return to state court. *Id.* at 143. The Court “disaggregated” the two orders and proceeded to direct review of the initial dismissal. *See Kircher v. Putnam Funds Trust, 547 U.S. , 126 S. Ct. 2145, 2156 n.13 (2006)*.

Similar reasoning applies to the current claim. The issue of resubstitution is “separate from and logically precedes the question of remand” and can be reviewed without effect upon the remand order.^[FN7] [Aliota v. Graham, 984 F.2d 1350, 1353 \(3d Cir.\)](#) (Alito, J.) (citations omitted), *cert. denied, 510 U.S. 817 (1993)*. The remand discussion contained in the district court opinion reveals that the decision to order remand was contingent upon a prior finding of resubstitution. (*See D. Ct. Mem. & Order, App. D to Pet. Cert. 24a* (“Having concluded that the United States is not a proper party to this case, this Court must now determine [the question of remand]”).) This decision thus fits squarely within the *Waco* rationale, and jurisdiction for review of the resubstitution order is available pursuant to the procedure contained in that opinion.^[FN8]

FN7. Assuming, of course, that the district court possessed the necessary statutory authority to order the remand. *Cf. infra* Part III(B).

FN8. Similarly to the application of the collateral order doctrine, the courts of appeal agree that *Waco* permits review of the resubstitution order. *See Coleman v. United States, 91 F.3d 820, 823 (6th Cir. 1996)*; [Flohr v. Mackovjak, 84 F.3d 386, 389-90 \(11th Cir. 1996\)](#); [Hanna v. iNaegele, 72 F.3d 137 \(unpublished table opinion\), 1995 WL 723597 \(10th Cir. 1995\)](#); [Kimbrow v. Velten, 30 F.3d 1501, 1503 \(D.C. Cir. 1994\)](#), *cert. denied, 515 U.S. 1145 (1995)*; [Jamison](#)

[v. Wiley](#), 14 F.3d 222, 233 (4th Cir. 1994); [Aliota v. Graham](#), 984 F.2d 1350 (3d Cir.) (Alito, J.), *cert. denied*, 510 U.S. 817 (1993); [Mitchell v. Carlson](#), 896 F.2d 128, 132 (5th Cir. 1990).

*42 4. *Kircher* permits review of the resubstitution order under *Waco*, because the order did not resolve the entire action.

In the *Kircher* opinion, the Court addressed an argument by the respondent mutual funds that review was available for the decision in that matter pursuant to *Waco*. The Court, in addressing this argument, noted “[w]ithout passing on the continued vitality of that case [*Waco*] in light of [§ 1447\(d\)](#), we note that on its own terms it is distinguishable.” [Kircher](#), 547 U.S. , 126 S. Ct. at 2156 n.13. The Court concluded that, because the “remand order here cannot be disaggregated as the *Waco* orders could,” the *Waco* rule did not permit review. *Id.*

First, nothing contained in the current version of [28 U.S.C. § 1447\(d\)](#) undermines the rule set forth in *Waco*. The version of the remand review statute in effect at that time, 28 U.S.C. §§ 71 and 80, contained a materially-identical bar to reviewing remand orders. See [Thermtron Prods., Inc. v. Hermansdorfer](#), 423 U.S. 336, 349-50 (1976) (“[Sections 1447\(c\) and \(d\)](#) represent the ... recodification of §§ 71 and 80. They were intended to restate the prior law with respect to remand orders and their reviewability.”). As this Court explained in *Thermtron*, “[n]o changes of law or policy are to be presumed from changes to the language in the 1948 revision of the Judicial Code unless an intent to make such changes is clearly expressed.” *Id.**43 at 350 n.15 (citation omitted). Because the text of the current version of [§ 1447\(d\)](#) contains no “clear expression” of a change in law from the remand review statutes in effect at the time of *Waco*, the rubric set forth in that opinion remains unaltered in evaluating review of the resubstitution order in the case at bar.

Second, *Waco*, unlike *Kircher*, is not distinguishable here on its facts. The discussion in *Kircher* arose out of the peculiar statutory mechanism contained in the Securities Litigation Uniform Standards Act (“SLUSA”), [15 U.S.C. § 77p](#). The SLUSA statute provides not for a mechanism of continued adjudication, but one of dismissal; i.e., if the preclusion provision contained in the statute applies,

the case is automatically dismissed in its entirety. See [Kircher](#), 126 S. Ct. at 2155 (“If the action is precluded, neither the District Court nor the state court may entertain it, and the proper course is to dismiss.”). Here, upon resubstitution of Respondent Haley as a party defendant, there was something to return to state court - a bevy of state law employment-related torts against the Respondents. See [Mitchell v. Carlson](#), 896 F.2d 128, 133 (5th Cir. 1990) (noting that by ordering resubstitution of the individual defendant, a case exists for return to state court).

Further, in the case at bar, regardless of the FTCA protection extended to Respondent Haley, the FTCA will not bar continued action against Respondent Verdi. A Kentucky state court judge could exercise his or her discretion afforded under [Ky. R. Civ. P. 21](#) and sever the two claims, leaving an administrative action under the FTCA and a state court claim proceeding against Respondent Verdi. Unlike in *Kircher*, therefore, something did exist “to remand to state court” following entry of the resubstitution order. *Kircher*, 126 S. Ct. 2156 n.13.

*44 B. [Section 1447\(d\)](#) presents no bar to review of the remand order.

1. [Section 1447\(d\)](#) bars review only of remand orders invoking grounds within the district court's authority to consider under [Section 1447\(c\)](#).

The statutory language contained in [§ 1447\(d\)](#), while ostensibly absolute in its bar of appellate review, must be construed in light of the language contained in [§ 1447\(c\)](#). See [Thermtron](#), 423 U.S. at 345-46 (“These provisions, like their predecessors, are in pari materia and are to be construed accordingly rather than as distinct enactments.” (quotation and citation omitted)). This Court thus held in *Thermtron* that “only remand orders issued under [§ 1447\(c\)](#) and invoking the grounds specified therein that removal was improvident and without jurisdiction are immune from review under [§ 1447\(d\)](#).” *Id.* at 346. Applying this rule, the Court concluded in *Thermtron* that the Sixth Circuit possessed appellate jurisdiction to review a remand decision based upon an overcrowded district court docket. The Court found that the provision contained in [§ 1447\(d\)](#) did not insulate from review district court remands based on “grounds that seem justifiable to them but which are

not recognized by the controlling statute.” *Id.* at 351. That justice may move more slowly in some federal courts than in their state counterparts is not one of the considerations that Congress has permitted the district courts to recognize in passing on remand issues. Because the District Judge remanded a properly removed case on grounds that he had no authority to consider, he exceeded his statutorily defined power; and issuance of the *45 writ of mandamus [overturning the remand] was not barred by § 1447(d).

Id.^[FN9]

FN9. The Court subsequently recognized another circumstance that fits within the *Thermtron* rule construing the statutory authority of district courts and its impact upon appellate review. In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), the Court held that remand based upon application of the abstention doctrine established by *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) was not a remand order described in § 1447(c), and therefore appellate review was available. See *Quackenbush*, 517 U.S. at 712.

2. Section 2679(d)(2) barred the District Court from directing remand in this action, and accordingly there were no grounds it had authority to consider under § 1447(c).

In the case at bar, as in *Thermtron*, the district court “exceeded his statutorily defined power” in ordering remand. *Thermtron*, 423 U.S. at 351. Section 2679(d)(2) expressly states that the certification by the Attorney General “shall conclusively establish the scope of office or employment for purposes of removal.” 28 U.S.C. § 2679(d)(2). While the district court enjoyed the ability to review the scope of employment question under *Lamagno*, “his statutorily defined power” did not grant to him the ability to order a remand.

Congress, by expressly stating that the Attorney General’s certification is “conclusive” as to jurisdiction, has prohibited a district court from using its disagreement with the Attorney General’s scope of employment certification to deny jurisdiction and *46 so send the case back to state court where it originated.

Aliota, 984 F.2d at 1357. The court could not legitimately invoke the grounds specified in § 1447(c), that “removal was improvident and without jurisdiction,” when Congress had issued a blanket statement conclusively establishing removal jurisdiction.^[FN10]

FN10. Revisions to § 1447(c) enacted by Congress subsequent to the decision in *Thermtron* do not alter its directive that actions taken by a district court without statutory authority are not immune from appellate review. Moreover, it is clear from a review of the legislative history to these revisions that Congress sought only to impose a thirty day time limit on filing motions to remand based upon defects other than a lack of subject matter jurisdiction, not to alter the existing understanding of appellate review of remand orders. See H.R. Rep. No. 104-799, at 2 (1996), reprinted in 1996 U.S.C.C.A.N. 3417, 3418 (“The intent of this amendment was to impose a 30-day limit on all motions to remand except in those cases where the court lacks subject matter jurisdiction.”). The statutory history reveals the language that in 1976 (at the time of *Thermtron*) read “improvidently,” became in 1988 “defect in removal procedure,” and in 1996 became “any defect other than subject matter jurisdiction,” is consistently designed to cover defects that occur at the time of removal other than subject matter jurisdiction. Here, no “defect” existed at the time of removal due to the statutory language contained in § 2679(d)(2), placing the district court’s remand order outside those covered by § 1447(c) under any of its modern statutory phrasings.

Thus, the question is not whether there was “plain ... legal error in ordering the remand,” for which appellate review is unavailable. See *Kircher*, 126 S. Ct. at 2154 (citations omitted). The question is whether the district court had authority to remand at all. Congress’ express creation of non-discretionary, exclusive federal jurisdiction for matters under § 2679(d)(2) simply afforded the district *47 court no statutory authority to order remand of this “properly removed” action. *Thermtron*, 423 U.S. at 351.^[FN11]

FN11. District courts, like all inferior federal courts, are creatures of statute, there being no express provision in the Constitution for the creation of such courts without congressional action. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611, 2616-17 (2005) (“The district courts of the United States, as we have said many times, are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.” (quotation and citation omitted)). Congress has the power to invest district courts with “jurisdiction, either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which Congress may deem proper for the public good.” *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

Allowing district courts to override Congress' statutory directive with impunity would render the language of § 2679(d)(2) null and void. Enforcing this provision, by contrast, does no injury to § 1447, which merely protects the district courts' discretion to remand in cases in which removal jurisdiction is at issue. Subject to constitutional boundaries which are not reached here (see Part II(A), *supra*), Section 2679(d)(2) foreclosed any issue of removal jurisdiction or remand in Westfall Act cases in which the Attorney General has certified scope of employment. This is the “clear statutory command” the Court recognized as an exception to the presumption that Congress “is aware of the universality of th[e] practice of denying appellate review of remand orders when Congress creates a new ground for removal.” See *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 128 (1995) (citations omitted). Unlike the bankruptcy removal/remand statute the Court analyzed in *Things Remembered* and the SLUSA removal provision addressed in *Kircher*, §2679(d)(2) “cannot comfortably coexist” with § 1447 under the interpretation *48 Petitioner proposes. *Id.*; see also *Kircher*, 126 S. Ct. at 2153 n.8.

Contrary to Petitioner's argument, the district court lacked any authority to conclude it “had no original jurisdiction over this case,” as Congress expressly provided for such jurisdiction. (Petr.'s Br. 12 (quoting *Int'l Primate Protection League v. Admins. of Tulane*

Educ. Fund, 500 U.S. 72, 87 (1991).) Indeed, in *Lamagno*, all nine members of the Court recognized that Congress intended the language in question to remove from the district court the authority to evaluate the propriety of removal, and thus, remand. See *supra* Part II(A).^[FN12]

FN12. Denying effect to the “conclusively ... for removal” wording of the statute would threaten the very analytical foundation of *Lamagno*: if the majority had not interpreted the phrase to preclude remand, then its discussion of potential Article III problems would have been moot, along with the dissent. The alternative interpretation, that the Attorney General's certification is conclusive for all purposes, would preclude judicial review of the certification. Had *Lamagno* so held, then the U.S. Attorney's certification that Haley acted within the scope of his employment would control, and the case would remain in district court with the United States as a party. Under either interpretation, Haley would be entitled to defend the action in a federal forum. If the word “conclusively” is given any effect in the statute, the question of remand should never arise.

No constitutional prohibitions exist to prevent the exercise of the clear statutory language set forth by Congress, and the lack of authority for the district court's action in this situation is clear. Therefore, the remand order did not fall within the ambit of § 1447(c), and was properly subject to review by the court of appeals and now this Court.

*49 CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be affirmed.

APPENDIX A

28 U.S.C.A. § 2679

(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.

APPENDIX B

28 U.S.C.A. § 1447

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

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

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

APPENDIX C

28 U.S.C.A. § 1442

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

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

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

APPENDIX D

28 C.F.R. § 15.3 Agency report.

(a) The Federal employee's employing Federal agency shall submit a report to the United States

Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the employing Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.

(b) The appropriate Federal agency shall submit a report to the United States Attorney for the district embracing the place where the civil action or proceeding is brought fully addressing whether the person was acting as a covered person at the time of the incident out of which the suit arose, and a copy of the report shall be sent by the appropriate Federal agency to the responsible Branch Director of the Torts Branch, Civil Division, Department of Justice.

(c) A report under this section shall be submitted at the earliest possible date, or within such time as shall be fixed upon request by the United States Attorney or the responsible Branch Director of the Torts Branch.

[28 C.F.R. § 15.4](#) Removal and defense of suits.

(a) The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the Federal employee was acting within the scope of his office or employment with the Federal Government at the time of the incident out of which the suit arose.

(b) The United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory certification that the covered person was acting at the time of the incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy.

(c) A certification under this section may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence

calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or refusal to remove or defend, such civil actions or proceedings shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division or his or her designee.

U.S.,2006.
Osborn v. Haley
2006 WL 2570994 (U.S.)

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