House Committee on the Judiciary
Subcommittee on Courts and Competition Policy

Legislative Hearing on H.R. 5281,
The Removal Clarification Act of 2010

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U.S. House of Representatives

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Introduction and Overview

Thank you, Mr. Chairman, for inviting me to testify today in support of H.R. 5281, the Removal Clarification Act of 2010. The Office of General Counsel supports the bill's enactment because the bill would make certain necessary clarifications concerning the federal officer removal statute, 28 U.S.C. § 1442, a long-standing law that allows matters brought in state court against federal officers and agencies, based on their actions as federal officials or agencies, to be removed or transferred to federal court for resolution. The law applies to officials of all three branches of the federal government, and the clarification bill seeks to ensure uniform treatment throughout the country whenever the processes of state courts are invoked against federal officers in such circumstances.

I am honored to serve as the General Counsel of the United States House of Representatives. The functions of our office include providing legal representation to Members, officers, and staff of the House when they are sued or their testimony is sought to be compelled in connection with matters relating to their official responsibilities. Our office has had considerable experience in matters in which private litigants have attempted to use the processes of state courts to compel the appearance, testimony and/or production of documents of Members of Congress and their staffs. It is based on the experience of our office over the last three decades that I provide my testimony today in support of the bipartisan legislation that has been introduced by the Chairmen and ranking Members of the Judiciary Committee and this Subcommittee.

Our experience reveals that this bill is a needed clarification of the federal officer removal statute to ensure that removal to the federal courts will be available to officers in all three branches of the federal government where an issue of federal law is presented and their federal duties are implicated — regardless of the procedures that different state courts employ to obtain jurisdiction over individuals. As I will explain, unintended ambiguities in the current law have led to disparate treatment of virtually identical cases, even within the same federal Circuit. The federal officer removal statute — which has its roots in a statute first enacted in 1815 — reflects the longstanding recognition by Congress that it is important that federal officers be afforded a federal forum to present their federal defenses in litigation. Federal courts are generally more familiar than state courts with these defenses and immunities — such as sovereign immunity, executive privilege, and Speech or Debate Clause immunity — and state court litigation against federal officers can sometimes be used for improper political purposes or to harass and interfere with the federal government or its officers' performance of their official functions to the detriment of the American people. Litigation in this context encompasses not only lawsuits, but also ancillary legal proceedings, including (but not limited to) subpoenas for testimony or documents and pre-suit discovery requests such as demands for depositions or the production of documents.

The bill would serve the public interest by making needed clarifications in the law concerning federal officer removal, in two principal respects. First, the bill amends 28 U.S.C. § 1442 to make clear that the federal officer removal statute, where its terms are

satisfied, applies not just to state judicial proceedings in which a federal officer or agency is a party, but also to all proceedings in which a legal demand is made in a state court for a federal officer's testimony or documents whether or not the federal officer is a formal party to the proceeding. Based on disparate treatment by federal courts, the current law is not sufficiently clear that ancillary proceedings against federal officers, such as pre-suit discovery petitions or subpoena enforcement actions, are "civil actions" for removal purposes. The legislative history of the federal officer removal statute, described below, confirms that Congress intended all proceedings in state courts to be considered a "civil action" for removal purposes, and this bill reaffirms that direction from Congress. Further, this clarification responds to confusion that has developed in the caselaw about whether removal to federal court is contingent on the initiation of contempt proceedings in state court relating to the enforcement of subpoenas or other judicial orders, and makes clear that a federal officer is not required to be held in contempt of a state court in order to remove the proceeding in question to federal court.

Second, the bill amends 28 U.S.C. § 1447(d) to provide that if a federal district court rejects a Section 1442 removal and remands to the state court, there can be an appeal to the federal circuit court of the remand order. As matters presently stand, appellate review of a district court's remand to the state courts of an action or proceeding against a federal official is generally not available, and thus each of over 600 different federal district court judges have the final, unreviewable say over these issues. In light of the clarifying amendments to the federal officer removal statute, this provision regarding appeal will apply only in a quite narrow set of cases, is unlikely to unduly delay matters, and will tend to promote uniform interpretation of the federal officer removal statute.

The bill leaves in place the current law and practices governing federal officer removal in nearly all respects. The bill does not alter the standards for general removal under 28 U.S.C. § 1441 or for federal officer removal under 28 U.S.C. § 1442, and does not enlarge the scope of a civil action or criminal prosecution as those terms are used throughout the federal code. Nor will it change the current practice in cases involving proceedings — such as a subpoena to a non-party federal official — whereby only the ancillary proceeding involving the federal officer is removed under Section 1442(a)(1), and the rest of the case remains in state court.[1] The proposed legislation also will not alter the well-settled requirement, derived from Article III of the Constitution, that removal under Section 1442(a)(1) must be predicated on the availability to the federal officer of a federal defense.[2]

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[1] *See, e.g., State v. Rodarte*, No. 09-2912, 2010 WL 924099 at *1 (D. Colo. Mar. 9, 2010); *In re Subpoena In Collins*, 524 F.3d 249, 251 (D.C. Cir. 2008); *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 414 (D.C. Cir. 1995); *Pollock v. Barbosa Group, Inc.*, 478 F. Supp. 2d 410, 413 (W.D.N.Y. 2007). In this regard, it may be advisable to explore any necessary amendments to the bill to make this point particularly clear.

[2] *See Mesa v. California*, 489 U.S. 121, 133-34 (1989) ("[A]n unbroken line of this Court's decisions extending back nearly a century and a quarter have understood . . . the federal officer removal statute to require the averment of a federal defense.").

Rather, under the terms of the bill if enacted, each of the currently existing requirements of the federal officer removal statute still must be met for removal to be permitted by the federal district judge. The bill simply clarifies the existing statute and will help ensure that federal officials will not be treated differently depending on where or by what procedure they are haled into state court.

I. 28 U.S.C. § 1442

The federal officer removal statute, 28 U.S.C. § 1442(a), permits "any officer (or 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" to remove "a civil action or criminal prosecution ... commenced in a state court" to federal district court if the officer is able to raise a colorable federal defense.[3]

The manifest purpose of the federal officer removal statute is to provide federal officers — including executive branch officials, judges, and Members of Congress — with a federal forum where they may litigate before appointed judges possessing the independence associated with Article III lifetime tenure where either the claim asserted against them is based on federal law or the federal officer asserts a colorable defense based on federal law. In contrast to its approach to the general removal statute, 28 U.S.C. § 1441, which the Supreme Court has instructed should be construed narrowly, the Court has repeatedly mandated that Section 1442 be broadly and liberally construed to effectuate its purposes.[4] As the Court has repeatedly explained, removal for federal officers in matters related to their official conduct involving federal law provides them with a federal forum, free from local interests or prejudice, and protects the federal government from interference with its operations.[5] In addition, Section 1442 provides for such decisions to be made in the federal courts — which are equipped with accumulated expertise to deal with such matters — and promotes uniform application of federal law.

Section 1442 has its roots in several statutes enacted early in the nation's history

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[3] *See* 28 U.S.C. § 1442(a)(1)-(4); *see also Mesa*, 489 U.S. at 138-39; *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981); *Willingham v. Morgan,* 395 U.S. 402, 406-07 (1969).

[4] *See, e.g., Jefferson County, Ala. v. Acker*, 527 U.S. 423, 431 (1999) (removal case involving federal judges); *Willingham,* 395 U.S. at 406-07; *Colorado v. Symes*, 286 U.S. 510, 517 (1932); s*ee also Louisiana v. Sparks,* 978 F.2d 226, 232 (5th Cir. 1992); *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1252 (9th Cir. 2006); *Nationwide Investors v. Miller*, 793 F.2d 1044, 1046 (9th Cir. 1986).

[5] *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 148 (2007) (canvassing the historical record and observing that "[t]his initial removal statute was obviously . . . an attempt to protect federal officers from interference by hostile state courts") (internal citation omitted and capitalization altered); *Manypenny*, 451 U.S. at 241-42; *Willingham*, 395 U.S. at 404-05; *see also Tennessee v. Davis*, 100 U.S. 257, 263 (1879) (interpreting Act of 1866).

that provided a right of removal for federal officers who were responsible for enforcement of customs and revenue laws, among other things.[6] In 1948, shortly after Congress adopted the Federal Rules of Civil Procedure, Congress amended Title 28, including the general removal and federal officer removal provisions.[7] The general removal statutory provisions then in Sections 71 and 114 were consolidated and recodified as 28 U.S.C. § 1441, which remains today the general removal statute.[8] The federal officer removal statutory provisions then in Sections 76 and 77 were consolidated and recodified as 28 U.S.C. § 1442 and, as rewritten, extended removal authority to all federal officers.[9] The term "civil action" was enacted by Congress into §§ 1442 and 1441 in 1948 and has remained in those provisions unchanged since then.

It is clear from the 1948 history that Congress intended by the term "civil action" to include both direct lawsuits and other ancillary legal proceedings such as subpoenas and discovery requests. In 1948, as now, Rule 2 of the Federal Rules of Civil Procedure provided that there is one form of action, the "civil action."[10] And, in 1948, as now, a "civil action" as used in Rule 2, included pre-suit discovery proceedings.[11] According to the contemporaneous House Report accompanying the 1948 legislation, in so revising the statute to conform with the then recently adopted Federal Rules of Civil Procedure, the words 'case,' 'cause,' 'suit,' and the like [that appeared in 28 U.S.C. §§ 71, 114 (1940)] were omitted and the words 'civil action' substituted [in § 1441] in harmony with Rules 2 and 81(c) of the Federal Rules of Civil Procedure."[12] Exactly the same thing is true of §§ 76, 77, the then-existing federal officer removal provisions. That is, words such as "civil suits," "suits," "suit . . . commenced in the State court by summons, subpoena, petition, or any other process," "personal action" and the like that appeared in 28 U.S.C. §§ 76, 77 (1940) were omitted in the 1948 recodification and the words "civil action" were substituted in § 1442 to encompass all types of proceedings in which process is initiated against federal officials and a judicial order is sought, including subpoenas for documents or testimony and petitions for pre-suit discovery, including depositions.

More recently, with the Federal Courts Improvement Act of 1996, Congress extended the § 1442 removal authority to federal agencies.[13] In so legislating, Congress

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[6] *See, e.g.*, *Watson*, 551 U.S. at 147-48; *Willingham*, 395 U.S. at 405-06 (citing Customs Act of February 4, 1815, ch. 31, § 8, 3 Stat. 198 (1815); Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633 (1833); Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171 (1866); Rev. Stat. § 643 (1874)).

[7] *See* Act of June 25, 1948, ch. 646, § 1442(a), 62 Stat. 938 (1948), 28 U.S.C. § 1442(a).

[8] *Id.*

[9] *See* H. Rep. No. 80-308, at A134 (1947).

[10] *See* Fed. R. Civ. P. 2 (1947).

[11] *See* Fed. R. Civ. P. 27 (1947).

[12] H. Rep. No. 80-308, at A133 (1947).

[13] *See* S. 1887, 104th Cong. (2d Sess. 1996)

reiterated its policy judgment that "[a] Federal forum in such cases is important since state court actions against Federal agencies and officers often involve complex Federal issues and Federal-State conflicts," and that, accordingly, the extension of removal authority "fulfills Congress' intent that questions concerning the exercise of Federal authority, the scope of Federal immunity and Federal-State conflicts be adjudicated in Federal court."[14]

II. 28 U.S.C. § 1447(d)

After a proceeding is removed, where a federal district court remands the proceeding to state court, 28 U.S.C. § 1447 generally governs whether an appeal to the regional federal circuit court of that remand order is available. The current form of Section 1447(d) provides that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." The Supreme Court has observed that the general intent of Section 1447(d) is to prevent "prolonged litigation of questions of jurisdiction of the district court to which the cause is removed."[15] If after removal, the federal district court finds that a matter was not properly removable and remands it back to the State court, under Section 1447(d) as it has been interpreted, the remand order is generally not appealable to the federal circuit courts, subject to several well-established exceptions, none of which this bill would alter.[16] The Section 1447(d) bar has been held to preclude appellate review of remand orders that followed removal under the federal officer statute, even in a case where the federal official had raised substantial defenses and had no opportunity to litigate the Section 1442 issue before the district court.[17]

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[14] S. Rep. No. 104-366, at 30-31 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 4202.

[15] *Osborn v. Haley*, 549 U.S. 225, 243 (2007) (*citing United States v. Rice*, 327 U.S. 742, 751 (1946)).

[16] There are at least two classes of recognized exceptions, neither of which the bill would alter in any way. First, there is an exception added by Congress in 1964 into the text of § 1447(d) to this bar on appellate review for "an order remanding a case to the State court from which it was removed pursuant to Section 1443," which is a provision concerning civil rights claims. Second, under the Supreme Court's interpretation of § 1447 in a line of cases beginning with *Thermtron v. Hermansdorfer*, 423 U.S. 336 (1976), *abrogated on other grounds*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 714-15 (1996), direct appellate review of a remand order is proper where the remand is based on a ground *other* than the two specified in 28 U.S.C. § 1447(c) — *i.e.*, lack of subject matter jurisdiction, or a defect in removal procedure. The Supreme Court has repeatedly held that 28 U.S.C. § 1447(d) must be read in *pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d). *See Carlsbad Tech., Inc. v. HIF BIO, Inc.*, 129 S. Ct. 1862, 1866-67 (2009); *Quackenbush*, 517 U.S. at 711-12; *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Thermtron*, 423 U.S. at 345-46.

[17] *See Price v. Johnson*, 600 F.3d 460, 462 (5th Cir. 2010).

III. The Proposed Bill's Amendments to Sections 1442 and 1447

The bill as drafted makes three material clarifications to the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and adds an additional exception to the Section 1447(d) statutory bar on appellate review of remand orders.

As to Section 1442, *first*, the bill clarifies that the terms "civil action" and "criminal prosecution" include, as the draft bill states, "any proceeding in which a judicial order, including a subpoena for testimony or documents, is sought or issued." *Second*, the bill clarifies that the term "against" a federal officer includes a proceeding in which a judicial order is "directed to" the federal officer in question, and that a civil action or criminal prosecution that is either "for" or "related to" a federal officer's conduct in his or her official capacity may qualify for removal under the statute. These language clarifications reaffirm that ancillary proceedings, such as subpoena enforcement matters and pre-suit discovery proceedings, fall within the scope of Section 1442. *Third*, the bill makes clear that a federal officer served with a state court subpoena that demands information about his federal activities can remove the subpoena proceeding to federal court without, as a number of courts have held, having first to stand in contempt of the state court.

As to Section 1447, the bill amends subsection (d) to permit a federal officer to appeal a district court's remand order if the federal officer removed under Section 1442 and the district court remanded the case — a scenario that should be exceedingly rare in the wake of the clarifying amendments to Section 1442.

Without these clarifications, Section 1442(a) leaves federal officers exposed to random, disparate treatment depending on where and how they are haled into state court, and Section 1447(d) may leave them with no right of appeal from erroneous remand orders. There are a number of recent cases, discussed below, that demonstrate why this legislation is warranted.

IV. Selected Relevant Judicial Decisions Illustrating the Need for the Bill

A. Subpoenas to Federal Officers

In the context of subpoenas issued to federal officers in state court proceedings, the Circuits have split on whether a state court must initiate contempt proceedings before a federal officer may remove to federal court. The proposed legislation would provide uniformity and reaffirm and codify the standard employed by the cases that have held that federal officers do not need to subject themselves to contempt before removing the subpoena proceedings under the federal officer removal statute. Under the bill's clarifying provisions, they would be able to remove the proceeding to federal court provided that they otherwise meet the requirements of the federal officer removal statute.

1. A Federal Officer May Remove a State Court Subpoena Prior to Contempt Proceedings.

In *Brown & Williamson Tobacco Corp. v. Williams*, the D.C. Circuit held that once a state court subpoena is directed to a federal officer, the federal officer may properly remove the subpoena matter to federal court under Section 1442(a).[18] Under this holding, it is not necessary that a federal officer stand in actual contempt of the state court in order for the subpoena proceeding to be removed to the appropriate federal district court. The D.C. Circuit stated:

> Once the subpoena is issued, a clash between state power and the federal official appears to be naturally inevitable. Certainly in any case in which the officer (typically represented by the federal government or Congress) seeks removal, we can assume the officer would be prepared to force the matter to a contempt proceeding—at which point removal is clearly available. Appellant has not suggested any reason why Congress would have wished that confrontation to be actually ignited before removal. We think, therefore, that the officer's "act," declining to comply with the subpoena, can be presumed to occur simultaneously with the removal petition. We do not believe Congress used the terms "civil action," "against," or "act" in the limited fashion that appellant urges, but rather meant to refer to any proceeding in which state judicial civil power was invoked against a federal official.[19]

Courts in at least five other Circuits have likewise indicated that a federal officer may remove to federal court without waiting for contempt proceedings to be initiated.[20] Most recently, a federal official was subpoenaed to appear in a North Carolina state court divorce proceeding about actions he took in his official capacity.[21] The official removed

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[18] *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 412-15 (D.C. Cir. 1995).

[19] *Brown & Williamson*, 62 F.3d at 415.

[20] *See, e.g., Smith v. Cromer*, 159 F.3d 875, 883 (4th Cir. 1998) (affirming order on merits that followed removal pursuant to § 1442(a) where Department of Justice employees refused to testify in response to state court subpoena); *Edwards v. United States Dep't of Justice*, 43 F.3d 312, 317 (7th Cir. 1994) (affirming grant of motion to quash that followed removal pursuant to § 1442(a) where Department of Justice refused to produce FBI surveillance reports in response to state court subpoena); *Nationwide Investors v. Miller*, 793 F.2d 1044, 1045 (9th Cir. 1986) ("At least part of the purpose of Section 1442(a)(1) is to prevent state courts from unlimited exercise of their subpoena power against federal officers upon pain of contempt."); *Pollock v. Barbosa Group, Inc.*, 478 F. Supp. 2d 410, 412 (W.D.N.Y. 2007); *Ferrell v. Yarberry*, 848 F.Supp. 121, 122-23 (E.D. Ark. 1994).

[21] *In re Subpoena to Appear and Testify to U.S. Representative Patrick T. McHenry, in Lampe v. Lampe*, 08-CVD-1865, (Dist. Ct., Caldwell Cty., N.C., 2009).

to federal court under Section 1442(a)(1) and filed a motion to quash. The district court accepted the removal and resolved the motion to quash.[22]

2. Certain Federal Courts Require Contempt Proceedings Against Federal Officers Before They May Remove to Federal Court.

Other courts have taken an approach to Section 1442(a) very different from that of the D.C. Circuit and other courts applying the same approach, and have required that the state court initiate contempt proceedings or that the federal officer actually be held in contempt in order to allow removal under Section 1442.[23]

This view was articulated recently in the *Stallworth* case, an Alabama case involving a federal bank examiner who was the subject of a deposition subpoena seeking information about her official federal activities in a state court slander/libel case.[24] After the examiner was served with a deposition subpoena, she removed the matter to a federal district court. The district court rejected removal and remanded the matter back to the state court. The district court specifically considered and rejected the *Brown & Williamson* line of reasoning.[25] Rather, the court concluded that removal was premature, because "the appropriate time to invoke federal jurisdiction under § 1442(a)(1) is the point at which contempt proceedings are initiated against the federal employee by the state court."[26]

Confusing the issue even more is that where the Circuits follow the rule that a federal officer must stand in contempt of a state court before permitting removal, exceptions are still allowed based on the peculiarities of state law. For example, under Louisiana law, a state court may immediately cite a federal officer for contempt for refusing to comply with a subpoena without either notice or a show cause proceeding. Based on this State law, the Fifth Circuit, which usually requires a contempt proceeding in a subpoena matter before allowing removal, permitted removal by a federal officer without initiation of contempt proceedings, but did so in a manner that limited the

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[22] *In re Subpoena to Appear and Testify to U.S. Representative Patrick T. McHenry, in Lampe v. Lampe*, 08-CVD-1865, (Dist. Ct., Caldwell Cty., N.C., 2009), Misc. Case. No. 5:09-mc-5 (W.D.N.C. Dec. 3, 2009) (order granting motion to quash).

[23] *See, e.g., 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. Schaffer*, 565 F.2d 961, 964 (7th Cir. 1977); *Boron Oil Co. v. Downie,* 873 F.2d 67, 68 (4th Cir. 1989) (citing *North Carolina v. Carr*, 386 F.2d 129, 130 (4th Cir. 1967)).

[24] *Stallworth v. Hollinger*, 489 F.Supp.2d 1305 (S.D. Ala. May 24, 2007).

[25] *Id.* at 1309.

[26] *Id.* at 1307.

holding to the facts of the case. Thus, the Court held, under these circumstances, the mere issuance of the subpoena triggered Section 1442.[27]

The proposed bill would bring needed clarity and uniformity by rejecting the *Stallworth* approach, and by codifying the *Brown & Williamson* approach ensuring that no contempt proceeding need be threatened or brought against a subpoenaed federal official in order for the official to remove the subpoena proceeding to federal court.

B. Pre-Suit Discovery

As shown in the Appendix attached to my testimony, nearly every State has some type of pre-suit discovery provision that allows individuals to be deposed and/or required to produce documents even though they have not yet been — and may never be — sued. The state statutes differ in their scope and application. Many, mirroring the text of Federal Rule of Civil Procedure 27, permit pre-suit discovery for the limited purpose of preserving testimony where there is an expectation that the witness will be unavailable when the action is commenced.[28] In other States, the rules are broader, allowing potential plaintiffs to use pre-suit discovery to investigate potential claims, confirm the identity of the putative defendant, identify unknown potential defendants, or verify factual allegations.[29] Texas is viewed by some as the State with the most expansive pre-suit discovery rule in the nation, allowing for the investigation of possible claims, and one commentator has noted that state courts in Texas provide very little supervision to ensure that there is no abuse of this pre-suit discovery device.[30]

Recent cases reveal that a federal official subject to pre-suit discovery in one state may receive very different treatment than a similarly situated federal officer served with a pre-suit discovery petition in another. As the case studies described below demonstrate, the outcomes, even within the same federal Circuit, are not consistent.

1. *Price v. Johnson*

In 2009, a county commissioner in Texas filed a petition in state court pursuant to Texas Rule of Civil Procedure 202 to take pre-suit deposition testimony from a Member of Congress.[31] The purported purpose of the petition was to investigate a potential defamation claim against the Member of Congress in connection with an interview she gave to a local newspaper that concerned transportation issues of importance to her constituents and the region. The fact that the interview was tape-recorded and available

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[27] *Louisiana v. Sparks*, 978 F.2d 226, 231-32 (5th Cir. 1992).

[28] *See* Appendix § B.

[29] *See* Appendix § A.

[30] Lonny Hoffman, *Access to Information, Access to Justice: The Key Role of Presuit Investigatory Discovery*, 40 U. Mich. J.L. Reform 217, 259 (2007).

[31] *Price v. Johnson*, 09-2362 (14th Judicial Dist., Dallas Cty. Feb. 27, 2009).

on the internet cast considerable doubt on whether there was any legitimate need for such pre-suit investigation. The Member removed the proceeding to federal court pursuant to Section 1442(a)(1) and promptly moved to dismiss on several substantive federal law grounds.[32] The commissioner, without responding to that motion, moved to remand. The district court immediately granted the remand motion, sending the matter back to state court without waiting to hear from the Member of Congress.[33] The only articulated ground for the remand was that a "[p]etition for authorization to take depositions before suit [under Texas Rule of Civil Procedure 202] is not a removable 'civil action' under 28 U.S.C. § 1442(a)(1)."[34]

The Member appealed the remand order to the Fifth Circuit, and the state court stayed all further proceedings in that court pending disposition of the Fifth Circuit appeal. The Fifth Circuit — like the district court — never considered the federal official's arguments that removal was proper and authorized. Instead, the Fifth Circuit held that Section 1447(d) barred it from considering Congresswoman Johnson's appeal of the remand.[35] The case is now back in Texas state court.

2. *In re Charlotte White*

In re Charlotte White, also filed quite recently in the same Circuit as the *Price* matter just described and involving materially identical facts, the district court reached the *opposite* result. Unlike *Price*, the result of the *White* case is consistent with the intent of Congress in passing the federal officer removal statute in 1948, and would be mandated by the clarification in the pending bill.

In *White*, an aide to a U.S. Senator from Louisiana was the subject of a petition for pre-suit deposition in a Louisiana state court.[36] That petition is, for all material purposes, identical to the *Price* petition. The aide, like the federal official in the *Price* case, removed the petition to federal district court and asserted a federal defense in a motion to dismiss.[37] The federal district court in Louisiana, however, in stark contrast to the district court in the *Price* case, accepted the removed action, thereby implicitly

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[32] *See* Motion to Dismiss, *Price v. Johnson*, No. 3:09-cv-476 (N.D. Tex. Mar. 13, 2009).

[33] *See Price v. Johnson*, 600 F.3d 460, 462 (5th Cir. 2010).

[34] *See* Order, *Price v. Johnson*, No. 3:09-cv-476 (N.D. Tex. Apr. 10, 2009).

[35] *See Price v. Johnson*, 600 F.3d 460, 462-63 (5th Cir. 2010); Order On Petition for Rehearing En Banc, *Price v. Johnson*, No. 09-10389 (5th Cir. Apr. 29, 2010) (denying the petition for *en banc* review).

[36] *See* Petition, *In re: Charlotte White*, No. 10-185 (E.D. La. Nov. 20, 2009).

[37] *See* Notice of Removal, *In re: Charlotte White*, No. 10-185 (E.D. La. Jan. 27, 2010); Motion to Dismiss, *In re: Charlotte White*, No. 10-185 (E.D. La. Feb. 5, 2010).

concluding that the petition was a "civil action" within the meaning of Section 1442(a), and, concluding that it had subject matter jurisdiction, dismissed the petition.[38]

Louisiana and Texas are both in the Fifth Circuit. When two district courts in the same Circuit, faced with materially identical facts, reach such different results, the perception of justice and the rule of law are undermined. Congress should exercise its authority to clarify the federal officer removal statute so that virtually identical cases will be treated identically. Under Section 1442 as amended by the bill's welcomed clarifying provisions, the removal of both cases to federal court would have been effective.

Conclusion

Without the needed clarifications set forth in the bill, the judicial interpretations by certain federal courts of Section 1442 have the potential to close the federal courthouse door to many federal officers – including executive branch officials, up to and including the President, as well as judges and Members of Congress and their staffs – when they are subjected to subpoenas, pre-suit discovery petitions or other orders of state courts relating to their federal responsibilities. Without this legislation, each district court — without any judicial review — will under the current version of Section 1447(d) make its own determination of whether such a proceeding is an "action" that can be removed to federal court. There is no reason that identically situated federal officials should be treated differently depending on what State or in what judicial district they happen to be served with process. This is particularly true when many of these state processes, including pre-suit discovery and subpoenas, are subject to being abused for political or other reasons. The significance of this problem is magnified by additional considerations — including that in some States trial judges are elected, and that in some States their decisions on pre-suit discovery petitions are not appealable in the state courts.[39]

The bill responds to these problems by bringing needed clarity and uniformity to the application of the federal officer removal statute. The bill will promote uniformity and predictability across the country by making clear that removal is proper in subpoena enforcement, pre-suit discovery, and other ancillary proceedings where a federal official is haled into state court and has available a defense under federal law. Accordingly, on behalf of the Office of General Counsel of the House, I respectfully urge the Courts and Competition Policy Subcommittee of the House Committee on the Judiciary to give every favorable consideration to the Removal Clarification Act of 2010. Thank you.

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[38] *See* Order and Reasons, *In re: Charlotte White*, No. 10-185 (E.D. La. Mar. 10, 2010). For an example of a similar result outside the Fifth Circuit, *see Kelly v. Whitney*, 1998 WL 877625 at *1 (D. Ore. Oct. 27, 1998) (after several IRS employees were the subject of a pre-suit discovery petition filed in Oregon state court, the district court accepted removal under Section 1442(a)(1), declined to remand, and dismissed the action on the ground that the plaintiff's petition failed to satisfy the requirements of Federal Rule of Civil Procedure 27).

[39] *See, e.g.*, *In re Jorden*, 249 S.W.3d 416, 419 n.8 (Tex. 2008).

Appendix to Testimony of Irvin B. Nathan, General Counsel, U.S. House of Representatives Before the Courts and Competition Policy Subcommittee of the House Committee on the Judiciary

Collection of State Rules Regarding Pre-Suit Discovery

This Appendix divides the States into three categories. First, the Appendix lists those state pre-suit discovery provisions that employ a standard broader than that of Federal Rule of Civil Procedure Rule 27. Second, it lists those States with pre-suit discovery provisions that use or mirror the language of Rule 27 of the Federal Rules of Civil Procedure. Third, it lists the handful of States that do not appear to have pre-suit discovery provisions.

A. States with Pre-Suit Discovery Provisions Broader Than Federal Rule of Civil Procedure Rule 27

1) Alabama: Ala. R. Civ. P. 27 (if justice so requires the court may order depositions, both oral or written, to be taken, or may compel discovery of specific "objects"); *Young v. Hyundai Motor Mfg. Alabama, LLC*, 575 F. Supp. 2d 1251, 1253 (M.D. Ala. 2008) (Rule 27 of the Alabama Rules of Civil Procedure "has been construed as being broader than its federal counterpart" because unlike the federal rule it "permits persons to seek pre-suit discovery for the purpose of investigating and evaluating a potential claim.")

2) California: Cal. Civ. Code 2035-010 (evidence reasonably calculated to lead to admissibility may be perpetuated by depositions, interrogatories, document inspection, requests for admission, and mental and physical examinations so long as the rule is not be used to determine if a cause of action exists or to identify who shall be made party to an action)

3) Iowa: Iowa R. Civ. P 1.722-29 (if the applicant is unable to bring the action, then the court shall determine whether written or oral interrogatories are appropriate and such depositions must be filed within 30 days after the date fixed by the court for taking the deposition and a guardian ad litem must be present at the deposition if a party has not yet been served with notice); *Stewart v. Foster Wheeler Energy Corp.*, 2008 WL 4189010 at *1 (Iowa Dist. Jan. 17, 2008) (The Iowa Rule is distinctive from its federal counterpart because "contains a specific rule of exclusion for depositions taken in contravention of the requirement for a guardian ad litem to be present at the deposition to represent parties not yet served with notice.")

4) Maryland: Md. R. P. Circ. Ct. 2-404 and 3-431 (with leave of court for good cause a party may obtain discovery of documentary evidence as well as physical or medical examinations); *Allen v. Allen*, 659 A.2d 411, 416 (Md. App. 1995) (Maryland Rule 2-404 provides in pertinent part that it "has taken a more expansive approach than its federal counterpart insofar as it provides for the perpetuation of documentary evidence and mental and physical examinations in addition to testimonial evidence.")

5) New York: N.Y. Civ. Prac. L. & R. § 3102(c) ("Before an action is commenced, disclosure [by depositions, interrogatories, demands for addresses, discovery and inspection of documents or property, physical and mental examinations of persons, and requests for admission] to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order."); *Dublin Worldwide Prods. (USA), Inc. v. Jam Theatricals, Ltd.*, 162 F. Supp. 2d 275, 277 (S.D.N.Y. 2001) (". . . Counsel . . . [sought] discovery pursuant to N.Y.C.P.L.R. 3102(c)—'to aid in bringing an action,' a provision offering broader pre-action discovery than comparable federal procedure.") (citing Fed. R. Civ. P. 27(a))

6) Pennsylvania: Pa. R. Civ. P. 4003.8 ("A plaintiff may obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden or expense to any person or party.")

7) Texas: Tex. R. Civ. P. 202.1 ("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."); *In re Am. State Bank to Obtain Testimony of Wade*, No. 07-03-0483, 2005 WL 1967262, at *1 (Tex. App. 2005) ("Rule 202 is 'a rewrite of former Rule 187 [whose language was identical to Fed. R. Civ. P. 27] that is broadened somewhat to expressly permit discovery depositions prior to suit and to investigate potential claims.'")

B. State Pre-Suit Discovery Provisions Using or Mirroring the Language of Federal Rule of Civil Procedure Rule 27

1) Alaska: Alaska R. Civ. Pro. 27

2) Arizona: Ariz. R. Civ. P. 27(a)

3) Arkansas: Ark. R. Civ. P. 27(a)

4) Colorado: Colo. R. Civ. Pro. 27

5) District of Columbia: D.C. Sup. Ct. R. Civ. P. 27(a)

6) Florida: Fla. R. Civ. P. 1.290

7) Georgia: Ga. Code Ann. § 9-11-27

8) Hawaii: Haw. R. Civ. P. 27(a)

9) Idaho: Idaho R. Civ. P. 27(a)

10) Illinois: Ill. Sup. Ct. R. Civ. P. Trial Ct. 217

11) Indiana: Ind. R. Civ. P. 27

12) Kentucky: Ky. R. Civ. Pro 27.01

13) Louisiana: La. Code Civ. P. § 1429-30

14) Massachusetts: Mass. R. Civ. P. 27

15) Maine: Me. R. Civ. P. 27(a)

16) Michigan: Mich. R. Civ. P. 2.303(a)

17) Minnesota: Minn. R. Civ. P. 27.01

18) Missouri: Mo. R. Civ. P. 57.02

19) Mississippi: Miss. R. Civ. P. 27(a)

20) Montana: Mont. R. Civ. P. 27(a)

21) Nevada: Nev. R. Civ. P. 27(a)

22) New Jersey: N.J. R. Ct. 4:11-1

23) New Mexico: N.M. R. Ann. 1-027

24) North Carolina: N.C. R. Civ. P. 27(a)

25) North Dakota: N.D. R. Civ. P. 27(a)

26) Ohio: Ohio R. Civ. P. 27(a)

27) Oklahoma: Okla. R. Civ. P. 27(a)

28) Rhode Island: R.I. R. Civ. P. 27(a)

29) South Carolina: S.C. R. Civ. P. 27(a)

30) South Dakota: S.D. R. Civ. P. § 15-6-27(a)

31) Tennessee: Tenn. R. Civ. P. 27(a)

32) Utah: Utah R. Civ. P. 27(a)

33) Vermont: Vt. R. Civ. P. 27(a)

34) Virginia: Va. R. Civ. P. 4:2(a)

35) Washington: Wash. R. Civ. P. 27(a)

36) West Virginia: W. Va. R. Civ. P. 27(a)

37) Wisconsin: Wis. St. Ann. § 804.02(1)(a)

38) Wyoming: Wyo. R. Civ. P. 27(a)

C. States That Do Not Appear to Have Pre-Suit Discovery Provisions

1) Connecticut

2) Delaware

3) Kansas

4) New Hampshire

5) Oregon