Nos. 15-491, 15-494

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

FEDERAL COMMUNITY DEFENDER ORGANIZATION OF PHILADELPHIA,
Respondent.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

DEFENDER ASSOCIATION OF PHILADELPHIA,
Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

These cases arise from efforts by the Commonwealth of Pennsylvania to disqualify respondent, a Federal Community Defender Office that receives a periodic sustaining grant from the Administrative Office of the United States Courts (AO), from representing (among other clients) capital inmates challenging their death sentences in federal habeas corpus proceedings. The Commonwealth sought to bar respondent from representing state prisoners in their state post-conviction proceedings on the ground that such representation exceeds respondent's authority under its federal grants and violates 18 U.S.C. § 3006A and § 3599. Respondent removed the disqualification proceedings to federal court under 28 U.S.C. § 1442(a)(1) and moved to dismiss on the ground that the AO has exclusive authority to enforce the terms of its federal grants. The court of appeals ruled that the cases were properly removed to federal court and that Congress has vested in the AO exclusive authority to supervise respondent's compliance with its federal grants, preempting any state-law basis to the contrary.

The question presented is whether the court of appeals correctly ruled that these cases were properly removed to federal court and that the AO has exclusive authority to enforce the terms of respondent's federal grants.

PARTIES TO THE PROCEEDINGS

The petitioner in No. 15-491 is the Commonwealth of Pennsylvania, through the District Attorney of Philadelphia. The petitioner in No. 15-494 is the Commonwealth of Pennsylvania, through its Office of the Attorney General. The party that filed the notice of removal in each of the cases below, and thus the proper respondent to the petitions, is the Defender Association of Philadelphia. The Federal Community Defender Office for the Eastern District of Pennsylvania (FCDO) is a unit of the Defender Association of Philadelphia; in that capacity, it receives a grant from the Administrative Office of the United States Courts to represent individual clients. The individual clients represented by the FCDO are not parties to these proceedings.

CORPORATE DISCLOSURE STATEMENT

The Defender Association of Philadelphia is a nonprofit corporation; it has no parent corporation and no entity owns 10 percent or more of its stock.

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STATEMENT

A. Legal And Factual Background

1. The Criminal Justice Act (CJA), 18 U.S.C. § 3006A, was enacted by Congress to implement *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), which recog-

nized a federal constitutional right to counsel for indigent criminal defendants. The CJA, among other things, establishes mechanisms for the appointment of counsel for financially eligible federal criminal defendants. Section 3599(a)(2) of Title 18, originally enacted in 1988, supplements the CJA by mandating the appointment of counsel to any financially eligible inmate, federal or state, who is pursuing a federal habeas corpus challenge to a death sentence.[1] *See generally Martel* v. *Clair*, 132 S. Ct. 1276, 1284-1285 (2012).

The United States District Courts are responsible for establishing plans to provide representation under the CJA, using panels of private attorneys, bar associations, legal aid agencies, and defender organizations. 18 U.S.C. § 3006A(a)(1), (3). Defender organizations have been an integral part of the CJA scheme since their authorization in 1970. *Id.* § 3006A(g). The statute provides for two kinds of defender organizations: Federal Public Defender Organizations, which are staffed by federal employees, *id.* § 3006A(g)(2)(A), and Community Defender Organizations, which are non-profit defense counsel services that receive periodic sustaining grants from the Judicial Conference of the United States, *id.* § 3006A(g)(2)(B). Those grants are supervised by the Administrative Office of the United States Courts (AO), an agency within the Judicial Conference. *Id.* § 3006A(h).

The CJA grants the Judicial Conference authority to "issue rules and regulations governing the operation of [CJA] plans." 18 U.S.C. § 3006A(h). The Judicial Conference has exercised that authority by promulgating a comprehensive regulatory framework for admin-

[1] Section 3599 was previously codified at 21 U.S.C. § 848(q).

istering the CJA, which is set forth in its *Guide to Judiciary Policy* (*Guidelines*). CA App. 333-342. The AO administers that framework on a day-to-day basis, supervises appropriations under the CJA, "is responsible for training related to furnishing representation under the CJA[,] and provides legal, policy, management, and fiscal advice to the Conference." *Id.* 331.

2. The Defender Association of Philadelphia is a non-profit entity that provides legal representation to indigent criminal defendants in both federal and state courts. Its federal-court division, the Federal Community Defender Office (FCDO), is a Community Defender Organization that provides trial and appellate representation to indigent defendants charged with federal crimes, as well as federal habeas corpus representation to inmates who have been sentenced to death.

The FCDO receives a periodic sustaining grant under the CJA to provide that representation. The Judicial Conference's *Guidelines*, which regulate the operation of Community Defender Organizations like the FCDO, set forth in detail the terms and conditions governing the FCDO's receipt and use of federal grant funds. CA App. 333-342. Those terms require the AO to audit the FCDO every year. *Id.* 336-337. The FCDO must keep detailed financial books and records; submit an annual report setting forth its activities, financial position, and anticipated caseload; and return unexpended balances to the AO. *Id.* 334-336. The regulations prohibit the commingling of federal grant funds with non-grant funds, absent authorization by the AO. *Id.* 334, 338-339. If a grantee fails to "comply substantially" with the terms of its grant or is "unable to deliver the representation and other services which are the subject of [the] agreement," the Judicial Conference or the AO "may reduce, suspend, or terminate, or disallow

payments under this grant award as it deems appropriate." *Id.* 341.

The United States District Court for the Eastern District of Pennsylvania has designated the FCDO to facilitate the representation of eligible individuals under the CJA. Under the Eastern District Plan, the FCDO receives an annual sustaining grant from the AO, subject to the foregoing regulations. DA Pet. App. 8-9.[2] The Middle District of Pennsylvania includes the FCDO as an organization that may be appointed to represent indigent persons seeking habeas relief in death penalty proceedings. *Id.* 9.

In addition to their work in federal court, FCDO attorneys sometimes represent clients in state-court proceedings, including when asked by their habeas clients to help them exhaust claims under Pennsylvania's Post Conviction Relief Act (PCRA). 42 Pa. Cons. Stat. §§ 9501-9579; *see also* Pa. R. Crim. P. 904(H)(1)(c) (capital defendants entitled to be represented on post-conviction collateral review by willing counsel of their choice). The CJA and § 3599 generally do not authorize the expenditure of federal funds for pursuit of state post-conviction remedies. *See Harbison* v. *Bell*, 556 U.S. 180 (2009).[3] Thus, when the FCDO accepts such representations without a federal court order directing

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[2] This brief refers to the petition in No. 15-491 as "DA Pet." and the petition in No. 15-494 as "AG Pet."

[3] *Harbison* recognized that, under § 3599, "a district court may determine on a case-by-case basis that it is appropriate for federal counsel to exhaust a claim in the course of her federal habeas representation." 556 U.S. at 190 n.7. When the FCDO receives such an order, all aspects of its representation, including appearances in state court, are properly chargeable to its federal grants. The cases at issue do not involve such a situation.

it to appear in state PCRA proceedings, it uses federal grant funds only for preparatory work relevant to a federal habeas corpus petition under 28 U.S.C. § 2254, and only where it has received a federal court order appointing it as counsel for federal habeas proceedings or is working to obtain such an appointment. By contrast, costs incurred solely for participating in state proceedings—such as appearances in state court or compensation of experts for testifying in state court—are not chargeable to the FCDO's federal grants and are instead funded by private donations or furnished pro bono. The AO is aware of the FCDO's use of non-federal resources for state court litigation and it requires the FCDO to maintain separate bank accounts for federal and private funds. CA App. 334.[4]

B. Proceedings Below

1. These petitions arise out of seven capital cases in which the Commonwealth sought to disqualify FCDO attorneys from representing their clients in state courts. These disqualification efforts followed a concurrence written by then-Chief Justice Castille of the Pennsylvania Supreme Court in *Commonwealth* v. *Spotz*, 18 A.3d 244 (Pa. 2011), in which FCDO attorneys appeared as counsel. In his concurrence, Chief Justice Castille criticized the FCDO's representation of capital inmates in state court and charged that it was not "ap-

[4] Contrary to the Commonwealth's characterization, the FCDO's lawyers are not "outside attorneys." DA Pet. 10. FCDO attorneys who appear in state court are members in good standing of the Pennsylvania Bar who are qualified to represent habeas clients not only in federal court but also in state post-conviction proceedings. Pa. R. Crim. P. 904(H)(1)(c) (capital defendants are entitled to be represented on post-conviction collateral review by willing counsel of their choice).

propriate, given principles of federalism, for the federal courts to finance abusive litigation in state courts that places such a burden on [the Pennsylvania Supreme] Court." *Id.* at 334. The Chief Justice lamented that the resources the FCDO devotes to death penalty cases were "something one would expect in major litigation involving large law firms"—which he characterized as a "perverse" commitment of funds that overwhelms the limited resources of individual counties in Pennsylvania. *Id.* at 332.

Following that opinion, the Commonwealth, through the Philadelphia District Attorney's Office, petitioned the Pennsylvania Supreme Court to exercise "extraordinary jurisdiction" to bar all FCDO attorneys from appearing in state post-conviction proceedings. In that pleading, the Commonwealth alleged that the FCDO had violated its funding obligations under federal law by using federal monies for its state court activities. *In re Appearance of Federal FCDO in State Criminal Proceedings*, No. 11-cv-7531, Dkt. 1, Ex. A at 3-34 (E.D. Pa. Dec. 8, 2011). The FCDO removed that petition to federal district court, *id.* 2-4, and the Commonwealth then voluntarily dismissed the action.

After abandoning its effort to disqualify the FCDO wholesale, the Commonwealth began pursuing the same objective through piecemeal means. The Attorney General and four local prosecutors' offices sought disqualification of FCDO counsel in seven individual PCRA proceedings, including cases in which FCDO attorneys had participated for years without objection from those same prosecutors. In each case, the Commonwealth accused the FCDO of improperly assisting and representing death-sentenced clients in PCRA proceedings with the support of federal funds in violation of § 3599.

The FCDO removed the seven disqualification proceedings—but not the underlying PCRA litigation—to federal court under 28 U.S.C. § 1442(a), which authorizes the removal of proceedings "against or directed to … any person acting under" a federal agency or officer "for or relating to any act under color of such office."[5] Three of the proceedings were removed to the Eastern District of Pennsylvania. The other four proceedings were removed to the Middle District of Pennsylvania. In each removed proceeding, the Commonwealth filed a motion to remand, and the FCDO filed a motion to dismiss with prejudice. In support of dismissal, the FCDO argued, among other things, that the AO has exclusive authority to supervise whether a Community Defender Organization is complying with the terms and conditions of its federal grants, that the Commonwealth therefore has no right of action to enforce those federal grants or § 3006A and § 3599 (which authorize the grants), and that any effort by the Commonwealth to accomplish the same result under state law is preempted by the federal scheme reserving enforcement authority for the AO.

In each of the three Eastern District cases, the FCDO prevailed on both the issue of removal and the merits of its motions to dismiss. DA Pet. App. 63-118, 228-256. In each of the four Middle District cases, the court granted the Commonwealth's motion to remand and did not adjudicate the FCDO's motion to dismiss. *Id.* 119-227; AG Pet. App. 1v-3v. Both the FCDO and

[5] The notices of removal were filed in the name of the Defender Association of Philadelphia, of which the FCDO is a unit.

the Commonwealth appealed, and the Third Circuit consolidated the seven cases into one proceeding.[6]

2. The court of appeals ruled that the disqualification proceedings were properly removed to federal court under 28 U.S.C. § 1442(a)(1), and that the Commonwealth's disqualification motions are preempted by the CJA, which vests exclusive authority in the AO to supervise the terms of the FCDO's federal grants. DA Pet. App. 1-62. Given its preemption holding, the court of appeals did not address the merits of the Common-

[6] The cases consolidated on appeal were *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Association of Philadelphia*, No. 13-3853 (*Dowling*); *In re Proceedings Before the Court of Common Pleas of Monroe County, Pennsylvania to Determine Propriety of State Court Representation by Defender Association of Philadelphia*, No. 13-3854 (*Sepulveda*); *In re Commonwealth's Request for Relief Against or Directed to Defender Association of Philadelphia*, No. 13-3855 (*Dick*); *In re Commonwealth of Pennsylvania's Rule to Show Cause Filed in Commonwealth of Pennsylvania v. William Housman*, No. 13-4269 (*Housman*); *In re Proceeding Before the Court of Common Pleas of Philadelphia to Determine the Propriety of The Defender Association of Philadelphia's Representation of William Johnson*, No. 13-4070 (*Johnson*); and *In re Commonwealth's Motion to Appoint New Counsel Against or Directed to Defender Association of Philadelphia*, No. 13-4325 (*Harris*). The seventh proceeding removed by the FCDO, *In re Proceeding in Which the Commonwealth of Pennsylvania Seeks to Compel the Defender Association of Philadelphia to Produce Testimony and Documents and to Bar it from Continuing to Represent Defendant Mitchell in State Court*, No. 13-3817, was mooted by the death of the defendant, Isaac Mitchell. Among the six cases reviewed by the Third Circuit, five are the subject of the Commonwealth's petitions to this Court. The sixth case, *Sepulveda*, was handled by the Monroe County District Attorney, which has not sought review of the Third Circuit's judgment. In addition, four similar disqualification proceedings were removed to and remain pending in district courts in the Third Circuit.

wealth's contention that the FCDO was exceeding the terms of its grants or violating the federal statutes authorizing those grants.

a. On the issue of removal, the court of appeals applied a settled four-prong test to determine whether the disputes fall within § 1442(a)(1): First, the removing party must be a "'person'"; second, the removing party's claims must be based on its conduct "'acting under'" the United States, its agencies, or its officers; third, the claims against the removing party must be "'for, or relating to'" an act "under color" of federal office; and fourth, the removing party must raise a "colorable federal defense" to the claims against it. DA Pet. App. 19. The court found all of those requirements to be satisfied.

As to the requirement that the removing party be "acting under" a federal officer or agency, the court of appeals drew guidance from this Court's decision in *Watson* v. *Philip Morris Cos.*, 551 U.S. 142 (2007), and the Fifth Circuit's decision in *Winters* v. *Diamond Shamrock Chemical Co.*, 149 F.3d 387 (1998). The court concluded that "[t]he relationship between the Federal Community Defender and the federal government is a sufficiently close one to conclude that the Federal Community Defender was 'acting under' a federal agency—the Judicial Conference and its subordinate, the AO—at the time of the complained-of conduct." DA Pet. App. 23. As the court explained, the FCDO "'assists' and helps the AO to '*carry out*[] the duties or tasks of a federal superior,' which is to implement the CJA and § 3599 through the provision of counsel to federal defendants and indigent federal habeas corpus petitioners." *Id.* 23-24. The court also stressed that "the Commonwealth targets the manner in which the Federal Community Defender uses its

federal money, not another aspect of its representation of clients in state court," and that the FCDO is subject to the AO's supervision on the detailed regulations on the use of its federal grant money. *Id.* 24

As to whether the Commonwealth's complaint was "for or relating to" the FCDO's actions under a federal officer, the court of appeals concluded that the FCDO had established "a 'connection' or 'association' between the act in question and the federal office." DA Pet. App. 28. As the court noted, the FCDO attorneys' employment with the federal defender "is the very basis of the Commonwealth's decision to wage these disqualification proceedings against them." *Id.* 29. Further, the FCDO's representation of state prisoners in PCRA proceedings at a time when it has been appointed (or is seeking to be appointed) to represent them in related federal habeas proceedings "is closely related to its duty to provide effective federal representation." *Id.*

The court of appeals also concluded that the FCDO had raised at least three "colorable" federal defenses to each of the Commonwealth's disqualification proceedings. First, the court observed, the FCDO has maintained that, contrary to the Commonwealth's contention, its representation of state court clients does not violate the terms of its federal grants or the relevant federal statutes, and that defense "requires interpretation of federal statutes, the CJA and § 3599, as well as" the *Guidelines* promulgated by the Judicial Conference to effectuate those statutes. DA Pet. App. 33. Although the Commonwealth argued that the FCDO's argument is foreclosed by *Harbison*, the court of appeals disagreed, noting that "that is the question squarely presented by the merits of this case," and that, under the removal statute, "we must accept the Federal Community Defender's theory of the case at this junc-

ture." *Id.* 34. In addition, the court ruled that the FCDO had raised two other colorable federal defenses: that "Congress intended for no one other than the Judicial Conference and the AO to monitor and enforce a Community Defender Organization's compliance with its grant terms," and that the Commonwealth "lacks a private right to action to enforce § 3599 and the terms of the Federal Community Defender's grant with the AO." *Id.* 34-35.

b. The court of appeals also ruled that the disqualification proceedings should be dismissed. It concluded that exclusive authority to enforce the terms of the FCDO's grants and § 3599 lies with the AO, and that the Commonwealth's efforts to enforce those provisions are preempted by federal law. DA Pet. App. 36-41.

The court first noted that the Commonwealth had conceded that it lacks a right of action under the CJA or § 3599, and so "the Commonwealth may not claim a direct violation of federal law." DA Pet. App. 36. To the extent the Commonwealth claimed to be proceeding under *state* law to disqualify the FCDO, the court found that effort to conflict with federal law—namely, the federal regime establishing the AO as the entity responsible for determining whether a Federal Community Defender Organization has complied with its federal grants and the relevant federal statutes. As the court explained, "[i]f the Federal Community Defender is authorized to use grant funds, the Commonwealth plainly cannot disqualify it for doing so without undermining congressional objectives." *Id.* 40. Moreover, "if the Commonwealth could sanction noncompliance, the AO could be hindered in its ability to craft an appropriate response," such as reducing or suspending payments rather than terminating the AO's relationship with the FCDO entirely. *Id.* 41. Thus, the court con-

cluded, "[a]llowing the Commonwealth to attach consequences to the Federal Community Defender's relationship with the AO would 'exert an extraneous pull on the scheme established by Congress' in a manner that conflicts with federal objectives." *Id.* (quoting *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 353 (2001)).

ARGUMENT

The Commonwealth principally urges this Court to decide whether Congress has "created a right to federally funded counsel in state capital post-conviction proceedings, in state court." DA Pet. i; *see also* AG Pet. i. That contention does not warrant this Court's review for several reasons.

First, and most fundamentally, the FCDO has never contended that Congress created such a right, and the court of appeals did not address, let alone decide, that issue. Nor did the court of appeals decide whether FCDO lawyers may appear for their federal habeas clients in state court without a federal court order directing them to do so, either by proceeding pro bono or using private funds. Rather, the court of appeals ruled that any issues about the permissible use of federal grant funds in the FCDO's representation of its clients were for the AO to decide in its annual audits of the FCDO's reports detailing its use of federal funds.

The nearest the court of appeals came to the issue that the Commonwealth would have this Court review was in the context of upholding removal under § 1442. There the court of appeals concluded that the FCDO's defense that it did not finance its state court activities with federal funds was a colorable defense, among others, to the Commonwealth's claim that the FCDO had

violated the terms of its federal grant and federal law by appearing in state court. But even that ruling was not a decision on the merits; it was simply a conclusion that the FCDO's federal-law defenses were sufficiently substantial to sustain federal removal jurisdiction.

Second, the rulings that the court of appeals did make—that removal jurisdiction was proper, and that exclusive authority to enforce the terms of the FCDO's federal grants and the related statutes is vested in the AO—do not conflict with the decision of any other court of appeals. Those rulings are also plainly correct. The FCDO is a federal grantee acting to carry out a federal statutory mandate to provide legal representation to indigent clients, and its expenditures of federal funds are closely supervised by the AO. The federal statutory scheme leaves no room for state authorities to issue decisions, possibly conflicting with those of the AO, about the propriety of the FCDO's use of federal funds.

Finally, the Commonwealth points to nothing to suggest that the issues in this case have sufficiently broad or recurring significance to warrant this Court's intervention. No other State has sought to systematically disqualify inmates facing a death sentence from proceeding with their counsel of choice, when that choice comes at no financial cost to the state or federal government—and indeed, saves the State money by ensuring that the State will not be responsible for their legal representation.

I. THE COURT OF APPEALS DID NOT DECIDE ANY ISSUE ABOUT SECTION 3599 WARRANTING THIS COURT'S REVIEW

A. The Third Circuit Did Not Decide The Issue On Which The Commonwealth Principally Seeks This Court's Review

The principal flaw with the Commonwealth's petitions is that the Third Circuit did not hold what the Commonwealth says it held. The District Attorney contends that the court of appeals erred in ruling that "18 U.S.C. § 3599 allows the federal government to afford counsel for defendants 'in state habeas proceedings.'" DA Pet. 16; *see id.* i. The Attorney General similarly asks this Court to decide "whether there is a right to federally funded counsel in state capital collateral review proceedings." AG Pet. i. But the court of appeals made no such ruling.

Instead, the court of appeals held that (1) the FCDO properly removed the Commonwealth's disqualification proceedings to federal court under the federal-officer removal statute (DA Pet. App. 5, 35) and (2) the Commonwealth's attempts to disqualify the FCDO are preempted by the pervasive procedural and remedial scheme created by Congress (*id.* 5-6, 41). Neither of those holdings required the court to decide whether § 3599 creates a right to federally funded counsel in state court, and it did not do so.

1. The court of appeals' decision on removal jurisdiction did not address the merits of the Commonwealth's contention that the FCDO's representation of its clients in state court violates § 3599. The removal ruling was purely jurisdictional; it decided only that the FCDO had properly invoked the authority of the federal courts to decide various issues of federal law. This

jurisdictional holding did not decide the *merits* of any question of federal law. That was entirely proper, for as this Court has explained, although the federal-officer removal statute "provides a federal forum for cases where federal officials must raise defenses arising from their official duties," the removal of cases under § 1442(a)(1) does not require the federal court to presume (much less hold) that the federal defenses will succeed. *See Willingham* v. *Morgan*, 395 U.S. 402, 405, 407 (1969) ("The position of the court below would have the anomalous result of allowing removal only when the officers had a clearly sustainable defense. The suit would be removed only to be dismissed."); *see also Mesa* v. *California*, 489 U.S. 121, 136 (1989) ("Section 1442(a), in our view, is a pure jurisdictional statute, seeking to do nothing more than grant district court jurisdiction over cases in which a federal officer is a defendant."); *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981) (federal officer-removal "is a purely derivative form of jurisdiction, neither enlarging nor contracting the rights of the parties").

To be sure, the Third Circuit did examine the FCDO's federal defense that it was not violating § 3599 (along with other federal defenses) to determine whether that defense was *colorable*. *See* DA Pet. App. 31-35. That inquiry was mandated by the removal statute, to ensure that the removed proceeding had a sufficient connection to federal law to satisfy the requirements of Article III. *See Mesa*, 489 U.S. at 129-134. But that discussion did not recognize a right to federally funded counsel in state post-conviction proceedings.

First, in keeping with the requirements for federal-officer removal, the Third Circuit held only that the FCDO's defense was colorable, not that it was meritorious. DA Pet. App. 33 ("Whether this is true is a de-

termination to be made by a federal court."); *see Willingham*, 395 U.S. at 407. At the removal stage, the court was required to credit the FCDO's theory of the case. *See Jefferson County* v. *Acker*, 527 U.S. 423, 431-432 (1999).

Second, the FCDO's defense is not what the Commonwealth characterizes it to be—which the court of appeals understood. *See* DA Pet. App. 33-34. The FCDO did not argue that it was entitled to use federal funds for its appearances in state court without a federal authorization order. Instead, the FCDO argued that (1) it in fact does not use federal funds to conduct its state court representation in cases like these, and (2) federal law does not prohibit FCDO lawyers from appearing in state court for their federal habeas clients pro bono or supported by private funds. Neither argument conflicts with *Harbison*; the first defense presents a factual contention, and the second involves a legal issue that *Harbison* does not address.

Harbison ruled that a district court erred in denying a habeas petitioner's motion to expand the scope of a federal appointment order under § 3599 to authorize representation in state clemency proceedings. *Harbison* v. *Bell*, 556 U.S. 180, 182-183 (2009). In reaching its decision, the Court explained that § 3599(e) authorizes federal courts to appoint counsel to represent federal habeas petitioners in "every subsequent stage of available judicial proceedings," but that ordinarily "[s]tate habeas is not a stage 'subsequent' to federal habeas." *Id.* at 189. The issue in these cases, however, is not whether a federal district court should have appointed counsel to represent any inmate, with federal funding, in state habeas proceedings. Rather, the FCDO's argument in these cases is that § 3599 does not prohibit an attorney who has been appointed to represent an

inmate in federal court from also representing that inmate, *without* federal funding, in state court. *Harbison* does not speak to that situation at all, as the court of appeals recognized. DA Pet. App. 34.

Third, the court of appeals recognized that the FCDO had at least two other colorable federal defenses sufficient to support removal jurisdiction in federal court: preemption and the lack of a private right of action. DA Pet. App. 34-35. The Commonwealth does not argue that the FCDO's preemption and private right of action defenses are not colorable. Thus, even if the court of appeals erred in its analysis of the FCDO's § 3599 defense, its judgment that removal was proper still would stand, and so granting certiorari on the § 3599 issue would serve no purpose.

2. Nor did the court of appeals' decision on preemption make any ruling about *Harbison* or the scope of § 3599. The court of appeals did not determine whether the FCDO violated § 3599, but only *who* is entitled to decide whether a Federal Community Defender Organization has exceeded the terms of its federal grants in contravention of § 3599 and the CJA. Applying standard principles of conflict preemption, the court concluded that the AO has exclusive authority to enforce the terms of grants under § 3599 and the CJA, and that the Commonwealth cannot interfere with this scheme. DA Pet. App. 40-41 (citing, *inter alia*, *Arizona* v. *United States*, 132 S. Ct. 2492, 2503 (2012), and *Buckman Co.* v. *Plaintiffs' Legal Comm.*, 531 U.S. 341, 349-351 (2001)). There is no conflict between that ruling and *Harbison*, and therefore certiorari is not warranted.

B. The Third Circuit's Decision Does Not Conflict With Decisions Cited by the Commonwealth

The Commonwealth incorrectly argues that the court of appeals' decision conflicts with decisions of other federal courts. DA Pet. 20-25; AG Pet. 11-12. Those decisions, however, uniformly concerned a different issue: whether appointed counsel representing a federal habeas petitioner should be *paid* federal funds under § 3599 (or its statutory predecessor) to represent that client in state proceedings, such as state habeas or related proceedings. Indeed, virtually all of the Commonwealth's cited cases arise out of a procedural posture similar to *Harbison*: a motion to extend the authorized scope of federal appointment to include state court proceedings.[7] Those decisions anticipated or followed the language in this Court's decision in *Harbison* to the effect that federal courts generally should not appoint counsel to pursue state habeas remedies. But none of those cases held that § 3599 bars a federally appointed lawyer from representing his habeas client in state court pro bono or using non-federal funds, as the FCDO has explained is the case here and as the court of appeals understood.

That crucial distinction is made clear in several of the cases cited by the Commonwealth, which arose in the context of appointed counsel's requests for compen-

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[7] *E.g.*, *House* v. *Bell*, 332 F.3d 997, 999 (6th Cir. 2003) (en banc); *In re Joiner*, 58 F.3d 143, 144 (5th Cir. 1995) (per curium); *Sterling* v. *Scott*, 57 F.3d 451, 457 (5th Cir. 1995); *In re Lindsey*, 875 F.2d 1502, 1505 (11th Cir. 1989); *Housman* v. *Wetzel*, 2012 WL 983551, at *1 n.1 (M.D. Pa. Mar. 22, 2012); *Wilson* v. *Horn*, 1997 WL 137343, at *8 (E.D. Pa. Mar. 24, 1997).

sation for services already provided.[8] In those cases, federally appointed counsel were also involved in state court proceedings and sought compensation from the federal court that had made the appointment for those services. Those requests were generally denied under the same rationale as articulated in this Court's discussion in *Harbison*—that § 3599 generally does not authorize a federal court to appoint (*i.e.*, pay for) counsel to pursue state habeas remedies. Not one of those decisions, however, suggested that it was improper for federally appointed counsel to be involved in the state court proceedings without federal funds. Although the CJA does not generally fund state habeas proceedings, neither does it prohibit federally appointed counsel from appearing in state court without compensation, or with state or private funds.

One of the cases cited by the Commonwealth makes that distinction explicit. In *Goff* v. *Bagley*, 2011 WL 1807386 (S.D. Ohio May 9, 2011), the district court, citing § 3599 and *Harbison*, declined to appoint counsel to represent a successful federal habeas petitioner on his reopened direct appeal in state court. Nevertheless, in response to the petitioner's stated preference that federal habeas counsel represent him in the reopened direct appeal, the court stated: "This Court sees no rea-

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[8] *E.g.*, *Gary* v. *Warden, Ga. Diagnostic Prison*, 686 F.3d 1261, 1272 (11th Cir. 2012) (district court denied in part CJA fee vouchers submitted for work conducted by federally appointed counsel in state proceedings); *Irick* v. *Bell*, 636 F.3d 289, 292 (6th Cir. 2011) ("[A] Tennessee state court has specifically authorized Irick's federal habeas counsel to represent him in his state competency proceedings."); *Hill* v. *Lockhart*, 992 F.2d 801, 803 (8th Cir. 1993) (denying fee request where appointed counsel "made no showing that Arkansas will not compensate appointed counsel who provide assistance in seeking clemency").

son why those attorneys, David Graeff and W. Joseph Edwards, may not seek appointment in the state appellate court to represent Petitioner on his reopened direct appeal." *Id.* at *2.

Accordingly, the Commonwealth has shown no conflict between the Third Circuit's decision and the decision of any other court of appeals concerning § 3599 or *Harbison*. Nor has the Commonwealth provided any evidence that district courts in the Third Circuit have stopped properly applying *Harbison* and § 3599 in the wake of the court of appeals' decision. Indeed, the evidence is to the contrary. As the District Attorney notes (DA Pet. 24), in one of the proceedings below, the district court—even while agreeing with the FCDO that removal was proper and that the Commonwealth's disqualification effort was preempted—simultaneously denied the habeas petitioner's motion for an expanded appointment order covering state post-conviction proceedings. *Mitchell* v. *Wetzel*, No. 11-cv-2063, Dkt. 27 (E.D. Pa. Aug. 15, 2013).[9] The district court found no inconsistency between those outcomes. The court concluded that expanding the scope of the FCDO's federal appointment to include pursuit of state post-conviction remedies would be inconsistent with *Harbison*. *Id.* 14-15, 17. Nevertheless, the court found no impediment to the FCDO representing the petitioner in state court "in its capacity as a nonprofit public defender organization, independent from its federal authorization under § 3599(a)(2)." *Id.* 14.

[9] As noted above (*supra* p.4, n.3), *Harbison* recognized that the district courts do have authority to appoint counsel, on a case-by-case basis, to exhaust claims in state court.

II. No Issues Actually Decided By The Third Circuit Merit This Court's Review

The court of appeals' actual holdings—that removal of the Commonwealth's disqualification motions to federal court was proper, and that the disqualification proceedings were preempted by federal law—raise no issue worthy of this Court's review. Those holdings implicate no circuit conflict and are plainly correct.

A. The Court Of Appeals' Decision On Removal Jurisdiction Does Not Merit This Court's Review

The Third Circuit held that, under the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), the FCDO properly removed the Commonwealth's disqualification proceedings against it to federal court. The Commonwealth does not point to a single decision in any other court that conflicts with the Third Circuit's application of the standard for removal under § 1442. Instead, the Attorney General argues that the Third Circuit's removal decision "led to a result that conflicts with decisions from other federal circuits (and decisions from federal district courts) interpreting § 3599 and *Harbison*." AG Pet. 11.[10] But none of the decisions

[10] The District Attorney does not challenge the Third Circuit's removal decision and does not ask this Court to review that decision. The District Attorney merely suggests, in a footnote, that the decision "was based on the contention that, by appearing in State habeas cases, the FCDO is complying with § 3599." DA Pet. 16 n.4. The District Attorney is wrong. As discussed above (*supra* pp. 10-11, 15-16), the Third Circuit determined only that, for purposes of removal jurisdiction, the FCDO's defense that it does not misuse its federal funds and therefore is in compliance with § 3599 is *colorable*. The Third Circuit did not, and did not need to, decide whether the FCDO is, in fact, complying with § 3599, and it did not base its removal decision on any such determination.

that the Attorney General cites in support of that argument even discusses the elements for removal under § 1442, much less reflects a conflict regarding those elements. Rather, all of those decisions addressed the issue of whether a district court should appoint federal counsel to pursue state habeas remedies. As explained above (*supra* pp.18-20), the Third Circuit's holding that removal was proper in this case does not create a conflict with other courts' interpretations of § 3599 or *Harbison*.

Certiorari is also unwarranted because the Third Circuit's removal decision was plainly correct. The court of appeals had little difficulty concluding that the FCDO satisfied all four requirements for removal under § 1442(a)(1). DA Pet. App. 19-35. Indeed, the Commonwealth barely suggests otherwise. The Attorney General attacks not the court of appeals' unremarkable *application* of the requirements for removal, but what the Commonwealth views as the *end result* of its ruling—that the decision "circumvent[s]" *Harbison* by "prevent[ing] the state court from reviewing FCDO's representation of state PCRA petitioners in collateral review actions that *precede* federal habeas review." AG Pet. 10, 11. But the Attorney General cannot create an issue worthy of this Court's review merely by pointing to a result that it does not like. The inevitable consequence of removal of an action asserting a federal claim is that a federal court will decide a federal question. That is true even when state courts also have the power to decide federal questions.[11]

[11] The Attorney General suggests that the Third Circuit's removal decision "opens the door" for the FCDO to appear in state court, which "undermine[s] its true federal duty to represent federal habeas petitioners." AG Pet. 15, 16. Citing *Martinez* v. *Ryan*, 132 S. Ct. 1309 (2012), the Attorney General theorizes that the FCDO cannot, in a subsequent federal habeas action, contend that

To the extent that the Commonwealth does take issue with the court of appeals' application of the standard for federal-officer removal, its arguments are unavailing. The Attorney General argues that, to satisfy the "acting under" requirement for removal under § 1442(a)(1), the party seeking removal must establish that it performed the complained-of activity "at the direction of" official federal authority, and that in turn the courts were required to determine whether the FCDO has a federal "duty" to provide counsel in state court. AG Pet. 13-15. On that interpretation of the "acting under" requirement, the Attorney General asks this Court to review whether the FCDO has satisfied that requirement. *Id.*

That contention reflects a misapprehension about the operation of the removal statute. As the court of appeals recognized, the Commonwealth is collapsing the "acting under" requirement into the separate requirement that the complained-of conduct be "for or relating to" an act under color of federal office. DA Pet. App. 25.[12] But in any event, the federal-officer removal

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its own attorneys were ineffective in state court. *Id.* The Attorney General thus asks this Court to "clarify federal counsel's duties." *Id.* 16. Again, the Third Circuit issued no ruling about the FCDO's duties, but simply held that the federal courts have jurisdiction to address the federal issues raised by the Commonwealth's challenges to the FCDO's appearances in state court. DA Pet. App. 20-35.

[12] The Attorney General suggests, without support or further argument, that "to the extent case law is unclear" as to whether these two requirements "consist of separate analyses or collapse into one analysis, this Court could clarify that issue." AG Pet. 15. The Attorney General cites no cases demonstrating that such clarification is required, and no cases suggesting that the Third Circuit's removal decision is in conflict with the decision of any other court on this point.

statute does not require the FCDO to show that the specific complained-of conduct was *at the direction* of a federal authority.

Before 2011, a party seeking removal under § 1442 was required to show that it had been sued "*for* any act under color of [federal] office." 28 U.S.C. § 1442(a)(1) (2010) (emphasis added). The party thus had to "show a nexus, a causal connection between the charged conduct and asserted official authority." *Jefferson County*, 527 U.S. at 431 (internal quotation marks omitted). In 2011, Congress loosened the "nexus" requirement, amending the language in § 1442 to encompass suits "for *or relating to* any act under color of [federal] office." 28 U.S.C. § 1442(a)(1) (emphasis added). The Third Circuit correctly concluded that the addition of the words "relating to" was intended to broaden the scope of removal jurisdiction, and that under the amended statute it is sufficient for there to be a "connection" or "association" between the act in question and the federal office. DA Pet. App. 28-29.

As discussed above (*supra* p.10), the court of appeals correctly concluded that such a connection exists in this case. The Commonwealth points to nothing to suggest that the court of appeals' decision conflicts with the decision of any other court or misinterpreted the amended statute. Further review of the removal decision is therefore unwarranted.

B. The Court Of Appeals' Preemption Ruling Also Does Not Merit This Court's Review

The Third Circuit held that whether the FCDO, a federal grantee, had complied with the terms of its federal grants is exclusively a matter of federal law, and that the application of state law by state courts to that

question is preempted by federal law. DA Pet. App. 37-41. The court of appeals further held that, under the statutory scheme established by Congress for the provision of annual sustaining grants to Community Defender Organizations, the AO has exclusive authority to decide whether the FCDO has exceeded the terms of its grants and complied with federal statutory requirements on funding. *Id.* 41.

Those rulings are correct and do not conflict with the decisions of any other court. Indeed, the Commonwealth does not even challenge the court of appeals' ruling that Congress delegated exclusive supervisory authority over CJA grants to the AO. But to the extent the Commonwealth argues that state courts must be allowed to decide whether the FCDO has complied with the terms of its federal grants, the Commonwealth is wrong and presents no issue warranting this Court's review.

First, the Commonwealth cites no cases suggesting a conflict with the Third Circuit's preemption analysis. Second, although the Commonwealth argues that its efforts to disqualify the FCDO in state courts present "no conflict with federal law" because "[t]here is no federal statute that requires federally funded lawyers to appear against the Commonwealth in state capital collateral review proceedings that *precede* federal habeas review," the Commonwealth again misapprehends the issue that the court of appeals actually decided. AG Pet. 21. As the court of appeals explained, the preemption issue is not *whether* the FCDO might have misapplied federal funds to underwrite its state-court representation of its habeas clients, but *who* Congress has empowered to decide that question. *See* DA Pet. App. 40.

Under the scheme Congress has erected, the AO has been vested with the full power to determine whether the FCDO is using its federal grant funds for an unauthorized purpose. As the Third Circuit explained, even if the FCDO had used those funds in PCRA cases without proper authorization, the Commonwealth's disqualification proceedings would interfere with the AO's exclusive authority to supervise the FCDO's compliance with the conditions of its grants. DA Pet. App. 41.

The Attorney General further argues that "[t]he presumption is that state conduct in its sphere does not conflict with federal conduct in its sphere." AG Pet. 21. That argument is wide of the mark. As the Third Circuit explained, the presumption against preemption does not apply when Congress legislates in an area of uniquely federal concerns. DA Pet. App. 38; *see Buckman Co.*, 531 U.S. at 347-348. Because this case involves a federal grantee's compliance with the terms of a federal contract, it falls squarely within a distinctly federal sphere and does not implicate any presumption against preemption. But even if such a presumption were applicable here, the structure of the CJA and § 3599 makes unmistakably clear that Congress intended the AO to have the exclusive authority to determine whether the FCDO has complied with the terms of its federal grants and has prevented the States from interfering with the AO's judgments on that score. DA Pet. App. 40-41.

The Commonwealth also fails to articulate any basis for this Court's review of any issue involving the private right of action doctrine. Although the FCDO argued below that the Commonwealth does not have a right to enforce the CJA and § 3599 against the FCDO, the Third Circuit's decision does not rest on that

ground. Rather, the Third Circuit assumed, based on the arguments in the Commonwealth's briefs, that the Commonwealth sought to enforce only *state* law, and held that its efforts to do so were preempted. DA Pet. App. 36-37.[13] In its petitions to this Court, the Commonwealth does not attempt to argue that it has a right to enforce the CJA or § 3599. But to the extent the Commonwealth seeks to enforce these federal laws against the FCDO, the Third Circuit's limited discussion of that issue—in which it expressed doubt that the Commonwealth has a right of action to do so—is correct. And the Commonwealth cites no cases suggesting that the Third Circuit has created any conflict with other courts' analyses of the private right of action doctrine.

The Commonwealth argues that applying the private right of action doctrine is "incoherent" where "the jurisdiction is that of a *State* court in a *State* proceeding that was merely removed to a federal *forum*." DA Pet. 30; *see also* AG Pet. 20 (arguing that the doctrine is "irrelevant when the jurisdiction in question is that of a state court" because the doctrine is "designed to restrict federal courts" and not States).

That argument cannot withstand scrutiny. The private right of action doctrine reflects a *substantive* determination about congressional intent: Establishing a private right of action to enforce federal law is a quintessentially *legislative* judgment reflecting a balancing of numerous considerations about who shall be answerable to whom, under what circumstances, and with

[13] Although the Commonwealth has, since the beginning of this litigation, relied on its purported right to enforce federal law (*e.g.*, DA Pet. App. 101-102, 247-250), it did not maintain that it had such a right in its briefs to the Third Circuit.

what consequences. *E.g.*, *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 162-163 (2008). Neither state nor federal courts can upset that congressional judgment. The Commonwealth is not exempt from that congressional judgment simply because it is a State. *New Jersey Dep't of Envt'l Prot. & Energy* v. *Long Island Power Auth.*, 30 F.3d 403, 421 n.34 (3d Cir. 1994) ("[I]t is Congress which must determine whether any particular party, be it state, federal government, or private person, has a right of action under a federal statute.").

III. This Case Does Not Present Legal Issues That Are Likely To Recur

Finally, this case does not warrant review because the underlying dispute is *sui generis*. No other State has sought to do what the Commonwealth wants to do here—deprive significant numbers of capital inmates of their counsel of choice, who are representing them either pro bono or with private funding, in their state post-conviction proceedings.

The Commonwealth's campaign to disqualify the FCDO is anomalous and unlikely to be repeated elsewhere. There are federal community defender offices throughout the country.[14] But no other State has taken

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[14] *Federal Public & Community Defender Directory*, *available at* https://www.fd.org/docs/defender-contacts/federal-public-and-community-defender-directory.pdf (last visited Dec. 17, 2015). The Commonwealth suggests that the budget for the FCDO is out of proportion to the caseload that it faces, as demonstrated by funding available for capital representation in other States. DA Pet. 7 n.1. Such funding judgments are for the AO to make, in light of information available to it about the need for resources and alternative sources of legal representation available to individuals facing the death penalty.

the position that lawyers working for Community Defender Organizations who are members in good standing of the relevant state bar must be disqualified wholesale from representing indigent capital habeas defendants pro bono or with private funds. That is hardly surprising, for the Commonwealth's disqualification efforts, if successful, would only result in the *Commonwealth* shouldering the financial burden of representation of capital inmates in state post-conviction proceedings—a burden it now avoids when the FCDO's attorneys represent their clients in state court.

Moreover, the issues in these proceedings are unlikely to have any relevance to cases outside the narrow context of indigent defense by Community Defender Organizations, which have a unique statutory, regulatory, and contractual relationship with the AO. Whether a government-funded private lawyer can invoke the federal-officer removal statute has previously been raised only in a handful of cases, none resulting in appellate opinions.[15] The Third Circuit's preemption holding is likewise limited to these unusual factual circumstances, where the Commonwealth has sought to enforce the CJA in a manner that would undermine the authority of the AO to see to it that that statute is implemented uniformly throughout the country and in fidelity to Congressional intention. Because the legal issues in this case are unlikely to recur, further review is not warranted.

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[15] *Williams* v. *Brantley*, 492 F. Supp. 925, 927 (W.D.N.Y. 1980), *aff'd* (without op.), 738 F.2d 419 (2d Cir. 1984); *Dixon* v. *Georgia Indigent Legal Servs., Inc.*, 388 F. Supp. 1156, 1161-1163 (S.D. Ga. 1974), *aff'd* (without op.), 532 F.2d 1373 (5th Cir. 1976); *Gurda Farms, Inc.* v. *Monroe County Legal Assistance Corp.*, 358 F. Supp. 841, 847 (S.D.N.Y. 1973).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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