IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MONTGOMERY BLAIR SIBLEY,	)	
Plaintiff,	)	
v.	)	
THE HONORABLE MITCH MCCONNELL SOLELY IN HIS CAPACITY AS MAJORITY LEADER OF THE SENATE,	)	**Case No. 15-730(JB)**
AND	)	
THE HONORABLE JOHN BOEHNER SOLELY IN HIS CAPACITY AS SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES,	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO REMAND OF DEFENDANT THE HONORABLE MITCH McCONNELL

Introduction and Summary

Defendant, the Honorable Mitch McConnell, Majority Leader of the United States Senate, through the undersigned counsel, files this Memorandum of Law in Opposition To Plaintiff's Motion To Remand.

In urging this Court to remand the action to the Superior Court for the District of Columbia, Plaintiff initially argued that the removal was unlawful because 28 U.S.C. § 1441 is

unconstitutional.[1] But because Defendants also removed based on 28 U.S.C. § 1442(a)(1), they were entitled to removal based on that provision.[2]

Plaintiff also contends that, because he lacks standing, this Court lacks subject matter jurisdiction. He argues that 28 U.S.C. § 1447(c), therefore, precludes this Court from dismissing his claims and, instead, requires it to remand the action to Superior Court.

Here, Plaintiff again ignores 28 U.S.C. § 1442(a)(1), which entitles a federal officer to remove a civil action. Section 1442(a)(1) gives a district court removal jurisdiction to consider a federal officer's federal defense. It thereby ensures a federal forum for the presentation of a federal defense by a federal officer, including defenses that are jurisdictional in nature. When read in conjunction with section 1442(a)(1), section 1447(c) does not require a district court to remand an action properly removed by a federal officer where, as here, the Speech or Debate Clause presents a federal defense that deprives the Court of jurisdiction to review the merits of Plaintiff's claim.

THE DISTRICT COURT MAY DISMISS THE COMPLAINT BECAUSE 28 U.S.C. § 1447(c) DOES NOT REQUIRE A REMAND OF AN ACTION PROPERLY REMOVED UNDER 28 U.S.C. § 1442(a).

1. McConnell Properly Removed the Action.

Senator McConnell properly removed this action under 28 U.S.C. § 1441 and 28 U.S.C. § 1442(a). Under Section 1442(a), any officer of the United States may remove a civil action begun in a state court to the federal district court embracing the place where it is pending.

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[1] Plaintiff has withdrawn that argument. See Plaintiff Reply in Support of Motion To Remand at 1-2.

[2] We address Plaintiff's argument that this Court must address his Motion to Remand before

Because Senator McConnell is an officer of the United States, his right to remove this action is clear.

McConnell was also entitled to remove the action under 28 U.S.C. § 1441. Under Section 1441, except as otherwise expressly provided, a party may remove any civil action brought in state court over which the district court has original jurisdiction to the federal district court embracing the place where it is pending. Because the Complaint challenges the failure of McConnell and Speaker Boehner to call for the convening of a Constitutional convention, this action alleges a failure to discharge a duty under federal law. Inasmuch as this Court would have original jurisdiction over this action, it has removal jurisdiction, too.

Section 1442(a) guarantees a federal officer a right to remove an action brought against him in state court where he can allege a colorable federal defense. See Mesa v. California, 489 U.S. 121, 133 (1988); In re Subpoena In Collins, 524 F.3d 249, 251 (D.C. Cir. 2008); Jamison v. Wiley, 14 F.3d 222, 238 (4th Cir. 1994). As discussed in his Memorandum of Law in Support of his Motion To Dismiss, McConnell raises his immunity from suit under the Speech or Debate clause of the Constitution as a federal defense.

In removing the action under section 1442(a), Senator McConnell relied upon a statute that forms a condition upon the waiver of sovereign immunity that Defendant enjoys as an officer of the United States. See generally Stanley v. Schwalby, 162 U.S. 255, 270 (1896). This provision guarantees Defendant's right to remove an action brought against him in state court

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addressing Defendants' motions to dismiss at pages 12-13 infra.

because he alleges a colorable federal defense. See Jamison v. Wiley, 14 F.3d at 238; 14A C. Wright & A. Miller, Federal Practice & Procedure, § 3739 at 582. And, where a defendant has properly removed an action under 1442(a), a district court still retains jurisdiction even should it deny the federal defense. See Jamison v. Wiley, 14 F.3d at 238; Bennett v. MIS Corp., 607 F.3d 1076, 1091 n. 13 (6th Cir. 2010).Thus, unlike section 1441, section 1442 removal jurisdiction does not depend on the federal court's original jurisdiction over the plaintiff's claim. See, e.g., Broom v. Dudley, 883 F. Supp. 1091, 1097 (E.D. Mich. 1994) (district court reaches merits defense after rejecting federal defense that formed grounds for removal).

Plaintiff errs in challenging the legality of the removal. Plaintiff no longer challenges the constitutionality or applicability of section 1441, and ignores section 1442(a).

2. Because Section 1442(a) Forms An Independent Grant of Jurisdiction, Section 1447(c) Does Not Require the District Court To Remand An Action Removed Under Section 1442(a).

Plaintiff next argues that, even if Defendants properly removed this action, this Court must remand it to Superior Court because this Court lacks jurisdiction given that Plaintiff lacks standing.

To begin with, even if Plaintiff were right, remand would not affect the ultimate disposition of the action. Because Plaintiff admittedly lacks standing under District of Columbia law, the Superior Court would also be compelled to dismiss the action for want of jurisdiction.[3]

[3] See Fraternal Order of Police v. District of Columbia, 113 A.3d 195, 199 (2015) (D.C. Courts will generally follow federal law as to standing); Grayson v. AT&T Corp., 15 A.3d 219, 235 n. 38 (2011) (same).

But, in fact, this Court need not remand the action because section 1442(a)(1) provides the authority to hear a federal officer's defense under federal law. Defendants' jurisdictional defenses, including their Speech or Debate Clause immunity, assure their access to a federal forum rather than impair that access.

To determine whether it must remand the action, this Court must reconcile 28 U.S.C. § 1442(a)(1) with 28 U.S.C.§ 1447(c). A court must read these statutes together so as to give meaning and effect to each. See Ricci v. DeStefano, 557 U.S. 557, 580 (2009); Citizens To Save Spencer County v. EPA, 600 F.2d 844, 871 n. 1122 (D.C. Cir. 1979); Atwell v . MSPB, 670 F.2d 272, 282 (D.C. Cir. 1981). This principle applies with special force where, as here, the statutes are *in pari materia*, i.e., they pertain to the same person or class of persons. See United States v. Fillman, 162 F.3d 1055, 1057 (10th Cir. 1998).

Section 1447(c) directs a district court to remand an action where it appears at any time before final judgment that it lacks subject matter jurisdiction. But Section 1442(a)(1) permits an officer of the United States or a federal agency to remove a civil action or criminal prosecution from state court to federal district court.

Section 1442(a)(1) guarantees a federal officer the right to present any federal defense in a federal forum. See Willingham v. Morgan, 395 U.S. 402, 405 (1969). In Willingham, the Supreme Court reversed the court of appeals' order requiring a remand to state court of an action properly removed under section 1442(a)(1). The Court explained that, in order to carry out section 1442(a)(1)'s purpose, "the right of removal under § 1442(a)(1) is made *absolute* whenever a suit in state court is for any act 'under color' of federal office, regardless of whether

the suit could originally have been brought in a federal court. Federal jurisdiction rests on a 'federal interest in the matter.'" Id. at 406 (emphasis added). Based on this reasoning, the Court held that, notwithstanding section 1447(c), the district court retained authority to consider the officer's federal defense and grant relief.

> In fact, one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court. * * * In cases like this one, Congress has decided that federal officers, and indeed the federal government itself, require the protection of a federal forum.

Id. at 407. See also IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc., 676 F.2d 152, 156 (5th Cir. 1982) ("§ 1442 itself grants independent jurisdictional grounds over cases involving federal officers where a district court otherwise would not have jurisdiction"). Because Defendants properly removed this action, this Court may do what section 1442(a) contemplates: address a federal officer's federal defense. See Jamison v. Wiley, 14 F.3d at 237; 14A C. Wright & A. Miller, Federal Practice & Procedure, § 3739 at 582. That principle applies equally where the federal defense is jurisdictional in nature. The district court's authority to address the officer's federal defense reflects the settled principle that a federal court has jurisdiction to evaluate its jurisdiction. See Valentin v. Hospital Bella Vista, 254 F.3d 358, 363 (1st Cir. 2001); Smith v. Orr, 855 F.2d 1544, 1551 (Fed. Cir. 1988).

Plaintiff mistakenly relies on the wording of § 1447(c) without reconciling it with section 1442(a)(1)'s guarantee to any federal officer. The language in 1447(c) requiring that a case "shall be remanded" wherever it appears that a district court lacks subject matter jurisdiction over a removed case must be read together with section 1442(a)(1) in any case removed under

that section. Otherwise, 1447(c) would thwart 1442(a)(1)'s purpose of providing a federal officer a federal forum to hear any federal defense. Thus, although section 1447(c) may require remand of cases not involving a federal officer's defense where the district court lacks subject matter jurisdiction, it does not require a remand of an action properly removed under section 1442.

Moreover, Defendants' construction reflects the most sensible reading of these two complementary provisions. Many federal defenses, including sovereign immunity and the Speech or Debate Clause, are jurisdictional. If section 1447(c) required an immediate remand whenever a district court lacked jurisdiction to review the merits of a case properly removed under section 1442(a)(1), the removal would deprive the federal officer of the benefit Congress provided: a federal forum to determine a federal law defense.

That requirement would make section 1442(a)(1) an empty promise. Although a federal officer could remove an action to federal court briefly, he could not present his federal defense there if that defense were jurisdictional. And that promise would go unfulfilled even in a case like this one, where the district court's lack of jurisdiction is attributable to the plaintiff's lack of standing or to Defendants' immunity under the Speech or Debate Clause.

Moreover, allowing section 1447(c) to trump section 1442(a)(1) would leave plaintiffs with no forum. The United States, its agencies, and officers may be sued only with the federal government's consent. See United States v. Testan, 424 U.S. 392 (1976). As the Supreme Court observed more than a hundred years ago, Congress has not given the government's consent to be sued in the courts of any state. See Stanley v. Schwalby, 162 U.S. at 270. Therefore, should a district court remand a suit against a federal officer that was properly removed under section

1442(a)(1), sovereign immunity would require the state court to dismiss the action. Tellingly, dismissal would be mandatory even where the plaintiff has standing. Congress surely did not create a framework for removal and remand that compels litigants to have their cases transferred to a forum that must then immediately dismiss the action.

Furthermore, the legislative history of 28 U.S.C. § 1447(c) also supports the proposition that this provision does not require remand where a federal officer has properly removed an action under 28 U.S.C. § 1442(a)(1). See Consolidated Opposition of Speaker John Boehner at 12-17.[4]

The weight of authority also shows that remand is not mandatory here. District courts often retain jurisdiction over a removed action long enough to dismiss a federal defendant after holding that they lack jurisdiction over a nonfederal co-defendant. For example, in State of Nebraska ex rel. Department of Social Services v. Bentson, 146 F.3d 676 (9th Cir. 1998), an action that the State of Nebraska brought in state court, Bentson, the defendant, sought to enjoin Nebraska from collecting certain payments. After the state court included the IRS as the State's collection agent, the IRS removed the action to district court under 28 U.S.C. § 1442(a)(1). Bentson moved to remand contending that removal was improper because a federal statute barred federal courts from asserting subject matter jurisdiction. As the court of appeals observed, "[t]he district court disagreed with Bentson and dismissed the IRS from the action before remanding the case back to state court." Id. at 678. In upholding the removal, the Court also observed that section 1442 gave "the district court authority to determine whether it had

[4] Defendant McConnell incorporates by reference the arguments presented in Defendant

jurisdiction over the claim against the IRS." Id. at 679. And it explained that section 1447(c) did not require immediate remand, i.e., before the district court dismissed IRS from the action. Where, as here, neither the district court nor the state court has jurisdiction over the federal defendant, dismissal of the federal defendant is appropriate notwithstanding section 1447(c).

In an action removed under 28 U.S.C. § 1441, this Court reached a similar conclusion. In Williams v. The Purdue Pharma Co., 297 F. Supp. 2d 171 (D.D.C. 2003), plaintiffs brought a class action in Superior Court against several drug manufacturers for civil conspiracy. Defendants first removed the action under section 1441 and then moved to dismiss the complaint. Although the district court held that plaintiffs lacked standing, it nevertheless dismissed the complaint instead of remanding the action to Superior Court. Id. at 178. Thus, in Williams, which involved *private* defendants, the court dismissed the action rather than remanding it despite holding that it lacked jurisdiction. See also Cox v. Hegvet, 2009 WL 1407009 (D. Id., May 19, 2009) (after concluding that it lacked derivative jurisdiction because the state court lacked jurisdiction, district court dismissed Bureau of Land Management, which had properly removed under section 1442(a)(1) rather than remand to state court); Leitner v. United States, 679 F. Supp. 2d 37, 41 (D.D.C. 2010).

In Johnson v. Showers, 747 F.2d 1228 (8th Cir. 1984), the Eighth Circuit reversed the taxation of costs against the federal government that plaintiff had incurred in connection with a removal that preceded a remand to state court for further proceedings against a private defendant. As the court of appeals explained, "the district court's lack of subject matter jurisdiction over the

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Boehner's memorandum of law.

claim against the federal officer" does not "defeat section 1442(a)(1) removal jurisdiction." Although the court of appeals ultimately concluded that the district court lacked derivative jurisdiction because the state court from which the case was removed had lacked jurisdiction, it held that costs of removal could not be taxed against the federal government under 28 U.S.C. § 1447(c) because the removal had been proper. "[E]nsuring a federal forum for litigation of official defenses is precisely the purpose of section 1442(a)(1)." Id. "Section 1442 'itself grants independent jurisdictional grounds over cases involving federal officers where a district court otherwise would not have jurisdiction,'" quoting IMFC Professional Services, Inc. v. Latin American Home Health, Inc., 676 F.2d 121, 156 (5th Cir. 1982).

In contrast, the decisions suggesting that 1447(c) bars a district court from dismissing a federal defendant after it has determined that it lacks jurisdiction are readily distinguishable. Unlike this action, those decisions are not instances where a federal officer properly removed the action in conformity with section 1442(a)(1). Thus, because Sibley v. Alexander, 916 F. Supp. 2d 58 (D.D.C. 2013), did not involve a removal under 1442(a), this Court had no occasion to address the relationship between 1442(a)(1) and section 1447(c). Because the defendants in Alexander were not federal officers who had removed the action under 1442(a), the remand did not reflect a balancing of the right of federal officials to remove under section 1442(a)(1) against any duty the district court had to remand under section 1447(c). In fact, in most decisions where a district court has remanded an action under 1447(c), defendants removed under section 1441 because they were not federal officers.[5] Thus, interpreting Section 1447(c) to require remand in

[5] See Republic of Venezuela v. Phillip Morris, Inc., 287 F.3d 192 (D.C. Cir. 2002); Center For

those cases neither frustrated the purpose of the relevant removal provision, nor rendered it meaningless. That, of course, would be exactly the result should this Court deem remand necessary for a case properly removed under Section 1442(a).

Although the D.C. Circuit has neither adopted nor rejected a "futility exception" to Section 1447(c), Circuit precedent does not require the Court to remand Sibley's claims.[6] In reviewing Section 1441 removals, other judges in this District have interpreted language in Republic of Venezuela v. Philip Morris Inc., 287 F.3d 192, 196 (D.C. Cir. 2002) to "suggest that there is no futility exception to remand and that the plain language of section 1447(c) requires remand once a federal court concludes that it lacks subject matter jurisdiction over an action." Sibley v. Alexander, 916 F. Supp.2d at 64. See also Randolph v. ING Life Ins. & Annuity Co., 486 F. Supp.2d 1, 10 (D.D.C. 2007). But whatever precedential weight the pertinent language carries, that language merely paraphrases section 1447(c). Moreover, Republic of Venezuela did not present the question posed here – whether a case removed under section 1442 must be remanded to Superior Court if the federal defense involves subject matter jurisdiction. Given that the district court in Randolph did not address the adoption of a futility exception by other circuits, Randolph cannot be read to foreclose recognition of all exceptions to Section 1447(c). In any event, the Court need not determine whether a futility exception to Section 1441 removals

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Science In The Public Interest v. Burger King Corp., 534 F.Supp. 2d 141 (D.D.C. 2008); Randolph v. ING Life Insurance And Annuity Co., 486 F. Supp. 2d 1 (D.D.C. 2007); Chamberlain v. Mims, 2014 WL 6669138 (E.D. Cal. Nov. 24, 2014).

[6]Applying a futility exception, some courts have held that, where the court that would receive an action remanded under section 1447(c) must dismiss the action for want of subject matter jurisdiction, there is an implicit exception to the mandatory remand that permits the remanding court to dismiss the action itself. See Bell v. City of Kellogg, 922 F.2d 1418, 1424-25 (9th Cir.

should apply here because Defendants properly removed this case under Section 1442.

3. This Court Should Address Defendants' Motions to Dismiss Before Addressing Plaintiff's Motion To Remand.

This Court has discretion to decide Defendants' motions to dismiss before addressing Plaintiff's remand motion. In suggesting otherwise, Plaintiff misinterprets applicable Supreme Court precedent and ignores the jurisdictional nature of Speech or Debate Clause immunity.

More than fifteen years ago, the Supreme Court upheld a district court decision to address a defendant's motion to dismiss for lack of personal jurisdiction before considering the plaintiff's motion to remand for lack of subject matter jurisdiction in Ruhrgas v. Marathon Oil Co., 526 U.S. 574 (1999). "It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." Id. at 585. Subsequently, the Supreme Court held that a trial court may address even non-jurisdictional, threshold grounds before addressing its subject matter jurisdiction. See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 430-41 (2007) (addressing forum non conveniens before subject matter jurisdiction); Tenet v. Doe, 544 U.S. 1, 6 n. 4 (2005) (identifying examples of nonjurisdictional threshold grounds that may be considered before the merits).

Plaintiff errs in asserting that Speech or Debate Clause immunity is just another Rule 12(b)(6) merits defense. Reply to Boehner's Opposition to Second Motion to Remand at 4-6. Because such immunity is jurisdictional, this Court may consider Defendants' motions to dismiss before addressing the motion to remand. See Rangel v. Boehner, 785 F.3d 19, 22 (D.C. Cir. 2015) ("The district court dismissed [plaintiff]'s complaint on three grounds [standing, political

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1991); Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787 (5th Cir. 1990).

question, and Speech or Debate]- all jurisdictional. We can therefore address them in any order."). See also Howard v. Office of Chief Administrative Officer of the U.S. House of Representatives, 720 F.3d 939, 941 (D.C. Cir. 2013) (speech or debate clause a jurisdictional bar).

Conclusion

For these reasons, the Court should deny the motion to remand.

Dated: July 2, 2015

Respectfully submitted,

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