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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

METRO,

Petitioner,

v.

EXXON MOBIL CORP., SHELL PLC, F.K.A. ROYAL DUTCH SHELL PLC, SHELL U.S.A., INC., EQUILON ENTERPRISES LLC DBA SHELL OIL PRODUCTS US, BP PLC, BP AMERICA, INC., BP PRODUCTS NORTH AMERICA, INC., CHEVRON CORP., CHEVRON U.S.A., INC., CONOCOPHILLIPS, MOTIVA ENTERPRISES, LLC, OCCIDENTAL PETROLEUM F.K.A. ANADARKO PETROLEUM CORP., SPACE AGE FUEL, INC., VALERO ENERGY CORP., TOTALENERGIES, S.E. F.K.A. TOTAL S.A., TOTALENERGIES MARKETING USA F.K.A. TOTAL SPECIALTIES USA, INC., MARATHON OIL COMPANY, MARATHON OIL CORP., MARATHON PETROLEUM CORP., PEABODY ENERGY CORP., KOCH INDUSTRIES, INC., AMERICAN PETROLEUM INSTITUTE, WESTERN STATES PETROLEUM ASSOCIATION, MCKINSEY & COMPANY, INC., MCKINSEY HOLDINGS, INC., and OREGON INSTITUTE OF SCIENCE AND MEDICINE,

Respondents.

Case No. 3:24-cv-00019

**METRO'S REPLY TO RESPONDENTS' RESPONSE TO PETITIONER'S MOTION TO REMAND**



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The issue currently before this Court is a straightforward one of statutory construction: is a pre-suit petition to perpetuate testimony filed pursuant ORCP37 a "civil action" that can be removed to federal court under 28 U.S.C. §1441(a).[1]

The facts are, in all important respects, uncontroverted. Dr. Martin Hoffert has critical insider information about the state of knowledge of ExxonMobil and other possible defendants regarding the environmental impact of the burning of fossil fuels.[2] Dr. Hoffert, now over 85 years old, is in very poor health. He has fought cancer, a heart attack, and multiple cardioversions, and his health is further deteriorating. No one knows how much longer he will live. Metro, a local metropolitan service district, is considering bringing a claim for damages caused by fossil-fuel driven global warming, which manifested itself in the summer of 2021 as a mass casualty heat dome, among other ongoing heat-related disasters. Although Metro has made no final decision, it desires to preserve critical evidence, such as that which Dr. Hoffert has to offer, should it opt to proceed forward with litigation.[3] To comply with its fiduciary obligations to its citizens and taxpayers, Metro filed a petition in Multnomah County district court pursuant to ORCP 37a to perpetuate Dr. Hoffert's testimony so that a jury would have all the facts should Metro file a lawsuit

[1] Pursuant to the Court's Order of January 22, 2024, Doc. 54, Metro focuses exclusively on the removability of a Rule 37 petition to perpetuate testimony and preserves all claims that the Court lacks subject matter jurisdiction for briefing and resolution for a later date. Metro also expressly defers and preserves all arguments in support of the merits of its Petition.

[2] In the 1980s Dr. Hoffert, then a professor of physics at N.Y.U. worked as a consultant to ExxonMobil's predecessor, modeling the foreseeable effects of burning fossil fuels on global warming.

[3] Significant portions of the Notice of Removal and Response in Opposition to the Motion to Remand are devoted to contending Metro is conspiring with Multnomah County and trying to avoid the "threshold jurisdictional determination about the appropriate forum" or "expedite *merits* discovery". Doc. 94, p.8, 9. Metro addressed these misrepresentations in its Motion to Remand, Doc 69, p.5-6, but will note again: Metro is not conspiring with any person or entity, no decision has been made about whether to bring a lawsuit, much less against whom, or what damages to seek, and Metro does not seek to launch "merits discovery".



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and 85-year-old Dr. Hoffert not survive to trial. Respondents,[4] understandably, do not want a jury to hear Dr. Hoffert's evidence. Accordingly, to delay the deposition—with the obvious hope that it never takes place—Metro's petition to perpetuate Dr. Hoffert's testimony was removed to federal court.

Metro filed its Motion to Remand, contending the ORCP 37a petition is not a "civil action" that can be removed under 28 U.S.C. §1441(a). Supporting Metro's position are:

- the Constitution of the United States;
- the text of the removal statutes, especially 28 U.S.C. §§1441,1442 and 1446;
- legislative history;
- the 2011 amendments to 28 U.S.C. §1442;
- the holdings of federal appellate courts;
- the rulings of dozens of federal district courts; and
- Federal Courts' treatment of F.R.C.P. 27 motions to perpetuate testimony.

Supporting Respondents' position that Metro's petition to perpetuate testimony is a removable "civil action" are:

- a case that was subsequently overruled and whose holding has been explicitly rejected by numerous federal district courts; and
- a case whose holding has not been followed by any other court in the United States, including other courts in its own district.

For the reasons set forth below and in Metro's Motion for Remand, Doc. 69, Metro's petition to perpetuate the testimony of Dr. Martin Hoffert should be remanded.

[4] While ExxonMobil initially removed Metro's petition to federal court, has now been joined by all Respondents. Doc. 98, p.28-33. Apparently, all fear the impact of his testimony.



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**THE CONSTITUTION POINTS TOWARD REMAND**

It is axiomatic that federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). "They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. **It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.**" *Id.* (citations omitted) (emphasis added).

When it comes to removal, courts have long held that the removal statute must be strictly construed. *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941); *Takeda v. Northwestern Nat'l Life Ins. Co.,* 765 F.2d 815, 818 (9th Cir.1985); *Zurich American Ins. Co. v. CentiMark Corp.*, Case No. 3:21-cv-647 YY, 2021 WL 3563099 at *1 (D. Or. June 28, 2021) (You, M.J.). Federal jurisdiction must be rejected if there is any doubt as to the right of removal. *Libhart v. Santa Monica Dairy Co.,* 592 F.2d 1062, 1064 (9th Cir.1979). This "'strong presumption' against removal jurisdiction," *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992), arises from the constitutional fact that federal courts are courts of limited jurisdiction and the "due regard for the rightful independence of state governments", *Shamrock Oil and Gas Corp*, 313 U.S. at 108, a concept imbedded in the federal structure of our Constitution. "Because removal jurisdiction raises significant federalism concerns, federal courts are directed to construe removal statutes strictly." *Univ. of S. Ala. v. Am Tobacco Co.*, 168 F.3d 405, 411 (11th Cir. 1999). "This is especially so in diversity cases, since concerns of comity mandate that state courts be allowed to decide state cases unless the removal action falls squarely within the bounds Congress has created." *Zurich American Ins. Co. v. CentiMark Corp.*, Case No. 3:21-cv-647 YY, 2021 WL 3563099 at *1 (D. Or. June 28, 2021) (You, M.J.).



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The foundation for Respondents' whole argument is that "the term 'civil action' is to be construed broadly….", Doc. 94, p.14, an argument contrary to fundamental constitutional jurisprudence, which requires strictly construing the removal statute. *Zurich American Ins. Co.*, 2021 WL 3563099 at *1. Respondents seek to evade the Constitutional dictates regarding strict statutory construction of 28 U.S.C. §1441(a) by representing to the Court that *Dresser Indus., Inc v. United States*, 596 F.2d 1231, 1238 (5th Cir. 1979) and *In re I-35W Bridge Collapse Site Inspection*, 243 F.R.D. 349 (D. Minn.) set out the "**LEGAL STANDARD**" applicable to the case at bar. Doc. 94, p.13-14. Respondents claim the applicable legal standard is:

> A federal court has jurisdiction over a pre-suit petition to perpetuate testimony if "in the contemplated action, for which testimony is being perpetuated, federal jurisdiction would exist."

This argument misses the mark. Both cases are irrelevant; they involve pre-suit petitions filed in federal court under Rule 27. Neither has anything to do with interpreting the removal statute. As this Court held in *Zurich American*, the constitutional directive is clear: 28 U.S.C. §1441 should be strictly and narrowly construed.

This north star points to but one conclusion: the term "civil action" must be strictly construed and that dictate requires the Court to remand Metro's petition to perpetuate testimony to state court. But beyond just the Constitution, there are multiple other sources that support remand, including both the language of the statute and the holdings of dozens of other cases.

**THE REMOVAL STATUTE ESTABLISHES METRO'S PETITION SHOULD BE REMANDED**

Knowing the phrase "civil action" in Section 1441(a) must be strictly and narrowly construed, we now turn to the language of the statute itself. "Statutory construction 'is a holistic endeavor,' and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *U.S. Nat. Bank of Oregon v. Independent Ins. Agents*



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*of America, Inc.*, 508 U.S. 439, 455 (1993) (citation omitted). Courts do not "construe statutory phrases in isolation" but rather "read statutes as a whole." *U.S. v. Morton*, 467 U.S. 822, 828 (1984). Statutory construction requires courts to look at other provisions of the same statute to see if there are differences that shed light on interpretation of the statute. What the Court will find in looking at all the removal statutes is that Congress has used different language in different sections to identify what constitutes a "civil action", and the language in Section 1441(a), unlike in other sections, does not include pre-suit discovery in the definition of "civil action". When Congress includes language in one section of a statute but omits it in another, it is presumed Congress acted intentionally and purposefully in the disparate inclusion or exclusion. *Gallardo by and through Vassallo v. Marstiller*, 569 U.S. 420, 430-431 (2022). *See, Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (holding Congress's inclusion of a phrase in two sections of a statute but not a third indicates the phrase should not be read into the third). Application of these fundamental canons of statutory construction to the term "civil action" found in 28 U.S.C. §1441(a) establishes the petition to perpetuate the testimony of Dr. Hoffert should be remanded.

Section 1441 is part of a chapter devoted to removal jurisdiction. 28 U.S.C. Chapter 89. Section 1441 is the general removal statute, *Home Depot U.S.A., Inc. v. Jackson*, 587 U.S. --, 139 S. Ct. 1743, 1745 (2019). Its next-door neighbor, 28 U.S.C. §1442, is part of the same statutory regimen; it governs what is referred to as "federal officer removal". *Watson v. Phillip Morris Companies, Inc.*, 551 U.S. 142, 146 (2007). After the 1948 recodification and consolidation of the removal statutes into Chapter 89, the term "civil action" was used to describe the type of civil matter that could be removed under both Sections 1441(a) and 1442(a). The term, at that time, was statutorily undefined.



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The two statutes are interpreted differently. While 28 U.S.C. §1441 is narrowly construed, 28 U.S.C. §1442 is liberally construed in favor of removal. *Watson v. Phillip Morris Cos.*, *Inc*, 551 U.S. 142, 147 (2007). The reason is that interpretation of Section 1441 must respect Article III and our system of federalism, while Section 1442 is designed to protect the federal government and its employees from interference in state court with its operations and is thus broadly construed. *Id.* at 150. Before 2010, as will be discussed below, the vast majority of courts held the term "civil action," as found in Section 1441(a), did not include pre-suit petitions to take depositions. Interestingly, even though it was meant to be construed broadly, many courts reached the same conclusion when interpreting the term "civil action" found in Section 1442; they also held it did not allow for the removal of petitions seeking pre-suit discovery from federal officers. H. R. Rep. No. 112-17(I), p.4 (2011), 2011 WL 692207 at *4.

In 2010 this issue became important to Congress as the result of the decision in *Price v. Johnson*, No. 3:09-cv-476-M, 2009 WL 10704853 (N.D. Tex. April 10, 2009). John Wiley Price, a County Commissioner in Dallas County, Texas, filed a pre-suit petition under Texas Rule of Civil Procedure 202 to depose Congresswoman Eddie Bernice Johnson.[5] Congresswoman Johnson removed the case to federal court pursuant to 28 U.S.C. §1442. The district court remanded the case, holding that a petition to take a deposition prior to a lawsuit was not a "civil action" under either Sections 1441(a) or 1442, citing cases holding that a pre-suit petition "is not a 'civil action' because it asserts no claim or cause of action upon which relief can be granted." *Id.* at *1.

Congress immediately sprang into action. Even though it knew courts were holding a petition for pre-suit discovery was not a "civil action" under both Sections 1441(a) and 1442,

[5] The purpose of Price's suit was to investigate the potential of a defamation action against Congresswoman Johnson. *Price v. Johnson*, 600 F.3d 460, 461 (5th Cir. 2010).



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Congress chose to amend **only** Section 1442. That amendment involved inserting a definition section. New Section 28 U.S.C. §1442(d)(1), added in 2011, now provides:

> The terms "civil action" and "criminal prosecution" **include any proceeding** (whether or not ancillary to another proceeding) **to the extent that in such proceeding a judicial order**, **including a subpoena for testimony** or documents, is sought or issued.

(emphasis added). The text of Section 1442(d)(1) is clear: for the purposes of federal officer removal, a "civil action" includes a proceeding seeking a judicial order to obtain testimony. And the legislative history is clear, this provision was expressly added to address the question of pre-suit discovery. H. R. Rep. No. 112-17(I), p.4 (2011), 2011 WL 692207 at *4.

There is now a significant textual difference between Sections 1441(a) and 1442, where once there was none. Section 1442, the federal officer removal statute, now contains a provision expanding the definition of a "civil action" to include pre-suit depositions. *Hammer v. U. S. Dept. of Health and Human Services*, 905 F.3d 517, 527 (7th Cir. 2018) (the term "include" in 28 U.S.C. §1442(d)(1) broadens the type of civil actions that are removable). *See, Samantar v. Yousef*, 560 U.S. 305, 314 and n.10 (2010) (citing 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47.7, p. 305 (7th ed.2007) ("[T]he word 'includes' is usually a term of enlargement, and not of limitation" (some internal quotation marks omitted)).). Section 1441(a), on the other hand, does not contain language broadening the definition of "civil action" to include pre-suit discovery.

When Congress amends a statute, courts presume Congress was knowledgeable about judicial decisions interpreting the prior legislation. *Porter v. Board of Trustees of Manhattan Beach Unified School District*, 307 F.3d 1064, 1072 (9th Cir. 2002). Congress chose to expand the definition of "civil action" in Section 1442(d)(1) to cover pre-trial depositions but chose not to make the same change to the definition of "civil action" in Section 1441(a). The law is clear: courts



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must presume Congress was satisfied with the narrow judicial interpretation of "civil action" in Section 1441(a), the statutory provision at issue in this case. *Sosa*, 542 U.S. at 711 n.9 (holding Congress's inclusion of a phrase in two sections of a statute but not a third indicates the phrase should not be read into the third). Congress has inserted language in Section 1442 that it chose not to include in Section 1441. It is presumed that Congress acted intentionally and purposefully in this exclusion. *Cheneau v. Garland*, 997 F.3d 916, 920 (9th Cir. 2021) (*en banc*). This can mean only one thing: the term "civil action" in Section 1441(a) does not include pre-suit depositions to preserve testimony.

It is not just the difference in the language used by Congress in Sections 1441 and 1442 that drives the conclusion that pre-suit petitions to perpetuate testimony are not removable; the language in Section 1446 also supports that conclusion. 28 U.S.C. §1446 sets out the procedure to be followed when a party removes a matter from state to federal court. Section 1446(b)(1) defines the time frame in which the notice of removal of "a civil action or proceeding" must be given. This language makes it clear that there are two distinct types of civil matters that are potentially removable: "civil actions" and civil "proceedings."[6] Section 1441(a) limits removal to only one of those subsets: civil actions.

Section 1446(g) affirms this important distinction. It sets out the deadline for filing a notice of removal "[w]here the civil action or criminal prosecution that is removable under section 1442(a) is a proceeding in which a judicial order for testimony or documents is sought or issued or sought to be enforced." Again, Congress makes it clear, "proceedings" are removable under Section 1442(a), but not under Section 1441(a).

[6] There would be no need to identify "proceedings" as a separate category of potentially removable civil matter if they were encompassed in the phrase "civil action". To so hold would violate the canon against surplusage. *Nielsen v. Preap*, —— U.S. ——, 139 S. Ct. 954, 969 (2019) (citation omitted) (holding every word and every provision in a statute is to be given effect; no provision should be interpreted to either duplicate another or to have no consequence).



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Congress' expansion of the definition of "civil action" in Section 1442(d)(1) to include pre-suit matters, Congress' use of the phrase "civil action or proceeding" in Section 1446(b)(1), and Congress' establishment of a deadline in Section 1446(g) to file a notice of removal of a proceeding removed pursuant to Section 1442(a) makes it clear that the term "civil action" in Section 1441(a) only allows for a removal of a narrow set of civil matters. As will be discussed below, courts around the country have concluded, almost unanimously, that pre-suit petitions to perpetuate testimony do not fall within the limited subset of civil actions that are removable under Section 1441(a).

Ignoring the text and legislative history of the whole statutory removal scheme, Respondents claim Congress intended for the term "civil action" in Section 1441(a) to be construed "broadly", citing several cases. Doc. 94, p.15-16. But none of those cases involve pre-suit depositions to perpetuate testimony. Instead, they reflect the change brought about in 1938 by the merger of the procedural rules of law and equity. That merger allowed for suits between parties to be governed by the new rules of civil procedure, regardless of whether previously the suits would have been governed by the rules of law or equity.

Respondents also reference the "Historical and Revision Notes" to Section 1441, but those Notes prove Metro's point, that the term "civil action" in Section 1441(a) applies to lawsuits, not discovery:

> Phrases such as "in suits of a civil nature at law or in equity," the words "case," "cause," "suit," and the like have been omitted and the words "civil action" substituted in harmony with Rules 2 and 81(c) of the Federal Rules of Civil Procedure.

Doc. 94, p.15. The language in the Notes is clear, Section 1441(a) is focused on lawsuits, cases in which one party sues another seeking monetary or equitable relief. There is no mention of the terms "pre-suit deposition" or "pre-suit discovery," which are not lawsuits, but rather motions. *See,*



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*State of Nevada v. O'Leary*, 63 F.3d 932, 934 (9th Cir. 1995) (describing a motion to perpetuate testimony under Federal Rule of Civil Procedure 27 as "more akin to a motion than to an 'action'"); *Ash v. Cort*, 512 F.2d 909 (3rd Cir. 1979) (repeatedly describing a petition to perpetuate testimony filed under Rule 27(b) as a "motion").

The plain language of the removal statute, the differences between Sections 1441 and 1442, the language in Section 1446, multiple canons of statutory construction, and the legislative history of the 2011 amendments to Section 1442 all clearly establish that a pre-suit petition to perpetuate testimony is not considered a "civil action" under 28 U.S.C. §1441(a). The statutory language alone mandates Metro's petition to perpetuate the testimony of Dr. Hoffert should be remanded.

**NATIONAL CASE LAW CONFIRMS METRO'S PETITION SHOULD BE REMANDED**

Often trial courts are left without precedent to guide their decisions. That is not the case here. There are dozens of precedential federal court rulings, almost all of which have concluded that a pre-suit petition to perpetuate testimony is not a "civil action" which is removable under Section 1441(a). For a partial list of the federal district court cases that have so held, s*ee,* Doc. 1, ExxonMobil Corporation's Notice of Removal*,* p.15, n.10, 11 and Doc. 69, Metro's Motion to Remand, p. 9, n.10.

The Second Circuit has reached the same conclusion. *Teamsters Local 404 Health Services & Ins. Plan v. King Pharmacy, Inc.,* 906 F.3d 260, 267 (2d Cir. 2018) (holding a pre-action petition to perpetuate testimony is not a "civil action" under Section 1441(a) and must be remanded). Since *Teamsters*, Metro is unaware of any court in the United States that has held a pre-suit petition to perpetuate testimony is a removable "civil action" under Section 1441(a).

Recognizing that the majority rule requires remand, Respondents first seek to distinguish the cases. They argue that the dozens of cases remanded generally involve "pre-suit discovery to



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*investigate* potential claims", whereas Metro's petition is different because it seeks to perpetuate testimony. Doc. 94, p.23-24. Respondents apparently concede pre-suit petitions to investigate potential claims are not removable but claim a pre-suit petition to perpetuate testimony is a "civil action" that is removable under Section 1441(a). This is simply not the law, and the distinction Respondents seek to draw is one that makes no difference.

First, it is a statute we are construing, and the role of courts in interpreting a statute is "to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004). There is nothing in the text of Section 1441(a) that supports Respondents' argument that a pre-action petition seeking to perpetuate testimony is a "civil action", but a pre-action petition seeking to investigate potential causes of action is not a "civil action." To achieve the granular result desired by Respondents, the Court would have to judicially legislate and add language to Section 1441(a), in violation of long-settled jurisprudence that courts should not add or subtract words from a statute. *62 Cases, More or Less, Each Containing Six Jars of Jam v. U.S.*, 340 U.S. 593, 596 (1951).

Second, there is no case in the history of American jurisprudence that reaches the Respondents' proposed conclusion. No court, in interpreting Section 1441(a), has drawn a distinction between the removability of a pre-action petition to perpetuate testimony and a pre-action petition to investigate potential causes of action. Indeed, no court has ever even mentioned such a distinction. Metro urges the Court to reject any suggestion that it chart a new path, previously unknown in American jurisprudence, and judicially amend the statutory language of Section 1441(a) to distinguish between the removability of pre-action petitions to perpetuate testimony and pre-action petitions to investigate claims.

Respondents' fallback position is to ask the Court to ignore the consensus—and, since *Teamsters*, unanimous—jurisprudence, and instead follow a true outlier, *Cong v. ConocoPhillips*



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*Co.*, No. CV H-12-1976, 2016 WL 6603244 (S.D. Tex. November 8, 2016). Doc. 94, p. 16-20. Respondents wax enthusiastic about what they describe as the court's recognition of "the broad sweep of 'civil action' as used in Section 1441(a)," and the statement in the opinion that "a civil action is one person asking a court to do something about another person." *Id.* at 16. There are multiple problems, however, with the holding in *Cong*, besides the fact it is directly contrary to the holdings of countless courts, including this Court in *Zurich American*, that Section 1441(a) must be strictly construed.

First, the court's holding that a pre-suit petition to investigate a potential claim is a "civil action," is *dicta.* The court's initial and primary holding was that plaintiffs' motion to remand was filed too late. *Cong*, 2016 WL 6603244 at *1. That ruling resolved the remand issue. The subsequent discussion about the removability of the pre-suit petition, as the district court itself admitted, was secondary. *Id.* The court's secondary—not alternative—holding in this unpublished opinion is *dicta* and without precedential value. *Export Group v. Reef Industries, Inc.*, 54 F.3d 1466, 1471-72 (9th Cir. 1995).

Indeed, the analysis in *Cong* is so out-of-step with mainstream jurisprudence that it is not followed by any other federal court in Texas, much less courts in the same district. *See, e.g., Rivera v. City of McAllen, Texas,* Civil Action No. 7:20-cv-00384, 2021 WL 37537 at *2 (S.D. Tex. January 5, 2021); *In re Highland Capital Management, L.P.*, Case No. 19-34054-sgj11, 2022 WL 38310 at *8 (Bankr. N.D. Tex January 4, 2022); *Leos v. Bexar County*, Case No. SA-22-CV-0574-JKP, 2022 WL 5236839 (W.D. Tex. October 4, 2022).

Even more troubling is that the holding in *Cong* is little more than *ipse dixit.* The district court devotes but two sentences to its analysis (probably because it considered this part of the opinion to be *dicta*) and does not cite any case to support its conclusion that "a civil action is one



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person asking a court to do something about another person." *Cong*, 2016 WL 6603244 at *1. The legal support the court offers for this statement, a treatise, **does not** contain this, or similar, language, s*ee*, 14C Charles A. Wright, et. al., Federal Practice and Procedure § 3721 (4th ed. 2023), and a Westlaw search fails to reveal any other federal court that has utilized similar language to define the statutory phrase "civil action" found in Section 1441(a). Failure to consider the dozens of prior federal on-point opinions and the legislative history of the statute means this decision is not a binding precedent on this Court. *See, Perea v. Humana Pharmacy, Inc.*, SACV 12-1881-JST (ANx), 2013 WL 12129618 at *4, n.2 (C.D. Calif. January 23, 2013).

Finally, the facts in *Cong* are totally different from those presented by Metro's petition. In *Cong*, even though the plaintiffs had already filed suit, the alleged purpose of their proposed discovery was "to investigate [the existence of] a potential claim," *Cong*, 2016 WL 6603244 at *1. In this case, Metro's purpose is simply to preserve the testimony of an 85-year-old scientist in failing health. There is simply no legal or factual basis for the Court to place any credence in *Cong*.

Respondents also contend *In re Texas*, 110 F. Supp.2d 514 (E.D. Tex. 2000), supports their position, Doc. 94, p.21-22, although with much less ardor than they did prior to Metro informing the Court *In re Texas* had been overruled. Respondents now attempt to minimize the impact of the Fifth Circuit's reversal. Doc. 94, p.21-22.Their analysis is simply inaccurate. The Fifth Circuit, while declining to rule on the removability under Section 1441(a) of a pre-action petition to take depositions, used language strongly suggesting that the trial court's holding that a Rule 202 petition is a removable "civil action" was wrong. The court described a Rule 202 petition as "only an investigatory tool" and concluded that federal courts could not interfere with the use of this tool in the state courts. *Texas v. Real Parties in Interest*, 259 F.3d 387, 394-95 (5th Cir. 2001), *cert. denied sub. nom., Umphrey v. Texas*, 534 U.S. 1115 (2002). The Fifth Circuit's ruling was so decisive that,



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for the past nineteen years, every court in the United States that has considered the district court's analysis in *In re Texas*, has rejected it.[7] Metro urges the Court to follow the mainstream jurisprudence and not an overruled case that is no longer considered authoritative.

**THIS COURT'S HOLDINGS SUPPORT REMAND**

In *State ex. rel. Myers v. Portland Gen. Elec. Co.*, No. Civ. 04-CV-3002-HA, 2004 WL 1724296 (D. Or. July 30, 2004), this court concluded that pre-suit discovery was not a removable "civil action" under Section 1441(a). *Myers* arose out of a pre-suit Civil Investigative Demand (CID) issued by the Attorney General of Oregon seeking documents from Portland General Electric (PGE) so that the Attorney General could determine whether PGE violated Oregon law. *Id.* at *1. PGE removed the case to federal court and former Chief Judge Haggerty remanded, holding no Section 1441(a) "civil action" had yet been filed because "investigative proceedings cannot expose PGE to monetary damages or equitable relief. *Id.* at *2. Former Chief Judge Haggerty's opinion has since been followed by other courts. *See, Mississippi ex. rel. Hood v. Gulf Coast Claims Facility*, No. 3:11–CV–00509–CWR–LRA, 2011 WL 5551773 at *2-3 (S.D. Miss. November 15, 2011).

[7] *See, e.g. Mayfield-George v. Texas Rehab. Comm'n*, 197 F.R.D. 280, 282-84 (N.D. Tex. 2000); *McCrary v. Kansas City So. R.R.*, 121 F.Supp.2d 566, 569 (E.D. Tex. 2000); *Davidson v. S. Farm Bureau Cas. Ins. Co.,* Civ. A. No. H-05-03607, 2006 WL 1716075 (S.D. Tex. June 19, 2006); *Sawyer v. E.I. du Pont de Nemours & Co.*, No. Civ. A. 06-1420, 2006 WL 1804614 (S.D. Tex. June 28, 2006); *Young v. Hyundai Motor Mfg. Alabama, LLC*, 575 F. Supp. 2d 1251, 1255 (M.D. Ala. 2008); *In re Enable Commerce*, 256 F.R.D 527, 530 (N.D. Tex. 2009); *Mississippi ex. rel. Hood v. Gulf Coast Claims Facility*, No. 3:11–CV–00509–CWR–LRA, 2011 WL 5551773 at *2-3 (S.D. Miss. November 15, 2011); *Kingman Holdings, L.L.C. v. Everbank*, Civ. A. No. SA-14-CA-107-FB; 2014 WL 12877303 (W.D. Tex. March 31, 2014); *Capps v. JPMorgan Chase Bank, N. A.*, No. 3:13–CV–572–CWR–LRA, 2014 WL 10475644 (S.D. Miss. September 29, 2014); *In re Highland Capital Management, L.P.*, 2022 WL 38310 at *8. *See also, Rivera v. City of McAllen, Texas,* Civil Action No. 7:20-cv-00384, 2021 WL 37537 at *2 (S.D. Tex. January 5, 2021); *Leos v. Bexar County*, No. SA-22-CV-0574-JKP, 2022 WL 5236839 (W.D. Tex. October 4, 2022).



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Respondents seek to distinguish this case, which is directly on point, by arguing a civil investigative demand issued pursuant to a statute is different from a pre-suit petition to perpetuate testimony filed pursuant to ORCP 37. Again, this is a distinction without a difference. When evaluating whether the CID issued in *Myers* was a "civil action" removable under Section 1441(a), Chief Judge Haggerty identified a *sine qua non* of a "civil action": a claim for monetary damages or equitable relief. *Myers*, 2004 WL 1724296 at *2. This is in accord with many other federal cases. *See, e.g., Mayfield-George v. Texas Rehab. Comm'n*, 197 F.R.D. 280, 283 (N.D. Tex. 2000) (holding a pre-suit petition to take depositions must be remanded because it "asserts no claim or cause of action upon which relief can be granted); *In re Hinote,* 179 F.R.D. 335, 336 (S.D.Ala.1998) (holding a pre-suit petition to take a deposition "is a request for discovery, nothing more").

Like the State in *Myers*, Metro has not filed a "complaint" seeking either monetary damages or equitable relief—it has not even alleged a cause of action against anyone—but rather it has simply filed a petition seeking to depose a witness in extremely poor health to preserve his testimony. The holding and analysis in *Myers* dictate that Metro's Petition to Perpetuate Testimony should be remanded to Multnomah County Circuit Court.

Respondents' final argument is that in *Kelly v. Whitney*, No. 98-30-HU, 1998 WL 877625 (D. Or. October 27, 1998), the district judge did not remand a pre-suit petition to perpetuate testimony, indicating the court must have held it to be removable. Doc. 94, p.20-21. This interpretation overreads *Kelly*.

*Kelly* involved a *pro se* litigant's effort to take the pre-suit depositions of several IRS employees who were involved in collecting his taxes. *Kelly*, 1998 WL 877625 at *1. The United States Attorney removed the case to federal court based on 28 U.S.C. §1442—the federal officer



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removal statute, a completely different statutory provision than §1441(a) with different underlying policies, as discussed previously. Kelly did not file either a motion to remand or a motion challenging the court's jurisdiction, and the court proceeded to the merits without ever discussing whether a pre-suit petition to perpetuate testimony was removable under 28 U.S.C. §1442.

From this silence, Respondents argue there is precedent binding on this Court. They contend the district court must have considered the issue, as it was required to evaluate its own jurisdiction before issuing a ruling. But whether the district court considered the removability issue is a matter of speculation; it might have or it might not have. We do not know. The reporters are full of cases where an appellate court, for the first time in a case, considers whether there is federal court jurisdiction and subsequently concludes there is not. *See, e.g., Bender v. Williamsport Area School District*, 475 U.S. 534 (1986); *Cunningham v. BHP Petroleum Great Britain PLC*, 427 F.3d 1238 (10th Cir. 2005); *McCants v. Alabama-West Florida Conference of the United Methodist Church, Inc.*, 372 Fed. Appx. 39 (11th Cir. 2010).

Even if the *Kelly* court did consider the issue, the opinion is silent on the matter. That hardly seems like a basis for not remanding Metro's petition, especially considering Former Chief Judge Haggerty's subsequent analysis in *Myers*, the fact that *Kelly* involves a different statutory provision that is to be construed broadly and the legion of federal court cases that have actually analyzed the issue with respect to Section 1441(a) and reached the opposite conclusion.

## CONCLUSION

The Constitution of the United States; the plain language of Sections 1441(a), 1442(d)(1) and 1446(b)(1) and (g) of the removal statutes; the presumption that Section 1441(a) is to be narrowly construed; the legislative history underlying the 2011 amendments; the Second Circuit's holding in *Teamsters* and the unanimity of courts after that holding; the rulings in dozens of cases



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by federal judges around the country; the holding in *State ex. rel. Myers*; the Fifth Circuit's language in *Texas v. Real Parties in Interest*; and the principles underlying all of these rulings point to but one answer to the question the Court posited in its Order of January 22, 2024: a "Before action" petition to perpetuate testimony filed in state court pursuant to Oregon Rule of Civil Procedure 37 is not removable under 28 U.S.C. §1441(a) because it is not a "civil action" as required by that statutory provision. The Court should remand Metro's Petition to Perpetuate the testimony of Dr. Martin Hoffert back to the Multnomah County Circuit Court for resolution by the Circuit Court on the merits and, in light of his declining health, do so swiftly, to prevent the delay or denial of justice.

Dated: February 16, 2024.

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Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I do hereby certify that on February 16, 2024, a true and correct copy of the above and foregoing document was electronically served on all counsel of record, in accordance with the Federal Rules of Civil Procedure.

I further certify that the below listed entities for which counsel has not yet made an appearance are being served a true and correct copy of the above and foregoing document by U.S. Certified Mail, Return Receipt Requested:

| | |
|---|---|
| Motiva Enterprises, LLC<br>CT Corporation System<br>780 Commercial Street SE, Suite 100<br>Salem OR 97301 | Space Age Fuel, Inc.<br>Scott L. Jensen<br>1 SW Columbia Street, Suite 100<br>Portland OR 97204 |
| Total Energies Marketing USA, Inc.<br>Corporation Service Company<br>1127 Broadway Street NE, Suite 310<br>Salem OR 97301 | Peabody Energy Corp.<br>Corporation Service Company<br>251 Little Falls Drive<br>Wilmington DE 19808 |
| Oregon Institute of Science and Medicine<br>Attn: Arthur B. Robinson<br>2251 Dick George Road<br>Cave Junction OR 97523 | |

I further certify that Shell PLC, formerly known as Royal Dutch Shell PLC, is being served a true and correct copy of the above and foregoing document in accordance with the Federal Rules of Civil Procedure and the Hague Convention.

I also certify that all counsel of record for Multnomah County have been provided a courtesy copy of the above and foregoing document by email.

Respectfully,

*/s/ Richard Schechter*
Richard Schechter



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