No. 12-2236

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

HENRY RUPPEL

Plaintiff-Appellant,

v.

CBS CORPORATION, et al.

Defendants-Appellees.

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT CBS CORPORATION

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-2236

Short Caption: Ruppel v. CBS Corporation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Chamber of Commerce of the United States of America

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National Chamber Litigation Center, Inc.

(3) If the party or amicus is a corporation:

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N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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Attorney's Printed Name: Allison R. Cohn

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Attorney's Signature: s/ Robin S. Conrad Date: 7/27/2012

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Attorney's Printed Name: Sheldon Gilbert

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America (the "Chamber") has a direct and substantial interest in this case.[1] The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than 3,000,000 companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber has filed *amicus* briefs for over three decades in courts throughout the country, including in a number of cases involving issues affecting government contractors. The Chamber's briefs have been described as "helpful" and "influential" by courts[2] and commentators.[3]

[1] The Chamber, as *amicus curiae*, submits this brief pursuant to Federal Rule of Appellate Procedure 29. In compliance with Rule 29(c)(5), no party's counsel authored the brief in whole or part, and no one other than the Chamber, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, *Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1179 n.8 (R.I. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007).

[3] David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 Santa Clara L. Rev. 1019, 1026 (2009); *see also id*. (quoting Supreme Court practitioner Carter Phillips: "The briefs filed by the Chamber in that Court and in the lower courts are uniformly excellent. They explain precisely why the issue is important to business interests. . . . Except for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the [Chamber].").

The Chamber's members operate in nearly every industry and business section in the United States. Indeed, many of the its members serve as federal contractors, performing vital functions for the United States in the areas of national defense, law enforcement, healthcare, agriculture, transportation, and virtually all other areas in which federal power is exercised. In carrying out these functions, Chambers members frequently subject themselves to substantial potential tort liability related to goods manufactured at the request, and according to exacting specifications, of the United States. Accordingly, the Chamber's members have a strong interest in this case to ensure proper application of the federal officer removal statute to permit removal where Congress has authorized it for those "acting under" an officer or agent of the United States.

INTRODUCTION AND SUMMARY OF ARGUMENT

The District Court's opinion, which applied a presumption against federal jurisdiction when the removing defendant is a private entity acting under the federal government, reflects a deep hostility to vindicating the federal forum that Congress granted to government contractors. Although the United States Supreme Court has held that the federal officer removal statute must be broadly construed, and although Congress consistently has expanded the statute's scope without regard to the removing defendant's identity, the District Court applied the opposite presumption on the theory

that private contractors are unlikely to face hostility in state court. The District Court's theory is demonstrably false, and it has been discredited by every circuit court that has addressed the question. The District Court's novel construction of the federal officer removal statute to strongly disfavor removal by private government contractors, therefore, should be reversed.

A broad construction of the removal provision would allow government contractors to obtain a federal forum in product liability cases, including but not limited to some asbestos cases, arising from work done on behalf of the federal government. That federal forum helps to ensure that the government is able to order and obtain equipment and services essential to its operation. Cases like this implicate federal interests, especially where, as here, the federal government issued detailed orders to and heavily supervised a military contractor for the manufacture and supply of the product at issue. The specificity of the United States Navy's order and supervision here readily qualifies this case as a matter of federal concern subject to removal pursuant to 28 U.S.C. section 1442(a)(1).

ARGUMENT

I. THE DISTRICT COURT SHOULD HAVE LIBERALLY APPLIED THE FEDERAL OFFICER REMOVAL STATUTE

In its remand order, the District Court found that the removal statute should be "read narrowly" against a private actor "purportedly acting at the

direction of a federal officer" and that the court is "required to resolve all doubts in favor of remand, and to construe the factual record in this case most strongly against removal." (Dkt. No. 41, Memorandum and Order ("Order") at 5 (internal quotations and citations omitted).) After setting that unreasonably high threshold, the District Court found that CBS was unable to satisfy section 1442(a)(1)'s requirements (without waiting to see what CBS had to say about that question).[4] According to the District Court, CBS failed to establish the "acting under" prong because it could not "show that the federal officer really did make [the contractor] do it." (*Id.* (quoting *Weese v. Union Carbide Corp.*, Civil No. 07-581-GPM, 2007 WL 2908014, at *7 (S.D. Ill. Oct. 3, 2007) (Murphy, J.)) (alteration in original).)

The District Court's narrow application was contrary to the decisions of the U.S. Supreme Court, inconsistent with Congress's trend of expanding the scope of the federal officer removal statute, and was based on faulty district court precedent, including the District Court's own earlier, faulty opinions.[5]

---

[4] Despite being allowed 30 days to respond to the plaintiff's motion under the District Court's Local Rules, *see* S.D. Ill. Local R. 7.1(c)(1), the District Court issued its remand order only nine days after the plaintiff filed the motion, before CBS was able and allowed to file its opposition.

[5] The flaws in the District Court's analysis are underscored when its opinion is compared with the carefully reasoned approach taken by the district judge presiding over the asbestos cases pending in MDL Number 875 on this same removal issue. *See, e.g.*, *Hagen v. Benjamin Foster Co.*, 739 F. Supp. 2d 770, 783 (E.D. Pa. 2010) (Robreno, J.) ("Congress has erected a road to federal court for litigants who can invoke a federal defense. It is not the Court's role to impose judicially created tolls on those who seek to travel on it. Thus, . . . a defense is colorable for purposes of determining jurisdiction under Section 1442(a)(1) if the defendant asserting it identifies facts which, viewed in the light most favorable to the

A. The Supreme Court Repeatedly Has Instructed Lower Courts to Give Section 1442(a)(1) a Broad Interpretation

The U.S. Supreme Court has repeatedly held that the federal officer removal provision should not be given a narrow or limited application but must be liberally construed. *See Watson v. Philip Morris Cos*., 551 U.S. 142, 147 (2007) ("The words 'acting under' are broad, and this Court has made clear that the statute must be 'liberally construed.'" (quoting *Colorado v. Symes*, 286 U.S. 510, 517 (1932))); *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981) ("[T]his Court has held that the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" (quoting *Willingham v. Morgan*, 395 U.S. 402, 407 (1969))); *see also Willingham*, 395 U.S. at 407 (rejecting the lower court's holding that section 1442(a)(1)'s "color of office" test provides a limited basis for removal). A removing defendant need not demonstrate "an airtight case on the merits in order to show" the requirements of section 1442(a) are met, nor is the defendant required "virtually to 'win his case [on an official immunity defense] before he can have it removed.'" *Jefferson Cnty., Ala. v.*

defendant, would establish a complete defense at trial."). The Judicial Panel on Multidistrict Litigation has identified the *Hagen* removal ruling as one of the "substantive and thoughtful rulings that have been issued during the lengthy course of" MDL Number 875, which will provide "useful guidance" to those district courts presiding over asbestos actions that will not be transferred to MDL Number 875. *In re: Asbestos Prods. Liab. Litig. (No. VI)*, 830 F. Supp. 2d 1377, 1379 & 1379 n.5 (J.P.M.L. 2011).

Acker, 527 U.S. 423, 431-32 (1999) (quoting *Willingham*, 395 U.S. at 407). A liberal construction is necessary to "ensure a federal forum" in which a defendant could "raise a defense arising out of his official duties" and "have the validity of [that] immunity defense adjudicated" by a federal tribunal free from interference from hostile state courts. *Manypenny*, 451 U.S. at 241-42; *Mesa v. California*, 489 U.S. 121, 137 (1989).

The Supreme Court's decision in *Jefferson County, Alabama v. Acker* is instructive here. 527 U.S. at 431. There, the Court was faced with competing interpretations as to whether the defendants' challenged actions—the failure of two federal judges to pay county occupational taxes—were "*for* a[n] act under color of office." *Id.* (emphasis and alteration in original). The defendant judges argued that the ordinance declared it unlawful for them to engage in their occupation without paying the tax, while the U.S. Solicitor General argued that there was no causal connection between the lawsuits and the judges' official acts because the tax was aimed at the judges personally. *Id.* at 432. The Court ruled that "[t]o choose between those readings of the Ordinance [would be] to decide the merits of this case" and that the Court's role is to "credit the judges' theory of the case for purposes of both elements of our jurisdictional inquiry." *Id.* Thus, because there was a causal connection under the judges' theory of the case, the "for a[n] act under color of office" requirement was deemed satisfied. *Id.*

The Court also addressed whether the judges asserted a "colorable" federal defense—*i.e.*, that Jefferson County's tax fell on the performance of federal judicial duties in Jefferson County and risked interfering with the operation of the federal judiciary in violation of the intergovernmental tax immunity doctrine—and found that they did. *Id.* at 431. Although the Supreme Court ultimately rejected that defense on the merits, the Court noted that the federal officer removal rule only requires that application of the defense be "colorable," not that the court find that the defense is valid. *Id.* If the district court were to require the defendant to show a "'clearly sustainable defense,'" rather than a colorable defense, that would defeat the purpose of the removal statute. *Id.* at 432 (quoting *Willingham*, 395 U.S. at 407).

Despite this authority, the District Court declined to read jurisdiction "expansively," as required by the Supreme Court, because CBS is not a "federal official" but a "private company purportedly acting at the direction of a federal officer." (Order at 5 (quoting *Clayton v. Cerro Flow Prods., Inc.*, Civil No. 09-550-GPM, 2010 WL 55675, at *3 (S.D. Ill. Jan. 4, 2010)).) The Supreme Court, however, has never drawn such a distinction. To the contrary, the Court has permitted persons acting under a federal official to invoke the provision and has done so without imposing any presumption against removal. *See*, *e.g.*, *Maryland v. Soper*, 270 U.S. 9, 30 (1926) (finding

the removal test satisfied where a private individual acted as a "chauffeur" and a "helper" to four federal prohibition agents); *cf. Davis v. South Carolina*, 107 U.S. 597, 600 (1883) ("[T]he protection which the law thus furnishes to the marshal and his deputy, also shields all who lawfully assist him in the performance of his official duty.").

The Supreme Court recently considered the application of section 1442(a)(1) to a private entity in *Watson v. Philip Morris Companies*, and although the Court rejected application of the statute under the precise circumstances of that case, it did not apply any presumption against federal jurisdiction or draw a distinction between a federal officer and a private party acting under the direction of a federal officer. *See* 551 U.S. at 147. To the contrary, *Watson* affirmed that section 1442(a)(1)'s "acting under" requirement is broad and must be "liberally construed." *Id.* Indeed, the Court explained that the purpose behind federal officer removal (*i.e.*, to protect the federal government from the interference with its operations and to provide federal officials a federal forum in which to assert federal immunity defenses) may apply "[w]here a private person acts as an assistant to a federal official in helping that official to enforce federal law." *Id.* at 151.

The Court considered whether the Philip Morris Companies were "acting under" a federal agency when they tested and advertised their cigarettes in compliance with the Federal Trade Commission's detailed

regulations. *Id.* at 151-52. In holding that the companies had not been "acting under" a federal officer, the Court reasoned that the "help or assistance necessary to bring a private person within the scope of the [federal officer removal] statute does not include simply complying with the law." *Id.* at 152 (emphasis in original). Instead, an entity "act[s] under" a federal officer when it "*assist[s]*, or . . . help[s] *carry out*, the duties or tasks of the federal superior." *Id.* (emphasis in original). In other words, a "special relationship" must exist between the two entities. *Id.* at 156-57.

Unlike the Court's characterization of Phillip Morris' connection to federal officers, government contractors may have this special relationship because the "private contractor . . . is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.* at 153. Using *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), as an example, the Supreme Court explained that the "acting under" requirement was satisfied there because "Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war" and "at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Watson*, 551 U.S. at 153-54; *see also Bennett v. MIS Corp.*, 607 F.3d

1076, 1086 (6th Cir. 2010) (noting that the Supreme Court had distinguished the facts of the Phillip Morris case from those of other cases holding that "[g]overnment contractors fall within the terms of the federal officer removal statute, at least when the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision" (quoting *Watson*, 551 U.S. at 153)).

Here, as shown in the removal pleadings, CBS contracted with the United States Navy to manufacture and supply a product that aided in national defense and which product happened to contain asbestos insulation. (Dkt. No. 3, CBS Corp.'s Notice of Removal at 3-4.) Through its contracts with the Navy, CBS acted "in accordance with precise, detailed, specifications promulgated by Navy Sea Systems Command" and was subjected to close and ongoing supervision by the Navy. (*Id.*) CBS was not simply regulated by federal law; rather, CBS helped manufacture a product that the Navy otherwise would have had to manufacture. Under the expansive scope of section 1442(a)(1), CBS had the "special relationship" required by *Watson* to sustain federal officer removal. *See*, *e.g.*, *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008) (holding that removal by companies that produced Agent Orange for the Department of Defense was proper because the defendants assisted and helped the government carry out its duties).

B. The Federal Officer Removal Statute Affords No Basis for the Narrow Construction Adopted by the District Court

Neither the language of section 1442(a)(1) nor the legislative history of that provision provides any support for the District Court's narrow construction of the statute when applied to "person[s] acting under" an agency or officer of the United States. To the contrary, Congress has consistently expanded the protection afforded to federal officials and those persons acting under the officials, including as recently as last year. Although Congress surely was aware of the Supreme Court's *Watson* decision, in which the Court acknowledged that federal contractors may be entitled to remove under section 1442, and of the many lower court decisions finding in favor of removal by government contractors, Congress failed to enact any sort of distinction between "federal officials" and those persons "acting under" federal officials. Instead, Congress expanded such removal rights. This is strong evidence that, far from intending the anti-removal presumption the District Court has applied to government contractors, Congress intended to expand removal rights both for federal officials and for private companies acting under them. *See Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1795 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *Mac's Shell Serv., Inc. v. Shell Oil Prods. Co.*,

130 S. Ct. 1251, 1259 (2010) ("At the time when it enacted the statute, Congress presumably was aware of how courts applied the doctrine . . . .").

The federal officer removal statute has a long history of liberal interpretation in the United States courts, while Judge Murphy's distinction between federal officials and those acting under them has never been codified or recognized by the Supreme Court. *See Willingham*, 395 U.S. at 405 (describing the statute's history). The first such provision was enacted near the end of the War of 1812 to enforce a trade embargo with England against opposition from New England states that opposed the war. *Id.* Through that statute, Congress permitted federal customs officers and "*any other person aiding or assisting*" those officers to remove a case filed against them "in any state court" to federal court. *Watson*, 551 U.S. at 148 (quoting Customs Act of 1815, ch. 31, § 8, 3 Stat. 198) (emphasis in original).

The next such statute, passed in 1833 in response to South Carolina's threats of nullification, authorized removal by "any officer of the United States, *or other person*" of any lawsuit "for or on account of any act done under the revenue laws of the United States." *Id.* (quoting Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633) (emphasis in original). And following the Civil War, a new group of removal statutes was enacted that applied primarily to cases arising out of enforcement of the U.S. revenue laws. *Willingham*, 395 U.S. at 405. Once again, those statutes permitted removal by any "revenue

officer" and "*any person acting under or by authority of any such officer*." *Watson*, 551 U.S. at 148 (quoting Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171) (emphasis in original).

In 1948, Congress revised the statute, dropping the law's limitation to the revenue context. *Id.* at 148-49 (citing Act of June 25, 1948, ch. 646, § 1442(a), 62 Stat. 938, 28 U.S.C. § 1442(a)). The revised federal officer removal statute provided for removal by "[a]ny officer of the United States or of any agency thereof, *or person acting under him*, for any act under color of such office." 28 U.S.C. § 1442(a)(1) (original version) (emphasis added). "While Congress expanded the statute's coverage to include all federal officers, it nowhere indicated any intent to change the scope of words, such as 'acting under,' that described the triggering relationship between a private entity and a federal officer." *Watson*, 551 U.S. at 149.

Section 1442(a)(1) has subsequently been amended—and expanded—on two occasions. In 1996, Congress amended the provision to provide for removal by "[t]he United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. § 1442(a)(1) (1996 amend.) (emphasis added). This revision was in response to the Supreme Court's holding in *International Primate Protection League v. Administrators of Tulane Education Fund*, 500 U.S. 72

(1991), that only an individual and not a federal agency could remove to federal court. *See Watson*, 551 U.S. at 149 (noting that the amendment was passed to overrule *International Primate Protection League*); David D. Siegel, *Commentary on 1996 Amendment of Section 1442* ("The 1996 amendment of subdivision (a) overrules the [*League*] case and explicitly permits the removal to be effected by the agency."). While Congress reworded the entire provision, it once again expressly included private persons within the statute's scope and did so without drawing a distinction between federal officials and private parties.

Just last year, Congress passed the Removal Clarification Act of 2011, once again expanding the scope of removal. *See* Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545. Whereas removal previously was authorized only when the suit was "for" an act under color of office, Congress revised the statute to provide for removal of any action "for *or relating to* any act under color of such office."[6] *Id.* (emphasis added). This change was

[6] There have been only a handful of cases applying section 1442(a)(1), as amended, in the government contractor context. Those cases, however, have uniformly affirmed removal. *See, e.g.*, *Najolia v. Northrop Grumman Ship Sys., Inc.*, Civil Action No. 12-821, 2012 WL 1886119, at *9-11 (E.D. La. May 23, 2012) (denying motion to remand design-defect and failure-to-warn asbestos case brought against Navy manufacturer and supplier); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2012 WL 1448132, at *3-7 (E.D. La. Apr. 26, 2012) (denying motion to remand suit seeking liability for contractor's acts in installing and maintaining emergency housing units pursuant to a FEMA contract and "under color" of FEMA's authority); *Bouchard v. CBS Corp.*, No. MDL-875, 2012 WL 1344388, at *11 (E.D. Pa. Apr. 17, 2012) (Robreno, J.) ("[T]he facts identified in the affidavits provided, when viewed in the light most favorable to Defendant, demonstrate that Defendant has satisfied all necessary requirements for removal under §

expressly "intended to broaden the universe of acts that enable Federal officers to remove to Federal court." H.R. REP. No. 112-17, pt. 1, at 6 (2011).

Last year's statutory amendment provides more proof of the error in the District Court's restrictive construction of section 1442 applied below. Pre-amendment cases already made clear that the "for" prong was to be broadly construed, requiring only a showing that the challenged acts derived from the defendant's official duties. *See Willingham*, 395 U.S. at 409 ("It is enough that [the removing defendants'] acts or (their) presence at the place in performance of (their) official duty constitute the basis, though mistaken or false, of the [action]."). The additional phrase "or relating to" can only be deemed more expansive than the pre-amendment language, allowing removal where the challenged action has some connection or reference to the fulfillment of federal duties. *See Smith v. United States*, 508 U.S. 223, 237-38 (1993) (the phrase "in relation to" is "expansive," requiring only "some" "reference to"); *Dist. of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125,

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1442(a)(1)."); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2012 WL 601805, at *3-6 (E.D. La. Feb. 23, 2012); *Thompson v. Crane Co.*, Civil No. 11-00638 LEK-RLP, 2012 WL 1344453, at *16-29 (D. Haw. Apr. 17, 2012), *leave to appeal granted by*, Civil No. 11-00638 LEK-RLP, 2012 WL 2359950 (D. Haw. June 19, 2012); *Leite v. Crane Co.*, Civil No. 11-00636 JMS/RLP, 2012 WL 1277222, at *14-17 (D. Haw. Apr. 16, 2012), *motion to certify appeal granted by*, No. 11-00636 JMS/RLP, 2012 WL 1982535 (D. Haw. May 31, 2012); *but cf. Lockwood v. Crane Co.*, No. 2:12-cv-01473-JHN-CW, 2012 WL 1425157, at *1-2 (C.D. Cal. Apr. 25, 2012) (remanding case because the plaintiff filed an express waiver stating that his claims were not related to asbestos exposure at military and federal government jobsites).

129 (1992) (a law "relate[s] to" (alteration in original) if it "has a connection with or reference to;" "[t]his reading . . . gives effect to the 'deliberately expansive' language chosen by Congress").

The Removal Clarification Act of 2011 also is significant because it granted, for the first time, the right to appeal an order remanding a case removed pursuant to section 1442. *See* 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 or 1443 of this title shall be reviewable by appeal or otherwise."). Before that amendment, remand orders were unappealable, allowing district courts to remand similar cases with relative impunity. The addition of appeal rights "ensure[s] that any individual drawn into a State legal proceeding based on that individual's status as a Federal officer has the right to remove the proceeding to a U.S. district court for adjudication."[7] H.R. REP. No. 112-17, at 1-2.

Rather than make the District Court's (false) distinction between federal officials and those "persons" acting under them, Congress consistently has treated both on equal footing for federal officer removal purposes.

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[7] These revisions also show the error in the District Court's conclusion that the concerns addressed by section 1442 are "anachronistic." (Order at 5.) Congress plainly does not believe its concerns to be "anachronistic," having revised the statute in 2011 to grant the removal right to the broadest scope of litigants in the statute's long history, and having provided for the first time for appellate review of orders remanding cases removed under section 1442.

C. The District Court's Holding Was Based on Non-Binding, Unpersuasive, and Superseded Precedent

In ruling that section 1442(a)(1) is to be construed "narrowly" against a private defendant, the District Court exclusively relied on two of its own prior, unpublished decisions: *Clayton*, 2010 WL 55675, at *3 (Murphy, J.), and *Sether v. Agco Corp*., Civil No. 07-809-GPM, 2008 WL 1701172, at *4 (S.D. Ill. Mar. 28, 2008) (Murphy, J.). An analysis of those decisions and the authority on which they rely reveals that the District Court's ruling arises from an echo-chamber of unsound, non-binding authority.

In *Clayton*, for example, the district court's admonition that the federal officer removal provision was to be construed "narrowly" when asserted by a private actor was based on a non-binding decision of the United States District Court for the District of Colorado. *See Clayton*, 2010 WL 55675, at *3 (Murphy, J.) (citing *Freiberg v. Swinerton & Walberg Prop. Servs., Inc*., 245 F. Supp. 2d 1144, 1150, 1152 n. 6 (D. Colo. 2002)). *Freiberg*, in turn, relied on a decision by Judge Weinstein of the Eastern District of New York, *Ryan v. Dow Chemical Co*., 781 F. Supp. 934 (E.D.N.Y. 1992). *Freiberg*, 245 F. Supp. 2d at 1152 n.6.

But Judge Weinstein's decision in *Ryan* is no longer good law. In 2004, in a case based "on facts almost identical to those in *Ryan*," Judge Weinstein reassessed his prior holding and found that it was "no longer persuasive." *In*

re "Agent Orange" Prod. Liab. Litig., 304 F. Supp. 2d 442, 445 (E.D.N.Y. 2004), *aff'd*, *Isaacson v. Dow Chem. Co.*, 517 F.3d 129 (2d Cir. 2008). Judge Weinstein explained that the federal officer removal rule should be interpreted "broadly to achieve the protective purpose of the statute." *Id.* at 447 (citing *Willingham*, 395 U.S. at 407). In so ruling, Judge Weinstein followed the Fifth Circuit's decision in *Winters*, 149 F.3d at 392, "a persuasive appellate decision" in which the Fifth Circuit held the federal officer removal statute was applicable to government contractors. *In re "Agent Orange" Prod. Liab. Litig.,* 304 F. Supp. 2d at 445; *see also Hagen*, 739 F. Supp. 2d at 781 (holding that a heightened showing of a colorable federal defense is not necessary at the removal stage; "neither the Article III concerns some courts have raised nor the fact that the case involves private contractors asserting the government contractor defense compels a different conclusion").

The Second Circuit affirmed. *See Isaacson*, 517 F.3d 129. In *Isaacson*, the Second Circuit *rejected* any notion that section 1442(a)(1) was to be given a limited application when asserted by private government contractors. *Id.* at 138-39. Rather, the court of appeals held that section 1442(a)(1)'s requirements are "quite low," *id.* at 137, and, as such, the removal by the government contractor defendants was proper under section 1442(a)(1), *id.* at 139. Other courts have similarly rejected *Ryan*. *See, e.g.*, *Campbell v. Brook Trout Coal, LLC*, Civil Action No. 2:07-0651, 2008 WL 4415078, at *6 & *6

n.9 (S.D. W. Va. Sept. 25, 2008) (holding that "the federal officer statute is to be liberally construed" even in government contractor cases and refusing to follow *Ryan* and *Freiberg*).

The District Court's holding that federal jurisdiction is read "narrowly" and that all doubts should be resolved "in favor of remand" is, thus, based on unpersuasive case law and lacks any support from the Supreme Court, the circuit courts, or the legislative history.[8] Given the District Court's failure to cite or rely on any valid authority, and given the District Court's patently unfair procedure in ruling on the plaintiff's motion to remand without affording CBS an opportunity to respond, this Court should vacate the order and find that federal jurisdiction is proper.

II. THE PURPOSE OF THE FEDERAL OFFICER REMOVAL STATUTE IS SERVED BY FINDING FEDERAL JURISDICTION HERE

The purpose of section 1442 "is not hard to discern." *Willingham*, 395 U.S. at 406. The removal statute's "basic" purpose is to protect the federal government from interference with its "operations," as well as to ensure federal officials and those acting under them a federal forum in which to

[8] The *Sether* decision—cited by the District Court for the proposition that the court must construe the factual record against removal (Order at 5)—also derives from *Freiberg*, this time via another Judge Murphy decision. *See Sether*, 2008 WL 1701172, at *4 (citing to *Weese*, 2007 WL 2908014, at *3 (Murphy, J.), which in turn cited to *Freiberg*). It is, therefore, no more persuasive.

assert federal immunity defenses. *Watson*, 551 U.S. at 150. As the Court has repeatedly explained, the federal government

> can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,-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.

Willingham, 395 U.S. at 406 (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)); *see also Mesa*, 489 U.S. at 126 (same).

As shown above, neither the text of the removal statute in its various iterations, nor any Supreme Court precedent, has drawn a distinction between a federal officer and a private party "acting under" a federal officer in determining who is entitled to removal. On the contrary, the Supreme Court has held that the "chauffeur and helper" of federal agents had "'the same right to the benefit of' the removal provision as did the federal agents." *Watson*, 551 U.S. at 150 (quoting *Soper*, 270 U.S. at 30).

Circuit courts have likewise recognized that the right of government contractors to remove under section 1442 can be just as important for the protection of federal interests as the right of removal by governmental officials themselves. This is because government contractors fulfill important functions that the federal government would otherwise fulfill itself. The

contractor helps "the Government to produce an item that it needs" or helps "officers fulfill other basic governmental tasks." *Watson*, 551 U.S. at 153. The Fifth Circuit has recognized that, for a military contractor like CBS, the government functions fulfilled by the contractor are particularly important:

> The welfare of military suppliers is a federal concern that impacts the ability of the federal government to order and obtain military equipment at a reasonable cost. Federal interests are especially implicated where, as in this case, the Defense Department expressly issued detailed and direct orders to the defendants to supply a particular product.

Winters, 149 F.3d at 398 (quoting *Winters v. Diamond Shamrock Chem. Co.*, 901 F. Supp. 1195, 1200-01 (E.D. Tex. 1995)). Similarly, in *Isaacson*, the Second Circuit affirmed a district court's decision recognizing the following policy considerations in support of removal by a federal contractor:

> (1) the scattering of Agent Orange claims throughout the state courts would have a chilling effect on manufacturers' acceptance of government contracts; (2) the vagaries of state tort law would deter military procurement; and (3) state courts may circumvent *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the Supreme Court's preeminent decision on the government contractor defense, if they are unsympathetic to defendants.

Isaacson, 517 F.3d at 134. Thus, allowing removal by private contractors acting under the federal government is essential to the protection of federal interests from interference by potentially hostile state courts. That is why the statute explicitly allows such removal, and why the Supreme Court has never recognized the anti-removal presumptions applied by the District Court.

The District Court's misapplication of section 1442 is particularly problematic in light of the extreme hostility of the jurisdiction to which this case was remanded. Madison County has been widely recognized as the paradigmatic example of a "judicial hellhole." *See*, *e.g.*, *Kelly v. Martin & Bayley, Inc.*, 503 F.3d 584, 585 (7th Cir. 2007) (acknowledging American Tort Reform Foundation's classification of Madison County as a "Judicial Hellhole"). As observers have noted, the adjudication of tort claims in Madison County is notable for "systematic bias" against out of state corporations like CBS. *See* American Tort Reform Foundation, *Judicial Hellholes* (2006) at 4, available at http://www.judicialhellholes.org/wp-content/uploads/2010/12/JH2006.pdf ("Madison County has been the poster child of the Judicial Hellholes program for its systematic bias against out-of-state defendants in civil lawsuits, uneven application of the law, favoritism for local plaintiffs' lawyers, creation of previously unknown causes of action and implementation of procedures foreign to due process.").[9]

The policy considerations underlying section 1442 are of paramount importance in this case. The District Court's decision to apply its *sui generis*

[9] "As a perennial Judicial Hellhole, Madison County, Illinois, earned its reputation as a horrible place to be targeted by a class action or mass tort lawsuit. Madison County became known for plaintiff friendly rulings and thus attracted an extraordinary number of lawsuits, including asbestos claims and class actions." *See Judicial Hellholes* (2006), *supra*, at 18. "Personal injury lawyers from the far reaches of Illinois and from other states trekked to Madison County in hopes of striking gold. . . . Madison County was by far the busiest place for asbestos lawsuits with many claims filed on behalf of claimants from all over the country, many of whom never even heard of Madison County." *Id.* at 19.

anti-removal presumptions and remand the case without allowing CBS to present any evidence or argument against removal reflect more than a mere omission, but an affirmative distain for these important policy considerations.

CONCLUSION

For all these reasons, in addition to those stated in CBS's opening brief, the order remanding this action to the Circuit Court of the Third Judicial Circuit, Madison County, Illinois, should be vacated.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2012, I caused true and correct copies of the foregoing Brief for Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Defendant-Appellant CBS Corporation to be served on the following via the Electronic Case Filing (ECF) service:

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CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Fed. R. App. P. 32(a)(7)(c), that the foregoing Brief contains 5,954 words, excluding those sections excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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