UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MONTGOMERY BLAIR SIBLEY, *Plaintiff-Appellee*, v. THE HONORABLE PAUL D. RYAN, *Solely in His Capacity as Speaker of the United States House of Representatives,* *Defendant-Appellant.*	Case No. 15-5295

OPPOSITION OF HONORABLE PAUL D. RYAN TO MOTIONS FOR SUMMARY AFFIRMANCE AND ORAL ARGUMENT

Kerry W. Kircher, General Counsel
William Pittard, Deputy General Counsel
Sarah Clouse, Senior Staff Attorney

OFFICE OF GENERAL COUNSEL
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)

Counsel for Defendant the Honorable Paul D. Ryan, Speaker of the United States House of Representatives

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INTRODUCTION

Summary affirmance – sought here by Plaintiff-Appellee Montgomery Blair Sibley with respect to the appeal by Defendant-Appellant the Honorable Paul D. Ryan, Speaker of the U.S. House of Representatives – is not appropriate. It is not appropriate because this appeal involves issues that are not "so clear as to justify summary action"; indeed, Speaker Ryan's appeal raises "issues of first impression for the Court." Handbook of Practice & Internal Procedures at 35-36 (D.C. Cir.) ("Circuit Handbook") (summary disposition generally not appropriate in such circumstances).

Mr. Sibley also seeks oral argument on his motion. Oral argument generally is not appropriate on a motion for summary disposition. ***See*** Fed. R. App. P. 27(e); Circuit Handbook at 31. Indeed, the request itself defeats Mr. Sibley's motion for summary affirmance. ***See, e.g., Taxpayers Watchdog, Inc.*** v. ***Stanley,*** 819 F.2d 294, 297-98 (D.C. Cir. 1987) (per curiam) ("To summarily affirm an order of the district court, this court must conclude that no benefit will be gained from further briefing ***and argument*** of the issues presented." (emphasis added)).

BACKGROUND

Mr. Sibley demands a court order directing that Speaker Ryan, and co-defendant the Honorable Mitch McConnell, Majority Leader for the United States Senate, call a "Convention for proposing Amendments," U.S. Const. art. V. ***See***

Compl. for Declaratory J. & Mandamus (Apr. 8, 2015) ("Original Complaint"), attached as Ex. A; First Am. Compl. for Declaratory J. & Mandamus (Oct. 21, 2015) ("Amended Complaint"), attached as Ex. B.[1]

In seeking such an (extraordinary) order, Mr. Sibley filed suit, against Majority Leader McConnell and the Speaker, in the Superior Court for the District of Columbia. ***See*** Original Compl.; Am. Compl. Majority Leader McConnell removed the case to federal court, including pursuant to the federal officer removal statute, 28 U.S.C. § 1442. ***See*** Notice of Removal of a Civil Action (May 13, 2015) (ECF No. 1).

In the District Court, the Speaker moved to dismiss, asserting his federal defenses, including particularly his immunity pursuant to the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1. ***See*** Mot. to Dismiss . . . (June 3, 2015) (ECF No. 11). Mr. Sibley moved to remand, and for sanctions. ***See*** Pl.'s [First] Mot. to Remand (May 26, 2015) (ECF No. 7) ("First Remand Motion"); Pl.'s Second Mot.

[1] In his Original Complaint and Amended Complaint, Mr. Sibley named as a defendant the Honorable John A. Boehner; Mr. Sibley did so "solely" in Mr. Boehner's capacity as "Speaker of the United States House of Representatives." Original Compl. ¶ 5, caption; Am. Compl. ¶ 5, caption. Subsequently, the House elected a new Speaker: Speaker Ryan. ***See*** 161 Cong. Rec. H7337-38 (daily ed. Oct. 29,2015). Upon his election and by operation of law, Speaker Ryan automatically was substituted as the defendant here. ***See*** Fed. R. App. P. 43(c)(2) ("The public officer's successor is automatically substituted as a party."); Fed. R. Civ. P. 25(d) (same); D.C. Super. Ct. Civ. R. 25(d)(1) (same); ***see also*** Appellee Sibley's Mots. for Summ. Affirmance & Oral Argument at 2 n.1 (Nov. 3,2015) ("Sibley Motion") (acknowledging same).

to Remand (June 4,2015) (ECF No. 13) ("Second Remand Motion"); Pl.'s Mot. for Rule 11 Sanctions (June 8,2015) (ECF No. 14). According to Mr. Sibley, his admitted lack of "an injury-in-fact which is concrete and particularized" foreclosed the District Court from dismissing based on the Speaker's federal defenses and, instead, required the Speaker to litigate those defenses in D.C. Superior Court. ***See*** First Remand Mot. at 4-6; Second Remand Mot. at 4-6.

The District Court largely agreed with Mr. Sibley. ***See*** Order (Oct. 13, 2015) (ECF No. 37); Mem. Op. (Oct. 13,2015) (ECF No. 38). It noted (i) Mr. Sibley's admitted lack of standing, and (ii) that "D.C. law seems relatively clear that its courts 'follow[] Supreme Court developments in constitutional standing jurisprudence with respect to whether the plaintiff has made out a case or controversy,'" Mem. Op. at 5-14 (quoting *Grayson* v. *AT&T Corp.*, 15 A.3d 219, 233 (D.C. 2011) (en banc)), yet remanded to Superior Court rather than dismiss Mr. Sibley's claims – all without considering the Speaker's Speech or Debate Clause defense, ***see*** id. In doing so, the District Court reasoned that, while this Court "has yet to enter the fray" on the necessity of remand where that remedy would be futile (the other Circuits, as the District Court acknowledged, are split on this issue), it suspected that remand was "the only appropriate outcome." Id. at 2, 9; ***see also*** id. at 10 ("Put another way, in the absence of D.C. Circuit or Supreme Court law supporting a futility exception to remand, the Court believes it

must grant Plaintiff's Motion to Remand this suit."). This result necessarily would leave Speaker Ryan – notwithstanding the federal officer removal statute – to litigate his Speech or Debate Clause immunity, along with any other federal defenses, in a local court, here D.C. Superior.[2]

Immediately following the District Court's Order and Memorandum Opinion, Mr. Sibley filed in D.C. Superior Court his Amended Complaint, purporting to state a class action against, among others, "four hundred thirty five (435) Members of the House of Representatives." Am. Comp. ¶ 7. Mr. Sibley also noticed a deposition of the Speaker, while serving additional discovery demands. ***See,*** *e.g.*, Pl.'s First Notice of Depositions (stating service date of Oct. 22, 2015), attached as Ex. C; Pl.'s[] First Req. for Admissions and First Req. to Produce to [the Speaker] (stating service date of Oct. 22, 2015), attached as Ex. D.[3]

On October 26,2015, the Speaker timely noticed this appeal. ***See*** Notice of Appeal (Oct. 26,2015) (ECF No. 39); 28 U.S.C. § 1447(d) ("[A]n order remanding a case to the State court from which it was removed pursuant to section 1442 . . . of

[2] The District Court did deny Mr. Sibley's motion for sanctions. ***See*** Order at 1; Mem. Op. at 12-13 ("Nothing in Defendants' filings appears remotely to be frivolous. Sibley's attempt to aggravate federal officials via yet another 'citizen suit,' on the other hand, hews far closer to the conduct Rule 11 interdicts.").

[3] The Speaker then moved to stay Mr. Sibley's claims as against him, pending this appeal, ***see*** Opposed Mot. to Stay, in Part, of Def. [Speaker] (Oct. 27, 2015), attached as Ex. E. which motion the Superior Court granted, ***see*** Order (Nov. 19, 2015), attached as Ex. F.

this title shall be reviewable by appeal or otherwise."). Eight days later, Mr. Sibley filed his Motion, to which this opposition responds.

STANDARD OF REVIEW

"A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified." ***Taxpayers Watchdog,*** 819 F.2d at 297-98; ***accord United States v. Allen,*** 408 F.2d 1287, 1288 (D.C. Cir. 1969) (per curiam) (denying motion). Indeed, "[t]o summarily affirm an order of the district court, this court must conclude that no benefit will be gained from further briefing and argument of the issues presented." ***Taxpayers Watchdog,*** 819 F.2d at 297-98. Accordingly, this Circuit has emphasized that summary dispositions generally are not appropriate where, as here, an appeal raises "issues of first impression for the Court." Circuit Handbook at 36; ***see also, e.g., Sills v. Bureau of Prisons***, 761 F.2d 792,793-94 (D.C. Cir. 1985) (summary disposition only appropriate in cases "so clear" that "plenary briefing, oral argument, and the traditional collegiality of the decisional process" will not benefit Court).

Oral argument is presumptively unavailable on a motion, and particularly on a motion for summary disposition. ***See*** Fed. R. App. P. 27(e) (oral argument presumptively unavailable with respect to motions); Circuit Handbook at 31 (same;

"The [motions] panel does not hear oral argument on motions, except, very rarely, in emergency matters or for extraordinary cause.").

ARGUMENT

Summary affirmance is not appropriate here: Speaker Ryan's appeal raises important issues on which this Court would benefit from full briefing and argument, including issues of first impression. Nor is oral argument appropriate on Mr. Sibley's motion.

I. This Court Should Deny Mr. Sibley's Motion for Summary Affirmance.

The federal officer removal statute exists to ensure federal defendants the opportunity to litigate their federal defenses in federal courts, as the Speaker developed below. ***See,*** *e.g.*, Consolidated Opp'n . . . to Pl.'s Mot[]. to Remand . . . (June 18,2015) (ECF No. 22) (-'Speaker Remand Opposition"); Reply . . . in Supp. of Mot. to Dismiss (July 10,2015) (ECF No. 33) ("Speaker MTD Reply"). That is an unremarkable proposition, fully endorsed by the Supreme Court from early cases until recent ones. ***See,*** *e.g.*, *Jefferson Cnty., **Ala.*** v. ***Acker,*** 527 U.S. 423, 430-32 (1999) ("[O]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court." (quotation marks omitted)); ***accord Mesa*** v. ***California,*** 489 U.S. 121, 133 (1989); *Willingham* v. ***Morgan,*** 395 U.S. 402,407 (1969) ("One of the primary purposes of the removal statute – as its history clearly demonstrates – was to have such defenses litigated in

the federal courts."). Indeed, the Supreme Court, in upholding the constitutionality of an early federal officer removal statute, long ago emphasized:

> It is the right and the duty of the national government to have its Constitution and laws interpreted and applied by its own judicial tribunals. . . . This is essential to the peace of the nation, and to the vigor and efficiency of the government. A different principle would lead to the most mischievous consequences. . . . For every act of an officer, civil or military, of the United States, including alike the highest and lowest, done under their authority, he would be liable to harassing litigation in the State courts. However regular his conduct, neither the Constitution nor laws of the United States could avail him, if the views of those tribunals and of the juries which sit in them, should be adverse. The authority which he had sewed and obeyed would be impotent to protect him. ***Such a government would be one of pitiable weakness, and would wholly fail to meet the ends which the framers of the Constitution had in view. They designed to make a government not only independent and self-sustained, but supreme in every function within the scope of its authority. The judgments of this court have uniformly held that it is so.***

Mayor v. Cooper 73 U.S. 247,249,253 (1867) (emphasis added).[4]

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[4] ***See also, e.g., Watson v. Philip Morris Cos. Inc.,*** 551 U.S. 142, 147-51 (2007) (surveying history of federal officer removal provisions; noting "basic purpose [of those provisions] is to protect the Federal Government from . . . interference with its operations"; "State-court proceedings may reflect local prejudice against unpopular federal laws or federal officials." (quotation marks omitted)); ***Willingham,*** 395 U.S. at 405-06 (also surveying history of federal officer removal provisions; describing animating concern: "'[I]f the general government is powerless to interfere at once for their protection [i.e., the protection of federal officials], —if their protection must be left to the action of the State court, —the operations of the general government may at any time be arrested at the will of one of its members.'" (quoting ***Tennessee v. Davis,*** 100 U.S. 257,263

Here, however, Mr. Sibley and the District Court would deprive Speaker Ryan, and presumably all other federal officials (whether the President, a Cabinet Member, a Judge, or a Member of Congress, among others), of that right, wherever a plaintiff could not establish subject matter jurisdiction – including where the relevant federal defense (such as sovereign immunity, absolute immunity, legislative immunity, etc.) deprives the federal court of that jurisdiction, not to mention where, as here, the plaintiff is so bold as to concede his lack of even a cognizable injury. They would do so in reliance on a separate statutory provision, 28 U.S.C. § 1447(c) ("If. . . the district court lacks subject matter jurisdiction, the case shall be remanded."). That approach is demonstrably erroneous.

1. *First,* as developed immediately below, the authority overwhelmingly establishes that, following a § 1442 removal and the federal official's assertion of a meritorious federal defense, a court should dismiss, rather than remand. As an initial matter, and contrary to Mr. Sibley's suggestion, the "plain language" of

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(1879))); *id.* at 406 ("For this very basic reason, the right of removal under § 1442(a)(1) is made *absolute* whenever a suit in a 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." (emphasis added)); *id.* at 406-07 ("At the very least, [the federal officer removal statute] is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law."); *id.* at 409 ("Petitioners sufficiently put in issue the questions of official justification and immunity; the validity of their defenses should be determined in the federal courts."); *see generally Watson,* 551 U.S. at 147 ("[T]his Court has made clear that [§ 1442] must be liberally construed." (quotation marks omitted)); *accord* 16 Moore's Fed. Practice § 107.100[3][b] (3d ed.).

§ 1447(c) does not assist him. *Cf.* Sibley Mot. at 4. Rather, it is, at best, in equipoise with Federal Rule of Civil Procedure 12(h)(3), by which Congress directed: "If the court determines at any time that it lacks subject-matter jurisdiction, the court ***must dismiss*** the action." (Emphasis added). That language, as the Advisory Committee made clear from its inception, applies equally with respect to removed actions: "This rule continues U.S.C.A., Title 28, former § 80 [the predecessor to 28 U.S.C. § 1447, which expressly permitted "dismissal" of removed actions]." Fed. R. Civ. P. 12(h) advisory committee's note to 1937 adoption.[5]

Moreover, the Supreme Court has been steadfast, particularly in the context of the federal removal statutes, in interpreting those statutes in light not only of their language, but also of their purpose, structure, and history. ***See, e.g.*, *Wis. Dep't of Corrs.*** v. ***Schacht,*** 524 U.S. 381,391-93 (1998) (holding that court, following removal and determination that consideration of particular claim barred by sovereign immunity, may proceed to consider other claims, notwithstanding § 1447(c)'s "the case shall be remanded" language; noting that "statute's purpose" favors Court's interpretation); ***Caterpillar Inc.*** v. ***Lewis,*** 519 U.S. 61, 75 (1996) (in 28 U.S.C. § 1441 removal, where court denied motion to remand notwithstanding

[5] We demonstrated below that federal district courts since at least 1875 have maintained – by virtue of statutes such as Section 80, as well as via their inherent authority – the ability to dismiss removed actions for lack ofjurisdiction. ***See*** Speaker Remand Opp'n at 12-17.

parties' lack of complete diversity of citizenship at time of removal, no error where court, once complete diversity achieved, proceeded to judgment, all notwithstanding § 1447(c)'s "case shall be remanded language; noting that Court's interpretation "is in harmony with a main theme of the removal scheme Congress devised," and further supported by "considerations of finality, efficiency, and economy"); ***Mesa,*** 489 U.S. at 125-35 (holding that § 1442 permits federal officials to remove only upon assertion of "colorable federal defense," notwithstanding "plain language of the removal statute"; emphasizing that Court's interpretation supported by purpose of federal officer removal statute and historical practice); *Thermtron* ***Prods.,*** *Inc. v.* ***Herrnansdorfer,*** 423 U.S. 336,344-52 (1976) (interpreting § 1447(d)'s bar on appellate review of remand orders as limited to those orders issued pursuant to § 1447(c), notwithstanding lack of express textual limitation; noting that Court's interpretation supported by statutory structure, historical practice, and legislative history), ***abrogated on other grounds by Quackenbush*** *v. Allstate* ***Ins. Co.,*** 517 U.S. 706 (1996); ***see also,*** *e.g.*, Speaker Remand Opp'n at 8-17 (explaining why dismissal, rather than remand, appropriate remedy, including by reference to relevant legislative history).[6]

[6] Indeed, in ***Therrntron Products,*** the Supreme Court repeatedly emphasized that § 1447(c) and (d) historically have been, and still must be, interpreted "in pari materia." 423 U.S. at 345-46, 350 n.15 ("[Section 1447(d)] and § 1447(c) must be construed together, as this Court has said. . . . These provisions, like their predecessors, are in pari materia and are to be construed accordingly rather than as

In recognition of these background principles, a raft of cases has held that, as to claims properly removed by a federal official or entity pursuant to § 1442, a court should dismiss (rather than remand) those claims on the basis of a threshold federal defense, including where the plaintiff cannot establish subject matter jurisdiction.[7] Indeed this has been the long and consistent practice in this Circuit,

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distinct enactments . . . ." (quotation marks and brackets omitted)); ***accord Quackenbush,*** 517 U.S. at 711-12. In other words, § 1447(d)'s careful treatment of § 1442 removals differently, and more generously, then § 1441 removals, must inform the interpretation of § 1447(c).

[7] ***See, e.g., California v. NRG Energy Inc.***, 391 F.3d 1011, 1026-27 (9th Cir. 2004) (where district court remanded, rather than dismissed, upon determining that party that removed pursuant to § 1442 protected by sovereign immunity, reversing and directing that relevant party be dismissed; "Section 1442(a) guarantees federal agencies a federal forum in which to adjudicate claims. Where it is immune from suit, a federal agency's right to a federal forum is vindicated only by the district court's dismissal of the claims against the agency. Any other outcome would frustrate the purpose of § 1442(a)."), ***vacated on other grounds by Powerex Corp. v. Reliant Energy Servs., Inc.***, 551 U.S. 224 (2007); ***Greene*** v. ***Citigroup, Inc.***, 215 F.3d 1336,2000 WL 647190, at *1-2 (10th Cir. 2000) (unpublished disposition) (affirming, where district court dismissed, rather than remanded, claims against defendant that removed pursuant to § 1442, notwithstanding plaintiffs confessed lack of standing); ***Nebraska ex rel. Dep't of Social Servs. v. Bentson***, 146 F.3d 676, 678-79 (9th Cir. 1998) (same, where plaintiff maintained standing but could not establish subject matter jurisdiction for other reasons; "By dismissing the [federal agency, which had removed pursuant to § 1442] as a party prior to remand, the district court simply gave effect to the jurisdictional realities of the situation before it. This was an appropriate exercise of the district court's authority . . . ."); ***Me. Ass'n of Interdependent Neighborhoods v. Comm'r, Maine Dep't of Human Servs.,*** 876 F.2d 1051, 1055 (1st Cir. 1989) ("As we have said, if [a particular federal official] were to remove the case again under § 1442(a)(1), the district court would have to dismiss [rather than remand] the action," notwithstanding plaintiffs lack of standing); ***Johnson*** v. ***Showers,*** 747 F.2d 1228, 1228-29 (8th Cir. 1984) (approving dismissal of federal agency, which removed pursuant to § 1442, where federal court lacked subject matter jurisdiction; "[E]nsuring a federal forum for litigation

where courts regularly dismiss, rather than remand, claims against federal officials in exactly those circumstances.[8]

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of official defenses is precisely the purpose of section 1442(a)(1)."); ***Judd*** *v. Lummis*, No. 2:15-cv-00064 (D. Wyo. Aug. 26,2015) (ECF No. 19) (dismissing rather than remanding claims against House Member who removed pursuant to § 1442; doing so on Speech or Debate Clause grounds, while also noting "meritorious" nature of Member's additional threshold defenses, including lack of standing and sovereign immunity); *Haan v. Noem*, 2013 WL 5701638 (D.S.D. Oct. 17,2013) (same; doing so on Speech or Debate Clause grounds, as well as on basis of additional threshold defenses, including lack of standing and sovereign immunity); *Bryan* ***v. Defense Tech.*** *U.S.*, 2011 ***WL*** 590902, *7 (E.D. Cal. Feb. 10, 2011) (same as to non-House Member federal defendants; doing so on threshold subject matter jurisdiction grounds, including lack of standing and sovereign immunity; "Plaintiff also argues that the federal defendants should not have removed this action if they are now contending the court lacks subject matter jurisdiction. This argument is without merit." (citation omitted)); *Beckman v. Battin*, 926 F. Supp. 971,976-78 & n.26 (D. Mont. 1995) (same as to non-House Member federal defendant, where threshold subject matter grounds include plaintiffs' lack of standing and "judicial immunity"); ***Me. Assoc. of Interdependent Neighborhoods,*** *Inc. v.* ***Petit,*** 644 F. Supp. 81, 82-85 (D. Maine 1986) (denying motion for reconsideration where plaintiff sought remand, rather than dismissal on standing grounds, in action removed under § 1442; "If section 1447(c) were thought to require remand, due to plaintiffs lack of standing, following a proper removal under section 1442(a)(1), the absolute right of a federal officer to obtain removal of an action brought against him of his official acts would be defeated." (quotation marks omitted)).

[8] ***See*** Speaker Remand Opp'n at 9 & n.4 (detailing such cases, including the following: *Merkulov v.* ***United States Park Police,*** 75 F. Supp. 3d 126, 130-31 (D.D.C. 2014) (dismissing federal defendant on threshold – subject matter jurisdiction – grounds following removal under § 1442); *Cofield* ***v. United States,*** 64 F. Supp. 3d 206,215 (D.D.C. 2014) (dismissing federal defendants on threshold -- sovereign immunity – grounds following removal under § 1442; remanding only as to nonfederal defendants); *McKoy-Shields* ***v. First Wash. Realty,*** *Inc.*, 2012 ***WL*** 1076195, at *3 (D.D.C. Mar. 30,2012) (dismissing federal defendant on threshold – subject matter jurisdiction – grounds following removal under § 1442; remanding only as to nonfederal defendant); *Hicks v.* ***Dist. of Columbia,*** 2010 WL 760418, at

On the other side, Mr. Sibley has yet to cite, and the undersigned is not aware of, a single instance – other than that of the District Court's Order below (or orders later reversed) – of a court remanding for lack of subject matter jurisdiction claims properly removed on § 1442 grounds, much less doing so without reaching threshold federal defenses asserted by the relevant federal official or entity.

Given the lopsided nature of this authority, summary reversal would be far more appropriate than summary affirmance. Speaker Ryan has not moved for that remedy, however, in recognition of the fact that a clear, precedential statement from this Court is likely to avoid future confusion on this issue.[9]

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*2-3 (D.C. Mar. 2,2010) (same); ***Edwards v. Dist. of Columbia,*** 616 *F*. Supp. 2d 112, 118-19 (D.C. 2009) (same)).

[9] Mr. Sibley suggests that a federal court always must address subject matter jurisdiction, or even standing in particular, before other threshold defenses. ***See*** Sibley Mot. at 4. The law is otherwise. While a federal court may not address ***the merits*** without first considering subject matter jurisdiction defenses, including standing, the Supreme Court has emphasized that courts in fact are free to address threshold defenses in whatever order is appropriate under the circumstances. ***See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.,*** 526 U.S. 574, 583-85 (1999) (in removed case, unanimously approving consideration, first, of non-subject matter jurisdiction threshold defenses; "While [a previous Supreme Court ruling] reasoned that subject-matter jurisdiction necessarily precedes a ruling ***on the merits,*** the same principle does not dictate a sequencing of jurisdictional issues. . . . It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits." (emphasis added)); ***Sinochem Int'l Co. Ltd v. Malaysia Int'l Shipping Corp.,*** 549 U.S. 422, 431-32 (2007) (unanimously approving dismissal on ***forum non conveniens*** grounds prior to resolving uncertainty regarding subject matter jurisdiction; "A district court . . . may dispose of an action by a ***forum non conveniens*** dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant."; "[T]here is no mandatory sequencing of jurisdictional

2. *Second*, even if a district court's remand, rather than dismissal, of claims, properly removed pursuant to § 1442, for lack of subject matter jurisdiction was proper as a general matter (as it decidedly is not), and even if it was proper without the federal court first considering the balance of the relevant federal defendant's threshold federal defenses (as, again, it decidedly is not), the District Court still erred by remanding, given the futility of that remedy here. On this issue (whether, in *any* removed case, remand rather than dismissal ever is required where remand would be futile) there is a circuit split, on which this Circuit has yet to rule. *See, e.g.*, Mem. Op. at 9 ("The circuits are split as to whether § 1447(c) is subject to a 'futility' exception, which would permit dismissal without remand where remand would be futile because the state court, too, would dismiss the case.").

The Fifth and Ninth Circuits, for example, respectively have held that dismissal, rather than remand, is proper for a removed action, where remand would be futile. *See Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) (dismissal, rather than remand, appropriate where remand would be "a futile gesture, wasteful of scarce judicial resources"); *Bell* v. *City of Kellogg*, 922 F.2d

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issues."; "**[A]** federal court has leeway to choose among threshold grounds for denying audience to case on the merits." (quotation marks omitted)); *see also, e.g. Rangel* v. *Boehner,* 785 F.3d 19, 22 (D.C. Cir. 2015) (considering Speech or Debate Clause defense before alternative threshold grounds, including standing; "The district court dismissed [plaintiff]'s complaint on three grounds [standing, political question, and Speech or Debate]—all jurisdictional. We can therefore address them in any order." (citations omitted)).

1418, 1424-25 (9th Cir. 1991) (same; "Where the remand to state court would be futile, . . . the desire to have state courts resolve state law issues is lacking. We do not believe Congress intended to ignore the interest of efficient use of judicial resources."; "Because we are certain that a remand to state court [to decide a particular issue of state law, rather than have the federal courts predict the resolution of that issue] would be futile, no comity concerns are involved."). And the First Circuit has suggested the same result, so long as the district court can say with "absolute certainty" that remand would be futile. ***Me. Ass'n of Interdependent Neighborhoods,*** 876 F.2d at 1054-55 (requiring remand, but only after detailing at least three separate means by which remand, on particular facts of case, might not prove futile)."

Remand certainly would be futile here, as the District Court itself made plain. ***See, e.g.***, Mem. Op. at 11 ("[T]he Court's lack of subject-matter jurisdiction is clear ***as*** day."); ***id.*** at 7 ("[T]here is no doubt that [Mr. Sibley] lacks standing to

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[10] Other circuits apparently go the other way. ***See Bromwell v. Michigan Mut. Ins. Co.***, 115 F.3d 208,214 (3d Cir. 1997); ***Roach v. West Virginia Reg'l Jail & Corr. Facility Auth.***, 74 F.3d 46, 49 (4th Cir. 1996); ***Smith v. Wisconsin Dep't of Agriculture,*** 23 F.3d 1134, 1139 (7th Cir. 1994); ***see also Jepsen v. Texaco, Inc.***, 68 F.3d 483, 1995 WL 607630, at *3 (10th Cir. 1995) (unpublished disposition); *cf.* ***Mignogna*** v. ***Sair Aviation, Inc.***, 937 F.2d 37, 41, 43 (2d Cir. 1991) (recognizing that dismissal, rather than remand, of removed proceeding may be proper where remand would be futile; also noting Supreme Court's express recognition of same, in ***International Primate,*** discussed ***infra*** n.11); ***Barbara v. New York Stock Exchange,*** 99 F.3d 49, 56 n.4 (2d Cir. 1996) (acknowledging same, though with some skepticism).

demand that a court require the leaders of the House and Senate to call for a constitutional convention."); ***id,*** at 12 (expressing "sympathy" with concern that remand here "will unnecessarily prolong this case," but noting: "[G]iven the law set forth in *Grayson*, Sibley's case may not remain alive in Superior Court for long." (quotation marks omitted)). Indeed, the D.C. Court of Appeals has left no question on this score: "[W]e have said since the creation of the current District of Columbia court system that we will follow the federal constitutional standing requirement." *Grayson*, 15 A.3d at 224,236 n.38; ***see also,*** *e.g.*, ***Friends of Tilden Park,*** *Inc. v Dist.* ***of Columbia,*** 806 A.2d 1201, 1206 (D.C. 2002) (applying case-or-controversy requirement despite acknowledging that court not established under Article III; citing D.C. Code § 11-705(b): ***"Cases and controversies*** shall be heard and determined by divisions of the court unless a hearing or a rehearing before the court in banc is ordered." (emphasis added)). Moreover, over and above Mr. Sibley's standing deficiencies, the Speech or Debate Clause provides the Speaker (and Majority Leader McConnell) an "absolute" immunity because Mr. Sibley seeks to invoke judicial authority with respect to "matters which the Constitution places within the jurisdiction of either House" – e.g., the Constitution's Article V vesture in "Congress" of the power to call a "Convention for proposing Amendments." *Eastland v. U.S.* ***Servicemen's Fund,*** 421 U.S. 491,501,503-04,

509 & n.16 (1975); ***see generally, e.g.***, Speaker MTD Reply at 3-12 (explaining why Speech or Debate Clause precludes Mr. Sibley's claims)."

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In sum, given the importance and uncertainty surrounding the issues raised here, summary disposition is not appropriate. ***See, e.g., supra*** Standard of Review (reciting law, including Circuit Handbook guidance that summary disposition generally not appropriate where affirmance would require resolution of "issues of first impression for the Court").

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[11] The District Court thought that the Supreme Court's decision in ***International Primate Protection League v. Administrator of Tulane Educational Fund,*** 500 U.S. 72, 87 (1991), or this Circuit's decision in ***Republic of Venezuela v. Philip Morris Inc.***, 287 F.3d 192 (D.C. Cir. 2002), suggested that this Court would reject the approach of those Circuits that have held dismissal, rather than remand, appropriate where remand would be futile. ***See*** Mem. Op. at 9-10. In fact, neither case suggests such a result. In ***International Primate,*** the Supreme Court expressly reserved the issue, noting a variety of reasons why, in that case, remand might not be futile. ***See*** 500 U.S. at 87-89; ***see also id.*** (relying heavily on ***Maine Association of Interdependent Neighborhoods,*** 876 F.2d at 1054-55, where First Circuit – then Judge Breyer – took same approach, while emphasizing that "if [relevant federal official] were to remove the case again under § 1442(a)(1), the district court would have to dismiss [rather than remand] the action," notwithstanding plaintiff's lack of standing); ***Mignogna,*** 937 F.2d at 41 (recognizing same). And, in ***Republic of Venezuela,*** this Circuit held only that it lacked any appellate jurisdiction over a particular claim and, in so doing, stated only the general rule, in the context of a § 1441 removal, that remand is required in the absence of subject matter jurisdiction; this Court said nothing whatsoever about whether remand would be required where it would be futile. ***See*** 287 F.3d at 196. Indeed, in a later case, not cited by the District Court, this Court appeared carefully to reserve ruling on the issue. ***See Shaw v. Marriott Int'l, Inc.***, 605 F.3d 1039, 1044 (D.C. Cir. 2010) (in § 1441 case, concluding that plaintiffs lacked standing, and remanding to District Court to determine appropriate disposition, i.e., dismissal versus remand).

II. This Court Should Deny Mr. Sibley's Motion for Oral Argument.

Finally, Mr. Sibley seeks oral argument on his motion. As noted above, however, his request is self-defeating. By insisting that oral argument would be beneficial here, he concedes that this case is not suitable for summary disposition. *See supra,* Standard of Review. Moreover, Mr. Sibley has no constitutional right to oral argument here, contrary to his suggestion. *See, e.g.*, *Fed. Commc'ns Comm'n v. WJR, The Goodwill Station,* 337 U.S. 265,275-76 (1949) ("Certainly the Constitution does not require oral argument in all cases where only insubstantial or frivolous questions of law, or indeed even substantial ones, are raised."); *accord James Madison Ltd. by Hecht v. Ludwig,* 82 F.3d 1085, 1099 (D.C. Cir. 1996); *Cogar v. Schuyler*, 464 F.2d 747,753-54 (D.C. Cir. 1972); *United States v. Rentas*, 541 F. App'x 156, 158 n.1 (3d Cir. 2013) (rejecting contention that appellate court's summary-disposition procedures violate due process); *United States v. Pajooh,* 143 F.3d 203,204 (5th Cir. 1998) (same).

CONCLUSION

For all the foregoing reasons, this Court should deny the Sibley Motion.

Respectfully submitted,

KERRY W. KIRCHER (D.C. Bar No. 386816)
General Counsel
/s/ William Pittard
WILLIAM PITTARD (D.C. Bar No. 482949)
Deputy General Counsel
SARAH CLOUSE (MA Bar No. 688187)
Senior Staff Attorney

OFFICE OF GENERAL COUNSEL[12]
U.S. HOUSE OF REPRESENTATIVES
219 Cannon House Office Building
Washington, D.C. 20515
(202) 225-9700 (telephone)
(202) 226-1360 (facsimile)
William.Pittard@mail.house.gov

Counsel for Defendant the Honorable Paul D. Ryan, Speaker of the United States House of Representatives

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[12] Attorneys in the Office of General Counsel for the U.S. House of Representatives are "entitled, for the purpose of performing the counsel's functions, to enter an appearance in any proceeding before any court of the United States . . . without compliance with any requirements for admission to practice before such court." 2 U.S.C. § 5571(a).