The Subcommittee on the Constitution and Limited Government

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Committee on the Judiciary

"Legislative Reforms to End Lawfare

By State and Local Prosecutors"

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Chairman Roy, Ranking Member Scanlon, and Members of the Committee, it is a great honor and privilege to be part of your deliberative process, and I thank you for the invitation.

My name is Elizabeth Earle Beske, and I am a Professor of Law at American University, Washington College of Law, where I teach Federal Courts, Civil Procedure, and Constitutional Law. I went to Princeton University and Columbia Law School, and after law school, I clerked for Judge Patricia Wald and Justice Sandra Day O'Connor. Thereafter, I worked as a litigator at Munger, Tolles & Olson.

As will soon be apparent, I come to you not as a politician, but as a nerdy law professor. My message today is a simple one. You can add the proposed language to the statute, but it may not have the immediate, broad, and sweeping effect you intend. In fact, in most instances, it may not do very much.

Congress has extensive power to confer jurisdiction on the lower federal courts. Indeed, the framers conferred on Congress the authority to decide whether lower federal courts ought to exist in the first place. This vast power is limited, however, by Article III of the Constitution. The Supreme Court has made clear that "Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983). In this area, the Constitution requires that all cases have a "federal ingredient." *Osborn v. Bank of the United States*, 22 U.S. 738, 823 (1824).

28 U.S.C. Section 1442 allows removal by federal officers of civil and criminal actions brought against them in state court for actions they take under color of their office. A unanimous Supreme Court held in *Mesa v. California* that the Constitution only permits these kinds of removal where federal officers assert a "colorable federal defense." 489 U.S. 121, 129 (1989). That is the only time there is the requisite "federal ingredient." Any other reading, the Court made clear, would raise "grave" constitutional questions. *Id.* at 137. So even though the statute does not include this limitation on its face, we must read it in line with the "colorable federal defense" requirement. The *Mesa* Court confirmed that 28 U.S.C. Section 1442 is "a pure jurisdictional statute"—nothing more. *Id.* at 136. In other words, it provides a pathway to federal court for a defendant but does not establish the defendant's entitlement to get there. That must come from somewhere else.

This bill clarifies, as Judge Hellerstein of SDNY had already concluded, that the statute covers the President and Vice President. The bill also takes up Eleventh Circuit Judge Rosenbaum's call in *Georgia v. Meadows* to expand coverage to include former federal officers. Of course, the President, Vice President, and current and former federal officers cannot remove to federal court simply because they hold a particular federal office, or because the suit charges conduct under color of that office. The Supreme Court's unanimous opinion in *Mesa*, written by my former boss Justice O'Connor, considered and specifically rejected that very argument. *See id.* at 136-

37. The *Mesa* requirement applies to the original statute and to the proposed amendment. The President and Vice President, former federal officers, and former Presidents and Vice Presidents may only remove actions to federal court under the amended statute where they have in pocket a "colorable federal defense." Again, you don't see it, but it is there because the Constitution requires it.

Before turning to a discussion of these defenses, there is another feature of the proposed bill that requires attention. The proposed bill adds a new (5) to section 1442(a), permitting removal of any action against "[t]he President or Vice President . . . where the state court's consideration of the claim or charge may interfere with, hinder, burden, or delay the execution of the duties of the President or Vice President." On its face, this provision only applies, and it can only logically apply, to sitting Presidents and Vice Presidents. Assuming continued adherence to the norm of not criminally charging a sitting President or Vice President, this refers only to civil charges. *See Amenability of the President, Vice President and Other Civil Officers to Federal Criminal Prosecution While in Office,* Op. O.L.C. (Sept. 24, 1973); *A Sitting President's Amenability to Indictment and Criminal Prosecution,* Op. O.L.C. (Oct. 16, 2000). *Nixon v. Fitzgerald* establishes absolute immunity for civil damage actions based on official acts. 457 U.S. 731, 749 (1982). The Supreme Court has repeatedly rejected the argument that the Constitution requires immunity for actions—civil or criminal—based on unofficial or private acts. *See Clinton v. Jones*, 520 U.S. 681, 694 (1997); *Trump v. United States*, 603 U.S. 593, 615 (2024).[1] The Court likewise rejected President Clinton's effort to get "temporary immunity" from the Paula Jones lawsuit for the duration of his term. *Clinton*, 520 U.S. at 695. Providing such a reprieve, the Court explained, would not serve the principal purpose of immunity—preventing public servants from approaching their designated functions fearful of liability. *See id.* at 693. Nor was the Court persuaded by the argument that private suits would pose burdensome distractions. *See id.* at 699-706.

Okay, so no application to past Presidents and Vice Presidents. Or to sitting Presidents and Vice Presidents for criminal charges. Or to sitting Presidents and Vice Presidents for civil charges based on official conduct. There is only one thing left to which this provision can apply: Civil suits against sitting Presidents and Vice Presidents for *unofficial* conduct. If, by this provision, the bill seeks to expand removal to encompass lawsuits against Presidents and Vice Presidents involving purely private matters—the Trump University cases, the Paula Jones suits, and whatnot—this is a dramatic expansion of the removal statute and a restructuring of the state-federal balance that ought to merit your full attention. Removal is intrusive; it divests state courts of jurisdiction. It would be surprising to see Congress make a move with such federalism implications in the absence of a clear statement, particularly because the Supreme Court has repeatedly, and recently, made clear that the Constitution provides no shield against these lawsuits. *Cf. Gregory v. Ashcroft*, 501 U.S. 452 ("If Congress intends to alter the 'usual

[1] Again, though, the norm is that no criminal prosecutions, even for unofficial acts, take place while a President or Vice President is in office.

constitutional balance between the States and the Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute."); *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990) (requiring clear statement before Congress can oust state courts of jurisdiction over a federal claim). Of course, even if Congress *were* attempting quietly to make such a far-reaching expansion of federal jurisdiction, per *Mesa*, no removal would be permissible unless the President or Vice President had in pocket a "colorable federal defense." The *Mesa* limitation, required by the Constitution, restricts all jurisdiction conferred by the statute. But it is worth flagging that the new section (5) appears to propose something rather extraordinary.

Perhaps anticipating *Mesa*'s clear instruction that Section 1442 only permits removal for defendants with "colorable federal defenses," the bill proposes to create a new immunity provision, Section 1456. One assumes this intends to stand in as the defense the Court found lacking in the *Mesa* case, and it is to have a one-size-fits-all, very broad compass. This provision confers upon all federal officers a rebuttable immunity under Article VI section 2 of the Constitution from any charges or claims made under authority of state law. Article VI section 2 is the Supremacy Clause. The Supremacy Clause does three things. It declares that federal law is the law of the land, even in the states; it establishes that federal law is supreme; and it states that if ever there is a conflict between state and federal law, federal law wins. *See* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 245-260 (2000). It's a rule of priority—basically, a choice of law provision. In 2015, another unanimous Supreme Court case, *Armstrong v. Exceptional Child Center*, made clear that the Supremacy Clause does nothing else. Justice Scalia—one of the best writers on the Supreme Court, then and since—stated it plainly: "the Supremacy Clause is not the source of any federal rights." 575 U.S. 320, 324 (2015). In other words, it lacks independent content. So, a unanimous Supreme Court has clearly told us we cannot look to the Supremacy Clause to *find* any federal rights. It just tells us what to do once we have found them. Plainly, then, Section 1456 and the Supremacy Clause themselves cannot provide content for a brand new, very expansive defense. Section 1456, by itself, does not solve a *Mesa* problem.

The proposed new "Official Immunity" provision certainly does not enact what some have called "Supremacy Clause Immunity." This term hearkens back to *Cunninham v. Neagle* (commonly called "*In re Neagle*"), 135 U.S. 1 (1890), which leading commentators note "stands virtually alone in the Supreme Court's jurisprudence on this issue." Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2197 n. 1 (2003). Neagle, a federal marshal charged by the U.S. Attorney General with protecting Justice Field—who was repeatedly threatened by disgruntled litigant David Terry—shot and killed Terry as he leapt menacingly at the Justice. California authorities promptly arrested Neagle and charged him with murder. Neagle filed a petition for habeas that eventually reached the Supreme Court, which puzzled over whether he was held in violation of federal law notwithstanding the absence of a federal statute. Unsurprisingly, the Court found itself able to grant relief, concluding that he was authorized by federal law to act and had done no more than was necessary and proper under the circumstances in discharging his

duties. *See Neagle*, 135 U.S. at 75. The Supreme Court has largely ignored the case since, and most lower courts, which have drawn on *Neagle* and coined the term "Supremacy Clause immunity,"[2] have required that officers demonstrate an objectively reasonable, well-founded belief their actions were necessary to fulfill federal duties. *See, e.g.*, *Texas v. Kleinert*, 855 F.3d 305, 314-15 (5th Cir. 2017); *Wyoming v. Livingston*, 443 F.3d 1211, 1221 (10th Cir. 2006); *New York v. Tanella*, 374 F.3d 141, 147 (2d Cir. 2004). Although they used the term "Supremacy Clause" to name the defense (the Supreme Court never did), these courts have not found content for the defense *in the Supremacy Clause itself*. Instead, they have evaluated extrinsic sources to find authorization under federal law and satisfaction of the necessary and proper standard. *See, e.g., Livingston*, 443 F.3d at 1226-27 (concluding that U.S. Fish & Wildlife Service employees were acting pursuant to regulatory authority requiring them to monitor wolves). Tying an "Official Immunity" provision to the Supremacy Clause, in other words, does not enact a "Supremacy Clause Immunity" defense (or any other substantive defense).

So, too, the "Official Immunity" provision does not quietly codify any immunity recognized in *Trump v. United States*, 603 U.S. 593 (2024). Rather, as a unanimous Court recognized in *Mesa*, this statute is purely jurisdictional, and inclusion of a provision tethered to the Supremacy Clause, which another unanimous Court said includes nothing of substance, does not change that. Section 1442 provides a jurisdictional vehicle by which federal officers can get to federal court armed with a "colorable federal defense." It does not provide that defense itself.

One last point. Proposed Section 1456(d) purports to bar courts from defining or limiting the "scope of the duties of an official of the Executive Office of the President." This provision relates to the requirement of Section 1442(a) that removable suits relate to acts "under color of such office." As all courts have sensibly found, to determine whether an act is "under color of such office," one needs to understand the role of the office. Presumably, the proposed language responds directly to that portion of the Eleventh Circuit opinion in *Georgia v. Meadows* finding two limits to former White House Chief of Staff Mark Meadows' duties—that the Chief of Staff had no role either supervising state elections or electioneering on behalf of a political campaign. The Eleventh Circuit examined positive law—both constitutional and statutory sources—that gave only the states and Congress a role in overseeing state elections. It noted that Mr. Meadows had conceded both points. The court declined to infer a role in overseeing state elections derivatively from the President's general duties under the Take Care Clause. Mr. Meadows and his attorney disagreed with this conclusion. With respect to the electioneering point, the Eleventh Circuit noted that, because the Chief of Staff was expressly forbidden by the Hatch Act from engaging in the conduct with which he was charged, it followed that it could not be part of the official duties of his office.

The proposed language in this bill seems to declare that, in future cases, Mr. Meadows would win on both points without argument: courts would be powerless to ask what roles an executive

[2] Interestingly, they have done so even though the *Neagle* case does not cite to the Supremacy Clause at all.

office does and does not include. What does this mean? Is this provision saying a court must accept that an officeholder's job includes conduct that another statute expressly forbids? Must a court accept a defendant's assertion that charges arise out of or relate to his office without any inquiry? If so, this effectively writes a key element out of the statute and, problematically in the case of the Hatch Act, requires a court to accept as official conduct something that conflicts with another federal statute. It likely doesn't offend the Constitution, as Mr. Meadows must still bring with him a "colorable federal defense" to remain in federal court under *Mesa*, but it is worth flagging that once we start down the road of requiring a court to accept that a suit implicates duties of a federal office on defendant's say-so, the statute inches more toward a general removal provision (and, again, in its broad, largely unexamined sweep brings with it a host of federalism issues).

To conclude, the proposed bill clarifies the inclusion of the President and Vice President in Section 1442 (something Judge Hellerstein was undoubtedly correct to presume before), it takes up Eleventh Circuit Judge Rosenbaum's call to add former officers to the removal statute, and it adds a new immunity provision that, in my view, does nothing of substance. It remains a "pure jurisdictional statute" qualified by Article III of the Constitution and by *Mesa*'s requirement that defendants must carry with them a "colorable federal defense" to remove. A possible expansion to encompass purely private lawsuits would radically affect the federal/state balance without any recognized federal interest or clear statement. With regard to Section 1456(d), it takes certain questions completely from the purview of judges, possibly even when doing so might conflict with other federal statutes, and it would seem to require that courts assume satisfaction of certain elements of Section 1442(a) on defendant's say-so. Perhaps this is the intent; it must be understood, though, that this enlarges the potential sweep of removability and requires judges to rubber stamp a defendant's assertion that he has met the element. As before, however, it is important to remember that this statute is just a pathway for getting to federal court, a purely jurisdictional statute. As Justice O'Connor reminded us for a unanimous Court, this removal statute on its own provides no substantive basis for staying there.