UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE HONORABLE PAUL DAVIS RYAN,
SOLELY IN HIS CAPACITY AS SPEAKER
OF THE HOUSE OF REPRESENTATIVES,

APPELLANT,

VS.

MONTGOMERY BLAIR SIBLEY,

APPELLEE,

AND

THE HONORABLE MITCH MCCONNELL,
SOLELY IN HIS CAPACITY AS MAJORITY
LEADER OF THE SENATE,

APPELLEE.
_____/

Case No. 15-5295

APPELLEE SIBLEY'S REPLY TO APPELLANT'S OPPOSITION TO MOTION FOR SUMMARY AFFIRMANCE

Appellee, Montgomery Blair Sibley ("Sibley"), Replies to the Opposition of Appellant Paul Ryan to Sibley's Motion for Summary Affirmance and states as follows:

Appellant desperately wants to delay this matter by subjecting it to the appellate process which moves at the speed of treacle. In support of his attempt to delay resolution in the D.C. Superior Court – where it is now stayed as a result of this

appeal – Appellant raises spurious arguments to claim that summary affirmance is not warranted. Each of those arguments, upon considered examination, fails to the simple truth that Judge James E. Boasberg immediately recognized: Article III's judicially-created "standing" doctrine prevents subject matter jurisdiction in the District Court. Accordingly, pursuant to 28 U.S.C. §1447(c), remand was obligatory and thus was properly entered. Thus, try as he might, Appellant cannot overcome the clear conclusion that this appeal is plainly without merit and presents no issue worthy of a published decision.

To stay off this unassailable conclusion, it is telling that Appellant first ignores Sibley's main argument: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994) (Emphasis added).

Here, by inviting this Court to "expand by judicial decree" the subject-matter jurisdiction of the District Court to allow an adjudication without-subject-matter jurisdiction of Appellant's affirmative defenses of (i) Speech or Debate clause[1] and

[1] This characterization of the Speech or Debate Clause as an affirmative, immunity defense is well-ground in law *Accord*: *Davis v. Passman*, 442 U.S. 228, 246 (1979)("The Court also was persuaded that the special concerns which would ordinarily militate against allowing recovery from a legislator were fully reflected in **respondent's affirmative defense based on the Speech or Debate Clause** of the

(ii) Political Question doctrine [2] would violate the express holding of *Kokkonen* and be a gross usurpation of power beyond the confines of Article III. Appellant has no answer to and thus does not address Sibley's primary argument.

Rather, Appellant initially invites this Court to commit a form of judicial treason by arguing that when: "claims [are] properly removed by a federal official or entity pursuant to §1442, a court should dismiss (rather than remand) those claims on the basis of a threshold federal defense, including where the plaintiff cannot establish subject matter jurisdiction." (App. Opp., p. 11). However, this "threshold" argument fails as Judge Boasberg explicitly recognized as has the Supreme Court. Absent this subject-matter jurisdiction, the District Court can do nothing. In *Ex parte McCardle*, 74 U.S. 506, 514 (1869), the court made this clear: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon

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Constitution." (Emphasis added).

[2] . Likewise, the "political question doctrine" cannot be a "threshold" question like subject matter jurisdiction, personal jurisdiction or *forum non conveniens* as it requires subtle interpretations of law, fact and public policy. As observed in *Baker v. Carr,* 369 U.S. 186, 215-217 (1962): "The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder. . . .[The Courts] will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."

principle." *Accord: Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000)("Questions of jurisdiction, of course, should be given priority – since if there is no jurisdiction there is no authority to sit in judgment of anything else.").

Here, by raising a novel "threshold" power to render decisions on the merits of the affirmative defenses of "Speech or Debate clause" and/or the "Political Question doctrine", Appellant is asking this Court to allow that which Article III expressly prohibits – proceeding to determine the law when it lacks subject matter jurisdiction.

Next, Appellant argues – and again ignores Sibley's point in this regard – that allowing the remand would "deprive" Appellant of a "federal court" to decide this case. This ignores that fact that the D.C. Superior Court is a federal court by virtue of its creation by Congress as an Article I court.

Third, Appellant seeks to apply the Federal Rules of Civil Procedure, Rule 12(b)(3) to trump a federal statute, 28 U.S.C. §1447(c). Nothing more needs to be said about this inane argument. Court rules cannot change statutes.

Last, Appellant seeks to raise a "futility" exception to the express Congressional language found in 28 U.S.C. §1447(c) obligating remand. As the starting point to address this argument, Sibley points this Court to *Utah Junk Co. v.*

Porter, 328 U.S. 39, 44 (1946) where the Court held: "All construction is the ascertainment of meaning. And literalness may strangle meaning. But in construing a definite procedural provision **we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy**." (Emphasis added). Similarly, in *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968), the Court held: "It is important, first, to emphasize the character of the statute with which we are concerned. Section 106 (a) is intended exclusively to prescribe and regulate a portion of the jurisdiction of the federal courts. As a jurisdictional statute, it must be construed both with precision and with fidelity to the terms by which Congress has expressed its wishes."

Here, as the Judge Boasberg recognized, there simply is no confusion on the meaning of 28 U.S.C. §1447(c). If Congress had wished to allow a "futility exception" to the express remand mandate it would have incorporated such into 28 U.S.C. §1447. Indeed, what Appellant seeks is that which is prohibited: "qualifications from broad, unexpressed claims of policy" by the Courts alone, not Congress. Accordingly, it would be perverse for this Court to amend 28 U.S.C. §1447(c) by adding an exception in contravention of the expressly stated wish of Congress that a court remand when it lacks subject-matter jurisdiction.

Appellant's citation to two Circuit Court cases cannot change the obligation to

remand in this case. In *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) the "futility" exception was employed only because the question of personal jurisdiction was *res judicata* between the parties:

> Our conclusion that personal jurisdiction is lacking makes it unnecessary for us to consider the assignments of error on venue and *forum non conveniens*. We briefly address, however, the argument that the state court action was improperly removed and should have been remanded. Subject matter jurisdiction of the action filed in state court, which asserted claims identical to those in the federal suit, is based on 28 U.S.C. §1337 by virtue of the COGSA claim. . . . Were the state action remanded, the Louisiana courts would be bound by our ruling that defendants had insufficient contacts with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction. A remand thus would be a futile gesture, wasteful of scarce judicial resources, an exercise in which we decline to engage.

Id. 787-788. Thus, the "futility" doctrine, such as it is, was only reserved to that instance when federal due process concerns litigated in federal court would bind the state court if remanded. As such, *Asarco, Inc.* is inapposite to the instant case.

Likewise, Appellant urges that *Bell v. City of Kellogg*, 922 F.2d 1418, 1424-25 (9th Cir. 1991) supports its "futility" exception to 28 U.S.C. §1447(c) by selectively quoting part of that holding. In *Bell*, the relevant holding of the court was as follows:

> The First Circuit has implied that it would be willing to recognize an exception to §1447(c) where there is "absolute certainty that remand would prove futile."

> *M.A.I.N. v. Commissioner, Maine Dept. of Human Servs*., 876 F.2d 1051, 1054 (1st Cir. 1989). The court was unwilling to apply such an exception in *M.A.I.N.* because a successful assertion of standing in state court was conceivable. *Id*. There is no such hope here. The state election statute provided the only state cause of action for the plaintiffs. The state court would have simply dismissed the action on remand due to the fatal failure to comply with the bond posting requirement. Because we are certain that a remand to state court would be futile, no comity concerns are involved. District court resolution of the entire case prevents any further waste of valuable judicial time and resources. The district court correctly denied the motion to remand and dismissed the state claims.

Thus, *Bell* stands for the proposition that when there is a statutory bar to a matter proceeding in the state court after remand, and remand would be a "waste of valuable judicial time and resources", remand was unnecessary.

Here, no such certainty of dismissal in the D.C. Superior Court can be assured. The present law from the D.C. Court of Appeals was most recently stated in *Sibley v. Alexander*, No. 13-cv-1151 (D.C. App. Ct. Nov. 21, 2013) in which a panel of the District of Columbia Court of Appeals held: "[T]his court has **generally** adopted the constitutional requirement of a case or controversy and the prudential prerequisites of standing applicable to the federal courts under Article III. *D.C. Appleseed Ctr. for Law & Justice, Inc. v. District of Columbia Dep't of Ins., Sec.,& Banking*, 54 A.3d 1188, 1199-1200 (D.C. 2012); *see also* D.C. Code 11-705 (b) (2012 Repl.)(stating

that divisions of this court hear and determine "cases and controversies")." (Emphasis added).

Yet the employment of adverb "generally" in *Sibley v. Alexander* reserves unto the D.C. Court of Appeals the authority to find exceptions to this general rule. It would be a gross violation of the principles of comity for an Article III court to wade into this peculiar District of Columbia legal arena and suppose what the D.C. Court of Appeals will make of the fact of this particular case and whether this case represents an exception to the "generally" adverb. *Accord: Picard v. Connor*, 404 U.S. 270, 275 (1971)("We have consistently adhered to this federal policy [of comity], for it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'").

Moreover, Sibley has raised the legitimacy of the "case or controversy" limitation that the Article I court is employing.[3] Hence, it is alone for the Article I

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[3] This argument is further buttressed by the clear law sustaining subject-matter jurisdiction in the D.C. Superior Court whose subject-matter jurisdiction is not bound by "standing" concerns. The D.C. Superior Court is an Article I, §8 Court. *See: District of Columbia v. Walters, D.C.App.*, 319 A.2d 332, 338, n.13 (1974), *appeal dismissed, cert. denied*, 419 U.S. 1065 (1974)("[J]urisdiction is limited to that which Congress has bestowed upon us (pursuant to its Article I power to 'constitute Tribunals inferior to the Supreme Court.") The subject-matter jurisdiction of the D.C. Superior Court is set out at D.C. Code §11-921(a) which states: "Except as provided in subsection (b), the Superior Court has jurisdiction of any civil action or other

courts of the District of Columbia to determine the scope of their subject matter jurisdiction.

In conclusion, this case is plainly without merit and present no issue worthy of a published decision. Accordingly, summary affirmance must be entered with all due haste so that the District of Columbia Superior Court case may proceed after the inordinate delay occasioned by this frolic and detour to Article III courts.

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matter (at law or in equity) brought in the District of Columbia." Hence, unlike this Article III "inferior" court which is expressly limited by Article III to "Cases" or "Controversies", the D.C. Superior Court's jurisdiction is that of any state Court: in a word, unlimited. *Palmore v. United States*, 411 U.S. 389 (1973)("Seeking to improve the performance of the court system, Congress, in Title I of the Reorganization Act, invested the [District of Columbia] courts with jurisdiction equivalent to that exercised by state courts. S.Rep. No. 91-405, pp. 2-3; H.R.Rep. No. 91-907, pp. 23-24."). *Accord: N.J. Citizen Action v. Riviera Motel Corp.*, 686 A.2d 1265, 1272 (N.J. Super. App. Div. 1997)("We have recognized often that . . . **state courts are not bound by the limitations of a case or controversy** or other federal rules of justiciability even when they address issues of federal law." (emphasis added)); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1964)("The constitutional and prudential considerations [of federal standing doctrine] respond to concerns that are peculiarly federal in nature.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via as requested by Email on: (i) Peter R. Maier, Special Assistant United States Attorney, Counsel for Defendant, The Honorable Mitch McConnell, (Peter.maier2@usdoj.gov) and (ii) William Pittard, Deputy General Counsel, Counsel for The Honorable Paul Davis Ryan, Office of General Counsel, United States House of Representatives, (William.Pittard@mail.house.gov) this December 3, 2015.

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