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Introduction

Mr. Chairman and members of the Committee: Thank you for inviting me to testify today on the proposed legislation that would amend the federal officer removal statute, 28 U.S.C. §1442. The legislation seeks to clarify the right of an officer or agency of the federal government to remove to federal court any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued. The legislation would reach not just familiar state court orders like testimonial or documentary subpoenas sought in connection with pending litigation, but also the less-well known procedures authorized in some states which permit a state judge to order that discovery be taken prior to the filing of a formal lawsuit.

One of my particular areas of academic specialty has concerned these presuit discovery procedures as they are authorized under state and federal law. More broadly, my scholarship and teaching interests are focused on civil procedural law, including jurisdictional and procedural issues as they arise in state and federal courts. One of my major goals as a professional academic has been to encourage legislators, courts and scholars alike toward greater clarity in thinking about what policy purposes ought to animate jurisdictional and procedural law, and how those objectives can best be accomplished. I am grateful for the opportunity to speak today about the subject of state court orders in the context of the federal officer removal statute.[1]

My main message to you is that because the proposed amendments to §1442 raise a host of complicated doctrinal and policy questions, the Committee may wish to consider using more specific language to clarify the purpose and effect of the legislative reforms. Doing so could go a long way toward minimizing uncertainty over statutory construction and, thereby, unnecessary litigation in the lower courts over the proposed legislation's meaning and application.

With regard to state presuit discovery there are several essential questions, which I discuss below, that can be anticipated to arise by the proposed amendment to §1442. Perhaps the most significant issue is what effect it will have to permit removal of a state presuit discovery request or order if no comparable discovery privilege exists under federal law. My own view of the answer, informed by considerations of policy and an evaluation of the relevant law, is that the proposed legislation can be read to implicitly authorize the district court to consider allowing the sought-after presuit discovery. If the proposed legislation is read to provide a federal forum for the officer or agency to raise whatever federal defense she or it may possess—in whole or in part—to the state presuit discovery petition, then §1442 will operate in the same manner as every other removal statute: it will change the forum, not necessarily the final outcome, of the case. Here, however, as in a number of other places, the proposed legislation would be improved by greater clarity as to its intended effects.

Beyond presuit discovery, it is significantly harder to predict what the consequences will be of expanding §1442 to reach those occasions in which a judicial order is sought or issued against a

[1] I appear before this Committee in my individual capacity. As university guidelines require, I attest that my testimony is not authorized by, and should not be construed as reflecting on, the position of the University of Houston.

federal officer or agency. The proposed language—which defines the terms "civil action" and "criminal prosecution" in §1442 to mean "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued"—is potentially far-reaching. In numerous contexts, state judicial orders are sought and issued that are directed to federal officers and agencies. The proposed legislation, thus, may unintentionally sweep into §1442 all manner of judicial orders for which no sound policy reason justifies expanding the statute so broadly. A second, vital question with respect to subpoenas and other orders is whether the proposed legislation strikes the right balance between state and federal interests in permitting removal not only when judicial orders are issued but also when they merely have been sought. Most courts have disapproved removals under existing §1442 when the federal officer or agency has only received a subpoena directed to them but no state coercive judicial order has issued to enforce the officer or agency's compliance. In my judgment, it probably makes better sense not to follow the majority view and to allow removal, as the proposed legislation does, when a coercive judicial order to a federal officer or agency has been sought or issued.

Executive Summary

The first section of my statement examines the special qualities of §1442. Chief among them is that, unlike the general removal statute, which only permits removal of those civil actions over which the federal district court has "original jurisdiction," §1442 is both a removal statute and a grant of original jurisdiction to the district court. Current §1442 allows federal officers and agencies to remove to federal court when they raise a colorable federal defense to the claims asserted. This essential tethering to the assertion of a federal defense of both the jurisdictional grant and the privilege of removal carries important implications for the proposed amendments to §1442.

The second section examines current law regarding state presuit discovery. It looks initially at the existing sources of authority, and their limits, for obtaining discovery prior to suit. In the vast majority of jurisdictions, including the federal jurisdiction, presuit discovery typically may only be taken to preserve witness testimony when there is a credible risk shown the testimony may be lost if it is not recorded immediately. Discovery to confirm the existence of a claim or investigate a potential claim is only authorized in a minority of jurisdictions. In addition, in this portion of the statement I describe the predominant view under existing law that regards presuit discovery requests and orders not to be "civil actions" within the meaning of the removal statutes.

The third section discusses current law regarding subpoenas and other state court orders that are directed to federal officers or agencies. A minority of courts allow removal under §1442 whenever a federal officer or agency is the subject of a state court subpoena or other order, even when no coercive state court order has issued to enforce compliance by the federal officer or agency. Most courts, however, have rejected attempts by federal officers or agencies to gain the federal forum merely after receipt of a state court subpoena or other order, absent issuance (or at least notice) of a coercive order requiring compliance by the federal officer or agency.

The fourth section of this statement examines how H.R. 5281 would change current law.

The fifth section poses three main questions that are raised by H.R. 5281 concerning presuit discovery. First, what is the effect of removing to federal court a state presuit discovery request or order when no comparable authority may be found under existing federal law? Second, what are the implications of expanding §1442 to permit removal of state discovery petitions and orders but still requiring removal to be predicated on the assertion of a colorable federal defense? Finally, what should happen after the state presuit discovery either has been denied or, alternatively, discovery has been completed?

In the sixth section, three questions are raised relating to subpoenas and other judicial orders. First, if a case is pending in state court when the subpoena or other order is sought or issued, what happens to the rest of the pending case after removal? Second, how far does the proposed legislation reach in allowing removal of any proceeding in which a judicial order is directed at a federal officer or agency? Finally, I consider whether the proposed legislation strikes the right balance in allowing removal whenever a judicial order against a federal officer or agency is either *sought* or *issued*.

I. The Special Qualities of Current 28 U.S.C. §1442

Like its neighboring provision, the general removal statute in §1441, §1442 permits a defendant to remove "civil actions" to federal court.[2] The critical difference between the two sections is that the general provision only permits removal of those civil actions over which the federal district court has "original jurisdiction," which must attach under some other statute since §1441 is not, itself, a source of original jurisdiction. In stark contrast, §1442 is both a removal statute and a grant of original jurisdiction to the district court insofar as it authorizes removal by defendants of a certain status (federal officers and agencies) when sued for any act "under color of such office." Although this triggering language certainly could be read as allowing into federal court any suit that relates to the federal officer's or agency's work, §1442's critical phrase "under color of such office" has been read more narrowly. Under §1442, removal "must be predicated on the existence, as alleged by the defendant in the notice of removal, of a colorable federal defense," the Supreme Court wrote in *Mesa v. California*, 489 U.S. 121, 139 (1989), endorsing a view it discerned to date to "an unbroken line of this Court's decisions extending back nearly a century and a quarter," *id*. at 133, and from which it has not subsequently wavered.

This reading of the "under color of such office" language in §1442 is necessary because an officer's mere status as an employee of the federal government has been thought an insufficient

[2] Section 1442(a) provides, in relevant part: "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. . ."

"ingredient" to qualify as a federal question for constitutional purposes under Article III, Section 2. *Id*. The assertion of a federal defense to the plaintiff's claims is what makes it constitutionally permissible, as the Court has seen it, for Congress to allow the case to be brought into the jurisdiction of the district court. That the federal issue arrives by way of a defense, rather than as part of the plaintiff's well-pleaded complaint, is of little consequence to Article III; it is, however, of enormous moment to the statute's construction since the general removal provision has always been read, in contradistinction, to incorporate the well-pleaded complaint doctrinal limit into the removal privilege.

As an express exception to the well-pleaded complaint rule, §1442 authorizes removal when the defendant federal officer or agency will offer a colorable federal defense to the claims asserted by the plaintiff in the state court suit. Nice problems can and do arise as a result of this essential tethering to the assertion of a federal defense of both the jurisdictional grant and the privilege of removal to the federal district court. As a practical matter, it has meant that the defendant's burden at removal is greater under §1442 than §1441: the federal officer or agency must specifically raise a colorable federal defense to the plaintiff's claims in the notice of removal. "Colorable" has not meant the federal officer bears the unreasonably high burden of showing he is likely to prevail on the defense, but the requirement inherently has meant that in assessing whether subject matter jurisdiction exists to adjudicate the case, the court may have to delve, to some degree, into the substantive merits of the defense itself. This overlapping of jurisdictional and merits inquiries is not the norm but appears to be unavoidable, at least to some extent, with regard to §1442.

The oft-repeated justification for §1442 has been to protect federal officers and agencies so they may carry out their legitimate governmental duties without undue interference by the state courts. *See, e.g., Colorado v. Symes*, 286 U.S. 510, 517 (1932) (federal officer removal statute serves purpose of "safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power"). This purpose has served as a guiding light for courts interpreting the section.

II. Current Law Regarding State Presuit Discovery Petitions

Authority for Obtaining Discovery Prior to Suit

In both state and federal practice, litigants have an array of discovery devices available to them after suit has been initiated. Nearly all jurisdictions—by rule, statute or common law—also allow prospective parties to petition the court to take discovery prior to the filing of a formal lawsuit but in most instances the right to use discovery devices before litigation is narrowly tailored. In most jurisdictions, presuit discovery typically may only be taken to preserve witness testimony when there is a credible risk shown the testimony may be lost if it is not recorded immediately. *See generally* Lonny Hoffman, *Access to Justice, Access to Information: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J. L. REF. 217, 235-36 (2007) (compiling list of state laws). Federal Rule of Civil Procedure 27, as it has been interpreted by nearly all courts

and commentators, typifies the narrow scope of authority given to private citizens to conduct presuit discovery.

The federal rule provides that "to perpetuate testimony regarding any matter that may be cognizable in any court of the United States" an oral or written deposition may be taken "to prevent a failure or delay of justice." While the text of the rule is not self-evidently clear—to *perpetuate* for what purpose?—the federal courts have long and nearly unanimously found that Rule 27 should be available to take the deposition of a witness prior to suit only when it has been demonstrated by the petitioner that the witness's testimony might otherwise be lost if it is not taken immediately. This might occur, for instance, when a witness is suffering from a terminal illness or may be about to leave the jurisdiction's subpoena reach.[3] According to the prevailing understanding, the rule is not meant for investigating the facts in advance of drafting a complaint. If the petitioner does not know the substance of the evidence she seeks to perpetuate, resort to the rule is unavailable. Most states have adopted the federal version of Rule 27 and given their state rule a similarly cramped interpretation. Even where textual variances exist in the state and federal rules, few courts have sanctioned any broader confirmatory or investigatory use of presuit discovery.

By contrast to the predominant rule in most jurisdictions, some states permit presuit discovery not only to preserve testimony but also to confirm the proper defendant to sue and/or the factual allegations that will be included in a suit. Some jurisdictions authorize a broader grant of presuit discovery for confirmatory purposes by rule, such as section 3102(c) of the New York Civil Practice Rule, which provides: "Before an action is commenced, disclosure to aid in bringing an action to preserve information or to aid in arbitration may be obtained, but only by court order." Other courts have exercised an equitable authority to allow bills of discovery to be used prior to suit. Florida courts, for instance, recognize a prospective party's right to bring an equitable bill of discovery.[4]

Finally, a few states have even broader grants of presuit discovery privileges, with the broadest of all, perhaps, coming from Texas. As promulgated by the Texas Supreme Court in 1999, Texas Rule of Civil Procedure 202 provides that a person "may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit."

Beyond these examples, it may also be helpful to add that there are a number of statutes that permit the use of formal process to compel the production of information prior to the filing of litigation in particular kinds of matters. One example is a provision in Delaware that permits

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[3] *See generally* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2071, at 651 (2d ed. 1994); PATRICK HIGGINBOTHAM, *Depositions or Other Discovery Before Action or Pending Appeal*, 6 MOORE'S FEDERAL PRACTICE § 27 (3d ed. 2006).

[4] *See* Florida Rule of Civil Procedure 1.290; *see also* First Nat'l Bank of Miami v. Dade-Broward Co., 171 So. 510, 510 -11 (Fla. 1937) (explaining that an equitable bill of discovery under Florida law "lies to obtain the disclosure of facts within the defendant's knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court").

investors to use state inspection statutes in order to investigate cases of potential corporate fraud.[5] Other examples of specific rules or statutes may be found authorizing[6]—and in some cases mandating[7]—the use of process to compel the production of documents and information for investigatory purposes.

Presuit Discovery Petitions and Removal

As noted, for a proceeding to be removable to federal court under either the general removal provision of § 1441 or federal officer removal in § 1442, it must be a "civil action." Nearly every court forced to confront whether a state petition to take discovery prior to suit constitutes a "civil action" for removal purposes has held that it does not. *See Mayfield-George v. Texas Rehab. Comm'n.*, 197 F.R.D. 280, 283-84 (N.D. Tex. 2000); *McCrary v. Kansas City S.R.R.*, 121 F. Supp.2d 566, 569 (E.D. Texas. 2000); *Barrows v. American Airlines, Inc*., 164 F. Supp.2d 179 (D. Mass. 2001); *Bryan v. America West Airlines*, 405 F. Supp.2d 218 (E.D.N.Y. 2005); *Sawyer v. E.I. du Pont de Nemours and Co.*, 2006 WL 1804614 (S.D. Tex., June 28, 2006); *Davidson v. Southern Farm Bureau Cas. Ins. Co.*, 2006 WL 1716075 (S.D. Tex., June 19, 2006); *Hasty v. Allstate Ins. Co*., 2007 WL 1521126 (S.D. Miss., May 23 2007); *In re Enable Commerce, Inc*., 2009 WL 604123 (N.D. Tex., Mar. 10, 2009); *Price v. Johnson*, 600 F.3d 460 (5th Cir. 2010); *but see In re Texas*, 110 F. Supp. 2d 514 (E.D. Tex. 2000), *rev'd on other grounds sub nom., Texas v. Real Parties in Interest*, 259 F.3d 387 (5th Cir. 2001).

The first district court to address the question succinctly explained why a state presuit discovery petition is not a "civil action" under § 1441:

> [T]he Petition is not a 'civil action' because it asserts no claim or cause of action upon which relief can be granted. It is merely a petition for an order authorizing the taking of a deposition for use in an anticipated suit, maybe with federal question jurisdiction, maybe not. Second, even if it can be argued that the Petition is a 'civil action' because it has all the indicia of a judicial proceeding, it surely is not removable under § 1441(b) because it is not a 'civil action of which federal district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States.' The petition simply seeks an order authorizing a deposition pursuant to the Texas Rules of Civil Procedure and contains no claim or right, much less one founded on the Constitution, treaties or laws of the United States. This Court concludes that federal subject matter jurisdiction does not exist.

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[5] DEL. CODE ANN. TIT 8, § 220 (1991); *see also* Guttman v. Jen-Hsun Huang, 823 A.2d 492 (Del. Ch. 2003) (approving use of the state inspection statute as an investigatory tool before litigation).

[6] *See, e.g.,* Fed. Bank. R. 2004 (authorizing any "party in interest" to petition the court to gather information before filing suit from "any entity" relating to "the acts, conduct, or property of the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge"); Fla. St. Ann. § 400.0233 (7) (LexisNexis 2005) (granting prospective claimants and defendants "informal discovery … to obtain unsworn statements and the production of documents or things").

[7] *See, e.g.,* Fla. St. Ann. § 766.203 (mandating compliance with presuit investigation procedure in medical malpractice cases).

Mayfield-George 197 F.R.D. at 283 (internal citations omitted). The first rationale offered by the court for disallowing removal under §1441—that the state discovery petition is not a "civil action" because it asserts no claim or cause of action upon which relief can be granted—bears equivalent relevance for §1442 purposes. It is notable, however, that the *Mayfield-George* court's second rationale for removal would seem to have more direct relevance to §1441 than to federal officer removal under §1442 since the latter, as noted, is a jurisdictional statute. This is to say, if the "civil action" hurdle can be overcome, as the proposed legislation contemplates, then the state presuit discovery petition need not raise a federal question within the jurisdiction of the federal court. It is enough that the federal officer assert in the notice of removal that a colorable federal defense exists. Yet, as I discuss below, that still leaves open one important question: a federal defense to *what*? The answer to this question illuminates the reach—and inherent limits—of amending §1442 to permit removal of state presuit discovery requests and orders. *See infra* Section V, Question No.1.

The one district court case that found a presuit discovery request to constitute a "civil action" for removal purposes is instructive to consider. It is notable not only for being an outlier but, more significantly, because one of the primary reasons the court offered in support of its conclusion has since been squarely rejected by the Supreme Court in an unrelated case.

In re Texas, 110 F. Supp. 2d 514 (E.D. Tex. 2000) was a part of the intense litigation battle between the State of Texas and the tobacco companies. After private lawyers reached agreement with the State, through then-Attorney General Dan Morales, to represent Texas in litigation against the tobacco companies, the private lawyers filed suit on the State's behalf in federal court. *See In re Texas*, 110 F. Supp.2d at 515. A global settlement reached in late 1997 was subsequently blessed by the presiding judge, the Hon. David J. Folsom. Thereafter, when Morales was no longer Attorney General, the State of Texas took the position that the private lawyers were not entitled to the amount of attorneys' fees to which they claimed out of the federal tobacco litigation. *Id.* Much procedural and political wrangling followed, but the relevant point for present purposes is that one of those procedural steps involved the filing by the State of Texas of a presuit petition to take discovery. Presuit deposition testimony purportedly was sought in an effort to try to establish a possible civil claim against the private lawyers and, potentially, other persons. *Id.* at 517-18. Upon receipt of the presuit discovery petition, the private lawyers removed it to federal court citing as the primary authority for doing so the All Writs Act, contained in 28 U.S.C. §1651(a). *Id.* at 518. At the time, it was an open question whether the All Writs Act could serve as an independent source of original jurisdiction to support removal of a state court suit to federal court.

Convinced that the All Writs Act could provide such jurisdictional support, Judge Folsom held in *In re Texas* that the state petition to take presuit discovery was properly removed under §1651(a) because the removal was sought "to protect or effectuate" the prior judgment he had entered approving the global settlement in the tobacco case. More precisely, Judge Folsom reached two critical conclusions to support retaining jurisdiction: first, that the State's presuit discovery petition was a "civil action" within the meaning of §1441 and that, because it threatened to interfere with the prior federal judgment, (ii) he had jurisdiction over it by way of removal under

the All Writs Act. *Id.* On appeal, a panel of the Fifth Circuit reversed Judge Folsom's order denying remand on the ground that the All Writs Act did not provide an independent basis of original jurisdiction. It expressly did not reach whether the state petition to take presuit discovery should be classified as a "civil action" for removal purposes. *See Texas v. Real Parties in Interest*, 259 F.2d 387, 395 n.14 (5th Cir. 2001).

Two years later in an unrelated case, the Supreme Court of the United States unanimously concluded that the All Writs Act could not be used to justify the removal of a state suit to federal court in the absence of an independent basis of original jurisdiction. *Syngenta v.Henson*, 537 U.S. 28, 33-34 (2002); *see also* Lonny Hoffman, *Removal Jurisdiction and the All Writs Act*, 148 U. PA. L. REV. 401 (1999), (*cited* in *Syngenta*, 537 U.S. at 35 n.1 (2003) (Stevens, J., concurring)). No presuit discovery petition was at issue in *Syngenta*, but the Court's holding underscores that for an action to be removable to the federal courts there must be an independent basis of original jurisdiction. As noted above, unlike §1441, §1442 internally provides that independent basis of jurisdiction but only for those matters that are "civil actions" within the meaning of the statute.

In sum, the primary take away regarding presuit discovery and federal removal is that nearly every court that has considered whether a state petition to take discovery prior to suit constitutes a "civil action" for removal purposes has held that it does not.

III. Current Law Regarding Subpoenas and Other State Court Orders Directed to Federal Officers or Agencies

A number of reported cases have found that when a federal officer or agency faces a direct and immediate threat of state court coercive power resulting from the officer or agency's failure to comply with a state court order, removal may be proper under §1442.[8] Some courts allow

[8] State of Florida v. Cohen, 887 F.2d 1451, 1454 (11th Cir. 1989) ("Once the state court initiated contempt proceedings against the federal officials, removal of the contempt proceedings was appropriate"); Wisconsin v. Hamdia, 765 F.2d 612, 614-15 (7th Cir. 1985) (removal upheld under §1442 after state court judge ordered production of subpoenaed documents); Wisconsin v. Schaffer, 565 F.2d 961, 963 (7th Cir. 1977) (holding that removal of contempt action proper after state court ordered federal officer to produce grand jury materials or show cause why he should not be held in contempt); California v. Reyes, 816 F. Supp. 619, 622 (E.D. Ca. 1992) (removal upheld after state judge issued order denying federal officer's motion to quash subpoena); Bosaw v. National Treasury Employees' Union, 887 F. Supp. 1199, 1207 (S.D. Ind. 1995) (case properly removed under §1442 after state trial court issued order compelling production of records in officers' possession); State of Indiana v. Adams, 892 F. Supp. 1101, 1104 (S.D. Ind. 1995) ("It is clear that commencement in the state court of a contempt action intended to compel discovery which has not been approved by a federal agency would constitute an action "commenced" against a federal official"); Charges of Unprofessional Conduct Against 99-37 v. Stuart, 249 F.3d 821, 824 (8th Cir. 2001) (upholding removal under §1442 after motion filed in state court for an order holding federal official in contempt for failing to appear for deposition and to compel her to testify); Smith v. Cromer, 159 F.3d 875 (4th Cir. 1998) (removal proper under §1442 after state court judge issued order for government to produce documents); State of Florida v. Cohen, 887 F.2d 1451, 1454 (11th Cir. 1989) ("Once the state court initiated contempt proceedings against the federal officials [for not complying with the state subpoena], removal of the contempt proceedings was appropriate"); Boron Oil Co. v. Downie, 873 F.2d 67 (4th Cir. 1989) (removal proper after state court denied Environmental Protection Agency's motion to quash two trial subpoenas and directed agency employee to testify).

removal under §1442 whenever a federal officer or agency is the subject of a state court subpoena or other order, even before notice is received of a coercive order to enforce compliance by the federal officer or agency.[9] This, however, is a minority view. A majority of cases has rejected attempts by federal officers or agencies to gain the federal forum merely after receiving a state court subpoena or other order directed to them, absent notice of a hearing to enforce compliance or issuance of a compliance order.[10] The primary basis on which courts have disallowed removal in this context has been that subpoenas or other orders directed at federal officers or agencies are not "civil actions" within the meaning of the removal statute, absent a state judge's order to enforce non-compliance. Further, without a coercive order directing compliance from the federal officer or agency, most courts have concluded that nothing has been "commenced in a state court against" the federal official under §1442. Representative of the majority view that rejects the idea that removal can be predicted solely on issuance of a subpoena is *Stallworth v. Hollinger*, 489 F. Supp. 2d 1305 (S.D. Ala. 2007).

The decision in *Stallworth* was prompted by the filing a state lawsuit and the subsequent issuance of a notice of deposition and subpoena to a third-party federal official to be deposed in connection with the state case. Without attempting to quash the subpoena and before any civil contempt proceedings had been initiated, the federal officer filed a notice of removal to the federal district court. The district judge then ordered a remand on the ground that removal would be inconsistent with the statutory language of §1442. *Stallworth*, 489 F. Supp.2d 1305, 1310 ("the mere possibility of future conflict between a federal official and state judicial civil power [cannot] be fairly deemed to have 'commenced' a civil action against the official"). Additionally, the court concluded that it would not further statutory purposes to permit removal merely upon issuance of a state court subpoena to the federal officer or agency:

> Issuance of a subpoena to a federal official is not a guarantee of confrontation between state power and that official. To the contrary, the threat of conflict may

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[9] Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408 (D.C. Cir. 1995); Nationwide Investors v. Miller, 793 F.2d 1044 (9th Cir. 1986); Louisiana v. Sparks, 978 F.2d 226, 232 (5th Cir. 1992) (even though the federal employee had not yet been held in contempt by the state court for not testifying, removal was proper because to require the federal employee "to run the risk of a contempt citation ... simply because he complies with his federal duty would be imprudent and defeat the larger purpose of the federal officer protection removal statute"); Ferrell v. Yarberry, 848 F. Supp. 121 (E.D. Ark. 1994) (though not entirely clear from reported decision, court appears to uphold removal under §1442 only after subpoena issued to federal officials but before any accompanying state court coercive order, such as a contempt proceeding, initiated).

[10] State of Indiana v. Adams, 892 F. Supp. 1101 (S.D. Ind. 1995); State of Alabama v. Stephens, 976 F. Supp. 263 (M.D. Ala 1995); Dunne v. Hunt, 2006 WL 1371445 (N.D. Ill., May 16, 2006); Stallworth v. Hollinger, 489 F. Supp. 2d 1305 (S.D. Ala. 2007); Murray v. Murray, 621 F.2d 103 (5th Cir. 1980); Hexamer v. Foreness, 981 F.2d 821 (5th Cir. 1993); Swett v. Schenk, 792 F.2d 1447, 1451 (9th Cir. 1986); Colorado v. Nord, 377 F. Supp. 2d 945 (D. Colo. 2005); *cf.* State of Florida v. Cohen, 887 F.2d 1451, 1454 (11th Cir. 1989) ("Once the state court initiated contempt proceedings against the federal officials [for not complying with the state subpoena], removal of the contempt proceedings was appropriate"); People of California v. Reyes, 816 F. Supp. 619, 622 (E.D. Cal. 1992) (finding jurisdiction before federal official held in contempt of state order where intent to hold officer in contempt was clear and observing that "[t]here is no question that contempt proceedings initiated in state court against federal officers are removable pursuant to 28 U.S.C. 1442").

> be averted in any number of ways. . . . Only if all of these highly uncertain contingencies came to pass could such a clash between state power and federal official come to fruition, the federal official reasonably require protection from the potentially hostile state court, and the underlying purposes of §1442(a) favor removal.

Id. at 1309. The *Stallworth* court, like most others, would permit removal only at the point at which contempt proceedings are initiated against the federal official for not complying with the state order. *Id*. at 1308-09.

Also representative of the majority view is *State of Indiana v. Adams*, 892 F. Supp. 1101 (S.D. Ind. 1995). In *Adams*, a defendant was prosecuted in state criminal court for three murders. Assisting in the crime investigation, the FBI collected DNA samples. Thereafter, the defendant sought subpoenas to depose the two FBI technicians who had collected the samples. The defendant sought to discover the procedures that they used and to learn whether their interpretation of the data varied from the testimony the state's experts were going to offer at the criminal trial. After the state judge granted the request to issue the subpoenas, the government moved to have them quashed, but the court refused to do so. Thereafter, the government removed to federal court "that portion of the state court action regarding the subpoenas" to the two FBI technicians. *Adams*, 892 F. Supp. 1101, 1103. The government argued that the FBI technicians could not be forced to comply with the subpoenas, under penalty of civil contempt for failing to do so, because under *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), "a subordinate official cannot be held in contempt for refusing to obey a subpoena when his or her compliance has been prohibited by a higher level official based upon valid federal regulations." *Adams*, 892 F. Supp. 1101, 1103 (*citing Touhy*, 340 U.S. 462, 466-68).

The *Adams* court discerned that the government was probably correct in its assertion that the state court judge could not compel the FBI technicians to be deposed unless supervising officials at the Justice Department granted their approval under the governing federal regulations. *Id*. (*citing* 28 C.F.R. §16.22(a), which provides, *inter alia*, that "[i]n any federal or state case or matter in which the United States is not a party, no employee . . . of the Department of Justice shall, in response to a demand, produce any material contained in the files of the Department . . . disclose any information or produce any material acquired as part of the performance of that person's official duties . . . without prior approval of the proper Department official"). Nevertheless, the court concluded that "until the state court takes some action intended to coerce [the FBI technicians] into complying with the subpoenas, the federal rights vindicated in *Touhy* have not been offended and no action has been commenced against [the FBI technicians] which may be removed to federal court" under §1442. *Id*. at 1106.

The leading exception to the majority view is the District of Columbia Court of Appeals' decision in *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408 (D.C. Cir. 1995). In *Williams*, the court found that service of a subpoena on the Chairman of the House of Representatives' Subcommittee on Health and the Environment of the Committee on Energy and Commerce was sufficient to support a removal right under §1442. At the heart of its reasoning was an assumption that Congress would not have desired that a confrontation between the state

court and federal official "be actually ignited" in order to trigger the removal right. "Once a subpoena is issued," the court wrote, "a clash between state power and the federal official appears to be naturally inevitable." Thus, the terms "civil action," "against," and "act" in §1442 need not be read in a "limited fashion" but instead could be understood, as the D.C. Court of Appeals saw it, to "refer to any proceeding in which state judicial civil power was invoked against a federal official." *Id.* at 415. [11]

A third, middle position, reflected in cases like *Dunne v. Hunt*, 2006 WL 1371445 (N.D. Ill., May 16, 2006), reads §1442 as allowing removal when a party has sought judicial intervention to compel a federal officer or agency to comply with a state court subpoena, but not merely on service of the subpoena. *Id*. at *3 ("In our view, the critical factor is whether the subpoenaing party has sought judicial intervention to compel a federal officer to comply with a subpoena, not whether the state court has ruled on the request. . . . It makes sense that serving a subpoena on a federal official, without more, does not trigger the right of removal.").

IV. How H.R. 5281 Would Change Current Law

The most significant changes H.B. 5281 would make to existing law concern the textual amendments to §1442. The bill adds a new subsection (c) that specifically defines "civil action" (and "criminal prosecution") for §1442 removal purposes to include "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued." This reform is meant to make clear the drafters' intent that state petitions to take discovery prior to the commencement of a formal lawsuit, as well as state court subpoenas, garnishments, and other orders directed at a federal officer or agency, would be removable to federal court under §1442 if the other requirements of the statute are satisfied. In terms of the latter, the bill departs from the majority view by allowing removal not just upon orders issued against the federal officer or agency but also when a judicial order is sought, even if no attempt has been made to hold the

[11] One question that arises with regard to those cases that have allowed removals under §1442 when a subpoena or other order has been directed at a federal officer or agency is what, exactly, is removed to federal court? The entire state court proceeding or just the portion of the case concerning the judicial order being sought that would coerce the federal officer or agency to act. Although the courts are not always clear on this issue, many have concluded that the only "civil action" that is properly removed to federal court is the coercive order sought or issued against the federal officer or agency. *See, e.g.*, State of Indiana v. Adams, 892 F. Supp. 1101, 1103 (S.D. Ind. 1995) (government removed to federal court "that portion of the state court action regarding the subpoenas" to the two FBI technicians"); Dunne v. Hunt, 2006 WL 1371445 at *1 n.3 (N.D. Ill., May 16, 2006) (observing that "[b]ecause the motion to compel is the only action against a federal officer in the state court legal malpractice action, only that portion of the state court case is removable to federal court under §1442(a)"); Charges of Unprofessional Conduct Against 99-37 v. Stuart, 249 F.3d 821, 824 (8th Cir. 2001) (noting with approval that the civil action that was removed was the civil contempt action brought against the federal official for not appearing for deposition); Wisconsin v. Schaffer, 565 F.2d 961, 963 (7th Cir. 1977) (upholding removal of contempt action and distinguishing it from rest of underlying criminal proceeding against state criminal defendant). In Section VI, *infra*, I return to the question of what is the proper unit for removal purposes.

officer or agency in civil contempt or otherwise compel the officer or agency to act pursuant to the state court order.

Additionally, the bill addresses the textual hurdle against removal some courts have found in existing §1442's use of the term "against." It does so by clarifying that the term references not just civil lawsuits that assert claims seeking relief against a federal officer or agency but also any state court proceedings that are "directed to" a federal officer or agency. This should overcome any concern that the "against" terminology in §1442 precludes removal of a state court proceeding absent a possible claim or cause of action that seeks relief from (that is "against") the officer or agency. Other minor changes to existing §1442(a) would make it consistent with the new subsection.

The final reform H.R. 5281 effects would be to amend §1447(d) so that an order remanding a civil action to state court shall be reviewable by appeal or otherwise when the matter was removed pursuant to §1442 or §1443. This reform would allow appeals of *any* civil action or criminal prosecution removed under §1442, not just those removals triggered by a discovery request or order directed to a federal officer or agency.

V. Questions Raised by H.R. 5281 Concerning Presuit Discovery

In this section, I consider three essential questions raised by H.R. 5281 concerning presuit discovery. In this section, I identify various ways in which the proposed legislation would be improved by greater clarity regarding its intended effects and purposes. The first question I consider is the most significant: what is the effect of removing to federal court a state presuit discovery request or order when no comparable authority may be found under existing federal law. The second question focuses on the implications of expanding §1442 to permit removal of state discovery petitions and orders but still requiring removal to be predicated on the assertion of a colorable federal defense. Finally, I look at another question with regard to presuit discovery about which the proposed legislation is silent: what happens after the state presuit discovery has been denied or, alternatively, discovery has been completed?

1. What is the effect of removing into federal court a state presuit discovery request or order if no comparable authority may be found under existing federal law?

Probably the most important issue raised by the proposed amendments to §1442 concerns the effect of removing to federal court a state presuit discovery request or order when no comparable authority may be found under existing law. At this point, the Rules of Decision Act and Erie Doctrine come into play. Does the state court discovery petition show up dead-on-arrival, to be perfunctorily dismissed? Or should the amended statute be read as authorizing the presuit discovery to go forward and, if so, under what guidelines? The proposed legislation is silent on these vital questions. My own view of the answer, informed by considerations of policy and an application of the relevant law, is that the statute should be read as implicitly permitting the district court to consider whether to allow the sought-after presuit discovery. State law would provide the substantive content of the federal standard to be applied in federal court, and whether

to allow the presuit discovery would be subject, of course, to any federal defense that would trump a conflicting state rule.

Though one may advert to empirical evidence suggesting otherwise,[12] removal statutes at least have always been understood to serve only the purpose of changing the forum in which suit is to be tried. To be sure, congressional grants of subject matter jurisdiction to the federal courts and concomitant removal rights are often passed with assumptions made (by at least some proponents) that adjudication in the federal forum may produce a different outcome than what would have occurred in state court—the Class Action Fairness Act of 2005 is perhaps the most recent, important example. Nevertheless, a statute's actual language, not the future hopes and expectations of individual legislators, is what ultimately counts. *Cf. Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546, 568 (2005) ("the authoritative statement is the statutory text, not the legislative history or any other extrinsic material"). The notion, then, that §1442, as amended, would have the direct but not expressly articulated effect of terminating the state court presuit discovery petition upon its arrival in federal court would not only likely be rejected as a matter of proper statutory construction. It also would be regarded as unprecedented: there are no other examples one can cite of a law Congress has ever passed that, allowing removal of a state court action to federal court, has the effect of simultaneously terminating it. The closest example that comes to mind, Section 502(a) of the Employee Retirement Income Security Act, is critically different.[13]

Faced with a statute that is silent about what to do with a state presuit discovery petition that has no equivalent under federal law, a court may begin by asking whether Federal Rule of Civil

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[12] Kevin Clermont & Theodore Eisenberg, Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction, 83 CORNELL L. REV. 581, 593-95 (1998).

[13] Section 502(a) of the Employee Retirement Income Security Act has been held to completely preempt any state law claim that could have been brought under the federal law if there is no other independent legal duty that is implicated by a defendant's actions. Aetna Health, Inc. v. Davila, 542 U.S. 200, 210 (2004) (*citing, inter alia,* Metropolitan Life Ins. Co v. Taylor, 481 U.S. 58, 66 (1987)). Because the complete preemption doctrine operates as an exception to the well-pleaded complaint rule, a state court action completely preempted by 502(a) may be removed under §1441. Beneficial Nat. Bank v. Anderson, 539 U.S. 1, 8 (2003) ("[W]hen a federal statute wholly displaces the state-law cause of action through complete pre-emption," the state claim can be removed"). Yet, in many instances, the substantive federal law provides no relief; thus, the effect of finding that the state law claims are completely preempted is to render the plaintiff's case stillborn. *Cf.* Di Felice v. Aetna U.S. Healthcare, 346 F.3d 442, 456 (3rd Cir. 2003) (Becker, J., concurring) (noting that the law provides "virtually impenetrable shields that insulate plan sponsors from any meaningful liability for negligent or malfeasant acts committed against plan beneficiaries in all too many cases"). Yet, although the ERISA removal issue appears similar to the problem implicated by §1442's amendment, the important distinction to keep in mind is that when an action is removed because ERISA completely preempts the field a dismissal of the action that follows results from application of the substantive federal law, not its procedural removal to federal court. Absent removal, the state court judge would be equally bound in these same circumstances to dismiss the suit if it is completely preempted by federal law. Quite the opposite dynamic is involved with removal and state presuit discovery petitions. If the discovery petition is not removable to federal court, then it will be governed by state law. Thus, to read the proposed legislation as requiring dismissal whenever existing federal law would not authorize the discovery allowed under state law would be *sui generis*: a removal statute that would have the direct and immediate effect of terminating the state court proceeding.

Procedure 27 answers the question in dispute. *Cf. Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct 1431, 1437 (2010) (in case that concerned class certification rule in Federal Rules of Civil Procedure and state law that precluded certain kinds of suits from proceeding as class actions, majority began with the observation that "[w]e must first determine whether Rule 23 answers the question in dispute"). If a court found Rule 27 to cover the same subject matter as the state presuit discovery law, then it could find that the federal rule must govern (thereby precluding the state petitioner from obtaining the investigatory discovery she sought), unless the federal rule exceeds statutory authorization or Congress's rulemaking power. *Id*. Following this approach, it could be observed that given the narrower grounds authorized for presuit discovery by Rule 27 (as noted above, Rule 27 has been consistently held not to permit discovery for confirmatory or investigatory purposes prior to suit), a court might conclude that the federal rule covers the same subject matter as the state rule and, thus, should be held to govern the field. Vertical choice of law problems are not easy to predict, but there is at least some support in the case law for this outcome.

Alternatively, a court might conclude that while the federal rule and state law generally cover the same subject matter, the texts are not in conflict. Rule 27 provides that testimony may be "perpetuate[d]" in order "to prevent a failure or delay of justice" but it does not say that testimony may *not* be gathered prior to suit for other purposes if another source of law would allow it. Arguably, the Supreme Court's decision in *Walker v. Armco Steel Corp*., 446 U.S. 740 (1980) supports this result. In *Walker*, the Court held that Rule 3 (which provides that a federal civil action is "'commenced'" by filing a complaint in federal court) did not displace a state law that seemed to cover the same subject matter. The state law provided, "'An action shall be deemed commenced, within the meaning of this article [the statute of limitations], as to each defendant, at the date of the summons which is served on him . . . .'" *Walker*, 446 U.S. 740, 743 n.4 (citing state statute) (alteration in original). The Court found no conflict because Rule 3 "governs the date from which various timing requirements of the Federal Rules begin to run, but does not affect state statutes of limitations" or tolling rules, which it did not "purpor[t] to displace." *Id*. at 750-51. The majority opinion in the recent *Shady Grove* case similarly characterized the *Walker* case. *Shady Grove*, 130 S. Ct 1431, 1440 n.6 (Scalia, J.).

It may not be necessary, however, for a court to address whether there is a conflict between Rule 27 and the state law authorizing presuit discovery. The proposed legislation amending §1442, instead, could be read to trump Rule 27 by implicitly permitting the court to consider whether to allow the sought-after presuit discovery, using state law as the content of the federal law to be applied in federal court. As Justice Scalia noted in *Shady Grove*, "Congress . . . has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances. *Shady Grove*, 130 S. Ct 1431, 1438 (*citing Henderson v. United States*, 517 U.S. 653, 668 (1996). This is precisely the argument that can be made with regard to the proposed legislation. By allowing removal to federal court of state presuit discovery petitions, the legislation can be understood to implicitly allow for the state law governing presuit discovery to be applied as the rule of decision in federal court. The alternative—to assume that the removal statute was meant to terminate the state court presuit discovery petition—is so much less appealing both as a matter of policy, and of statutory construction (one can readily anticipate a

court observing that if Congress had wanted to immunize federal officers from all state presuit discovery it could have done so expressly), as to give the view much to commend it that §1442 implicitly authorizes the federal court to consider allowing presuit discovery even though it would not be allowed under Rule 27.

The difficulty is the adverb: to say that §1442 *implicitly* authorizes federal courts to consider the request for presuit discovery leaves a great deal of room for litigation over the proper construction of the statute, and for differing opinions about the right answer. Consequently, I suggest that the better approach may be to expressly articulate the policy preference in §1442. And, as far as policy preferences go, my own view is that while Congress could choose to immunize federal officers and agencies from ever having to provide discovery prior to suit pursuant to state law, it is not the preferred course. If a federal officer or agency has a valid federal defense that would trump, in whole or in part, a state presuit discovery request or order, then that defense can be presented to a federal judge to rule on. Because the federal court is in a position to determine if presuit discovery in the specific case is precluded by some particular federal law, it would be unnecessary, to say nothing of excessive, to immunize federal officers and agencies, in every instance, from having to comply. Granting blanket immunity to federal officials from any state presuit discovery carries greater federalism implications than, I suspect, the drafters of this legislation intended. *Cf. Oklahoma v. Willingham*, 143 F. Supp. 445, 448 (E.D. Okla. 1956) (Section 1442 "should be construed liberally to effect its purpose of maintaining the supremacy of the federal law, but we think also that it should be construed with the highest regard for the right of the states to make and enforce their own laws in the field belonging to them under the Constitution"). If §1442, instead, is read to provide a federal forum for the officer or agency to raise whatever federal defense she or it may possess—in whole or in part—to the state court presuit discovery petition, then §1442 will operate in the same manner as every other removal statute: it will change the forum, not necessarily the final outcome, of the case.

In sum, faced with a statute that is silent about what to do with a state presuit discovery petition that has no equivalent under federal law, the best reading of the proposed legislation is that, aware that Congress "has ultimate authority over the Federal Rules of Civil Procedure," it provides a federal forum to the officer or agency to present all applicable federal defenses. In effect, the legislation creates an exception to Rule 27 to the extent the rule is considered in conflict with state law. Because vertical choice of law questions are not always easily predicted, however, the better approach would be for the proposed legislation to expressly address the effect of permitting removal to federal court of state presuit discovery petitions when no comparable presuit authority may be found under existing federal law.

2. What are the implications of expanding §1442 to permit removal of state discovery petitions and orders but still requiring removal to be predicated on the assertion of a colorable federal defense?

Above, I observed that §1442 is a special kind of removal statute in a number of respects. One of those respects, as noted, is that it operates differently from the general removal statute insofar as §1441 authorizes removal only when the basis for original jurisdiction appears as part of the

plaintiff's well-pleaded complaint. In contrast, if the federal officer or agency seeking to remove under §1442 raises a colorable federal defense to the plaintiff's claims in the notice of removal, then the statute confers jurisdiction on the federal district court; no other source of jurisdiction is needed. That essential tethering to the assertion of a federal defense of both the jurisdictional grant and the privilege of removal has, on occasion, raised difficult problems in applying existing §1442. The requirement inherently poses the risk that, in assessing whether subject matter jurisdiction exists to adjudicate the case, the district court may find itself having to delve into the substantive merits of the defense itself. As the Seventh Circuit once put it, §1442 "does not permit removal on the federal officer's say-so." *Venezia v. Robinson*, 16 F.3d 209, 211 (7th Cir. 1994) (Easterbrook, J.).

But whatever interesting problems are raised under the existing statute with regard to the intertwining of the jurisdiction inquiry and an assessment of whether the defense is meritorious, the proposed amendment raises even more difficult questions. If under §1442 "federal officer removal must be predicated on a colorable federal defense," *Mesa v. California*, 489 U.S. 121, 139 (1989), then what colorable federal defense is required to remove a state presuit petition that seeks only to discover information from the federal officer or agency and does not assert an affirmative claim for relief against anyone?

One way to think about this problem is to reflect on the more precise question, a federal defense to *what*? To a potential future claim for relief that may be asserted against the federal officer or agency? Or to the request to take discovery? In my view, the necessary answer is that the federal defense to be asserted in the notice of removal must be to the request to take discovery because the alternative raises potential constitutional problems. If the statute, as amended, were read to permit removal on the basis that a colorable federal defense may apply to a potential future claim for relief, serious concerns exist that the statute would exceed Article III's limits on federal jurisdiction. That potential future claim may not ever be asserted and, even if it is, it may not be brought against the federal officer or agency from whom the discovery is currently being sought. Further, the anticipated federal defense may or may not apply to the claim as it is actually constituted. To be sure, by design §1442 authorizes removal on the *anticipation* that the defendant federal officer or agency will offer a colorable federal defense, which distinguishes it from the general removal statute that, having had the well-pleaded complaint rule incorporated into it, need not worry about potential, anticipated federal questions. But to amend §1442 to permit removal on the basis that a colorable federal defense may apply to a potential future claim strikes me as going so far as to potentially run afoul of the "arising under" federal law head of jurisdiction in Article III.

One approach, then, would be to assume that the statute necessarily authorizes removal only when a colorable federal defense would apply to protect or immunize the federal officer or agency from the state court petitioner's request to take discovery. Even on this account, however, the question remains what to do when the state discovery petition is not adequately framed as to suggest a colorable federal defense. Of course, there will be instances when the discovery petition is plainly subject to a federal defense. For instance, the federal officer or agency may be able to assert in the notice of removal that he or it is not required to produce any of the information sought by the state discovery petition. This, indeed, was the defense offered

by Chairman Waxman and Representative Wyden in the *Brown & Williamson* case. One can imagine the circumstance, however, in which an injured person seeks to take discovery prior to the filing of a formal lawsuit to investigate a potential claim she may possess but does not have any idea whether her injury was the result of someone's negligence or merely bad luck for which no one is to blame. Nor might she have any idea what information, precisely, she will find or whether that information will reveal what cause of action she might possess against whom.

The answer to this difficult problem may be to say that when the state presuit discovery request is too generalized to permit the federal officer or agency to be able to plead a colorable federal defense, removal under §1442 will be unavailable. This limitation on the ability to invoke §1442 may be an unavoidable result of extending a general authority to remove state discovery petitions and orders. Simply put, in some instances the availability of a federal defense to the requested discovery may not be as apparent as it is with traditional lawsuits in which relief is affirmatively sought against the federal officer or agency.

3. What should happen after the state presuit discovery either has been denied or, alternatively, discovery has been completed?

There is one last issue concerning the effect of expanding §1442 to reach state presuit discovery petitions I want to address briefly. The proposed legislation is silent about what happens after the state presuit discovery has been denied or, alternatively, discovery has been completed. It might be suggested that if the discovery petitioner subsequently asserts claims for relief against the federal officer or agency in the proceeding that has been removed, the district court, by virtue of the proposed legislation, would have subject matter jurisdiction to adjudicate those claims. The better view, consistent with the traditional understanding that federal subject matter jurisdictional limits generally are to be narrowly construed, is that the district court would not have continuing jurisdiction to adjudicate any issues beyond those directly raised by the state court discovery petition and the federal defense(s) asserted by the officer or agency applicable to that discovery petition. However, because the statute is silent about what happens after the discovery petition has been removed, there is room for one inclined to argue in favor of continuing jurisdiction to do so. *Cf. Colorado v. Symes*, 286 U.S. 510, 517-18 (1932) ("It scarcely need be said that [the federal officer removal statute] are to be liberally construed to give full effect to the purposes for which they were enacted"); *Willingham v. Morgan*, 395 U.S. 402, 407 (1969) (cautioning against "a narrow, grudging interpretation of §1442(a)(1)"). The better approach, therefore, may be to expressly delineate in the text of the amendment that the district court has jurisdiction only to address the request for presuit discovery from the federal officer or agency and the applicability of any federal defenses to that request. Then, to the extent that the presuit investigation results in a claim filed in the state court against the federal official, that matter could be removable under the existing text of §1442.

VI. Questions Raised by H.R. 5281 Concerning Subpoenas and Other Judicial Orders, Sought or Issued

The last subject I wish to cover in this Statement, though certainly not the least significant, concerns the proposed change to §1442 that would have the statute reach "any proceeding in

which a judicial order . . . is sought or issued" against a federal officer or agent. I first consider the practical effect of amending §1442 in this manner: specifically, what happens to the rest of the pending case after removal? I then discuss the potential reach of the proposed legislation that would amend §1442 to cover any proceeding in which a judicial order is directed at a federal officer or agency. Finally, I consider the policy questions embedded in the proposed legislation's amendment of §1442 to apply both to judicial orders that are sought and to those that are issued.

1. If a case is pending in state court when the subpoena or other order is sought or issued, what happens to the rest of the pending case after removal?

The proposed legislation is not clear about what happens with the rest of a case commenced in state court, otherwise not within the subject matter jurisdiction of the federal courts, once the federal officer or agency invokes amended §1442. Imagine a state civil case that is pending between two private parties, both from the same state, concerning entirely state law questions. One of the parties seeks a subpoena from the state court directing a federal officer or agency to produce documents that may be relevant to the case between the two individual litigants. The proposed legislation allows the federal officer or agency to file a notice of removal at this point, but numerous questions then arise about which the proposed legislation is silent.

Does the entire civil action pending in state court between the two individuals get removed to federal court or only that part of it that relates to the judicial order sought against the officer or agency? The proposed legislation defines "civil action" under §1442 to mean "any *proceeding* in which a judicial order is sought or issued," suggesting perhaps that the entire civil action is to be removed. This could lead to some perverse tail-wagging-the-dog results, especially when the bulk of the underlying case has very little to do with the judicial order sought from the federal officer or agency. One particular problem might be that it could invite gamesmanship by private litigants seeking to gain the federal forum. One can imagine that a litigant might seek to obtain a judicial subpoena directed to a federal officer or agency, anticipating that the federal officer or agency will then remove the entire proceeding to federal court under §1442, as amended. Leaving to one side whether the statute, within the limits of Article III, could constitutionally permit removal of the entire underlying case, it is not clear why Congress would want private, non-diverse litigants asserting entirely state claims between them to be able to gain the federal forum in this manner. *Cf.* 28 U.S.C. §1367(b); H.R. Rep. No. 101-734, at 29 n.16 (1990) (noting that the purpose of §1367(b) is to implement the principal rationale of *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978)).

If the entire pending case does get removed by virtue of this proposed legislation, what happens next? Does it start all over in federal court? As a practical matter, what is the federal court to do if the case has already advanced in the state court system and is close to trial? May the court remand the portion of the case that does not concern the federal officer or agency and allow it to proceed in state court? On what authority? Perhaps a partial remand would be available on a model similar to that currently used in §1441(c), though the fit is not perfect. *But cf. Ferrell v. Yarberry*, 848 F. Supp. 121, 123 (E.D. Ark. 1994) (observing, after upholding removal under §1442, that "[o]nce the basis for the removal is dropped—here, to resolve the issue regarding the

effort to obtain testimony of the federal employees—it is within the discretion of the court to remand the rest of the case back to the state court from which it was removed" but citing no source of authority for granting a partial remand).

It would help answer many of these questions if the view is taken that the proposed legislation only means to authorize removal of the federal issue in the case relating to the subpoena or other order directed at the federal officer or agency, leaving the remainder of the underlying case unaffected in state court. As noted above, a number of the prior cases have adopted this view.[14] Restricting the unit removed to the federal issue in the case relating to the subpoena or other order directed at the federal officer or agency would then put the district court in a position to address whether the federal defenses asserted excuse the officer or agency's compliance, in whole or in part. Upon deciding that question, it would be reasonable to conclude that the matter that was removed under §1442 would terminate, either with the judge's order allowing the discovery to proceed under the subpoena or with a ruling that the discovery sought may be not had. Either way, it could be expected that in the normal course of affairs there would be no further superintendence of the matter by the district court.

All of this is speculation, of course, since the proposed legislation is silent on these important questions. This is why the better approach would be to more fully articulate what it means for §1442 to be expanded to reach "any *proceeding* in which a judicial order is sought or issued" against a federal officer or agent. The Committee may wish to clarify that the proposed legislation only means to authorize removal of the issues relating to whether the federal officer or agency must comply with the state court order sought or issued.

2. How far does the proposed legislation reach in amending §1442 to permit removal of any proceeding in which any judicial order is directed at a federal officer or agency?

As proposed, the legislation literally permits removal of "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued." The dependent clause is not framed as an exhaustive list; facially, it would permit removal not just of subpoenas but of any other judicial order sought or issued against a federal officer or agency. In numerous contexts state judicial orders are sought and issued against federal officers and agencies. To illustrate, consider the facts in *Angello v. St. Augustine Center, Inc*., 2006 WL 3827418 (W.D.N.Y., Dec. 27, 2006).

In *Angello*, a privately incorporated entity was placed into state court receivership. When the Internal Revenue Service received notice of the receivership, it filed for more than $850,000 based on tax liens it had issued, but it was not made a defendant and did not intervene formally into the case. When the state appointed receiver subsequently recommended a distribution to the IRS of less than $9,000 (in the motion it filed with the state court asking the court for an order approving his recommended distributions), the IRS removed the state court receivership action under §1442. It argued that "the actions contemplated in the Receiver's Motion—if granted—

[14] *See supra* note 11.

would be adverse to the IRS's tax liens and therefore the receivership action has become one 'against' the United States" within the meaning of 1442. *Angello*, 2006 WL 3827418 , at *1. Finding that "there is no state process or judicial power that has been invoked against the IRS" and that "the Receiver has merely provided notice of a proposed action—notice which is intended to allow the IRS and other claimants the opportunity to assert their rights if they so choose," the court granted remand. *Id*., at *2. Yet, under the proposed legislation, when the receiver sought a judicial order approving his recommended distributions, the right to remove would appear to be triggered.

As the *Angello* case suggests, a wide variety of judicial orders may be sought and issued against federal officers and agencies. In this way, the proposed language as drafted is potentially far-reaching and may unintentionally sweep into §1442 all manner of judicial orders for which no sound policy reason may exist for expanding the statute so broadly.

3. Does the proposed legislation strike the right balance in allowing removal of any proceeding in which a judicial order is either sought or issued?

The last issue to consider concerns the language of the proposed legislation that would extend the statute's reach to any proceedings in which judicial orders are issued, as well as to those in which they are merely sought. As noted, most courts have disapproved removals under existing §1442 when the federal officer or agency has only received a state court subpoena directed to them but no state coercive judicial order has issued to enforce the officer or agency's compliance.

One important issue to highlight is that although the proposed legislation likely was meant to track the minority view reflected in cases like *Brown & Williamson*, it may unintentionally deprive federal officers or agencies of the removal right in jurisdictions in which state law allows a subpoena to issue on the authority of the attorney, without prior judicial approval. The proposed legislation applies §1442 to any proceeding in which a *judicial* order is sought or issued. Arguably, then, the statute, as amended, would not reach subpoenas that are issued on the authority of the requesting attorney without the necessity of prior judicial approval.

Among the courts that have disapproved removal under existing §1442 merely upon issuance of a subpoena, several policy arguments are typically made to support a textual reading of §1442 as not authorizing removal in this circumstance. One that is advanced is what might be referred to as the "practically premature" argument. That is, until a state coercive order is issued or notice is received that the court will hold a hearing to decide whether to grant a coercive order, it is premature to conclude that something will be demanded of the federal officer or agency for which federal law might justify his or its non-compliance. This is how one court put it:

> Perhaps the Defendant was merely bluffing that he would attempt these depositions. It is not at all unusual that a litigant may make a discovery request and never follow through on the request. Unfortunately, some discovery requests are used merely to delay pending litigation. There is no way to evaluate this request on that basis in the abstract. On the other hand, perhaps the Government

> will capitulate and permit the agents to testify-or perhaps not. Until this matter progresses further, there is no way to determine whether the provisions of section 1442 will be invoked by an action being "commenced" against [the federal officers].

Adams, 892 F. Supp. 1101, 1105. It is surely right that discovery disputes do not always come to a head, but the downside to allowing removal to federal court in this circumstance seems quite modest. If the discovery dispute does blossom into a direct confrontation between the state discovery demand and a federal officer or agency's insistence that federal law excuses them from having to comply, then in hindsight removal will have been warranted. If it does not, the federal court can always dismiss if the dispute has fizzled out. Ultimately, the practically premature argument may be less of a policy argument for not allowing removal than a practical explanation to help bolster a textual reading of existing §1442 as not authorizing removal of mere requests for information because they are not yet actions "commenced against" a federal officer or agency.

A second policy argument advanced by courts that have not allowed removal under §1442 on the mere issuance of a subpoena might be referred to as the "premature federalism conflict" argument. This view emphasizes the federalism interests that are at stake in applying §1442. When a request for discovery or other order merely has been sought, but no state order coercing the federal officer to act is involved, these courts have maintained that there is no harm in assuming that the state court will give adequate due to any federal law defenses that may excuse the federal officer's compliance with the requested discovery (or other order). On this view, disapproving removal

> comports with general notions of the competence of state courts to vindicate federal rights. As the Supreme Court has noted, "[u]nder [our] system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). This court has faith in the able and experienced state court judge's ability to interpret the relevant law and to refuse any attempts by Defendant to coerce compliance with the instant subpoenas, absent the requisite Justice Department approval.

Id.[15] The problem with this argument is that it fails to consider the possibility that federalism interests may be more severely impacted by delaying the right to remove until the point that the confrontation between the state court judge and federal officer or agency has reached (or nearly reached) a dramatic crescendo. Once a subpoena has been issued, the federal officer or agency is on a collision course with the state court that could result if the officer or agency ultimately refuses to comply. Insisting that the federal officer or agency disobey a court order requiring

[15] *See also State of Alabama v. Stephens*, 876 F. Supp. 263, 265 (M.D. Ala 1995) ("[T]he relationship of federal courts and state courts [does not] involve mere technicalities. Concepts of federal judicial restraint in matters involving state court proceedings are too important to the principles of federalism which are so basic to our form of government to be ignored, even if enforcing them might seem to unnecessarily complicate procedural matters").

compliance may be understood to invite an even greater, more intense confrontation between the state court and federal officer or agency than if removal were permitted at an earlier point. To be sure, removal of a state case always has a certain quality of presumptiveness to it (it is, after all, called a *notice* of removal, not a *motion* to remove), but by allowing removal to be triggered not just when a judicial order issues but also when one is sought, the proposed legislation may have the salutary effect of reducing dramatic tension that may otherwise result from allowing the discovery dispute to go on too long. In this circumstance, respecting state's rights may actually mean allowing removal before the state court has ordered, or is on the precipice of ordering, the federal official to comply.

While recognizing that the question is a close one, my view is that the proposed legislation probably strikes the right balance between state and federal interests in authorizing removal when a party seeks judicial intervention to compel a federal officer or agency to comply with a state order. I do not come to this view easily. In my judgment, courts and commentators often overstate the necessity of federal superintendence over state adjudication. As I have written previously:

> It is abundantly clear from experience that pleas routinely recited to gain the federal forum may often reveal themselves as naked aggrandizements of federal power. … [T]here are costs to not maintaining a high presumption of state court competence to adjudicate issues of federal law, at least in certain contexts.

Lonny Hoffman, *Intersections of State and Federal Power: State Judges, Federal Law and the "Reliance Principle,"* 81 TUL. L. REV. 283, 288 (2006). I have also recognized, however, that "we certainly should not assume that a [] presumption of state court competence fits every occasion." *Id*. With regard to state subpoenas and other orders directed at federal officers or agencies, it probably makes better sense—in the interests of federalism—to allow removal, as the proposed legislation does, when a coercive judicial order to a federal officer or agency has been sought.