Department of Justice

STATEMENT OF

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BEFORE THE

SUBCOMMITTEE ON COURTS AND COMPETITION POLICY
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 5281, THE "REMOVAL CLARIFICATION ACT OF 2010"

PRESENTED

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Beth Brinkmann
Deputy Assistant Attorney General
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H.R. 5281, the "Removal Clarification Act of 2010"

Good afternoon, Chairman Johnson, Ranking Member Coble, and members of the Subcommittee. I am pleased to appear before the Subcommittee to present the Department of Justice's views on the Removal Clarification Act of 2010. The proposed amendments to the removal statute would clarify one aspect of current law that has sometimes been construed to delay Federal officers or agencies from vindicating their right to remove State court proceedings to a Federal forum. The law in its current form has been applied by some courts to deprive Federal officers or agencies of that right altogether. The Department believes the amendments would improve its ability to represent Federal officers and agencies. Specifically, the changes to the removal statutes would make an important difference to Federal officers or agencies who might wrongfully be shut out of Federal court under the removal statute as currently written.

The Department represents the Executive Branch officers and agencies whose public duties and interests often become at issue in litigation in the State courts. The removal statute gives the Executive Branch – as well as Judicial Branch officials and Members of Congress – the important right to be heard in a Federal forum. To vindicate this right, the Department ordinarily seeks removal to Federal court at the earliest possible opportunity.

The proposed amendments would clarify one aspect of the removal statutes that, in their current form, can impede access to a Federal forum. For cases involving subpoenas, the amendments would clarify *when* the United States can seek removal to Federal court and would provide for removal at an early stage of State court proceedings. The amendments also would add a new appeal right, the amendments would change one aspect of the removal statute that can allow the ruling of a single Federal district court judge to conclusively bar the Federal government's access to the Federal courts.

The proposed amendment to 28 U.S.C. § 1442 would resolve an uncertainty about the timing of removal that currently exists when a litigant seeks a subpoena in State court against a Federal officer or agency. This is not an uncommon issue for the Department. Federal officials such as FBI agents, DEA agents, and other Federal law enforcement officials may participate in

investigations that lead to State prosecutions, and these Federal officers or agencies may be subpoenaed in State criminal proceedings. In other cases, private individuals or corporations may seek the testimony of Federal officials performing investigatory functions for regulatory agencies. Officials from the Federal Aviation Administration, for example, could be subpoenaed in litigation among private parties over liability for an airline crash.

In any such situation, the Federal officer or agency facing a State court subpoena has a right to have a Federal court determine the extent to which the official must comply. In many instances, there will be no legal basis in either State or Federal court to require a Federal official or agency to comply with a State-issued subpoena. (In many circumstances, the limits of proper disclosure should ultimately be litigated not in the proceeding that gave rise to the subpoena, but in a separate action under the Administrative Procedure Act to determine whether a decision to withhold information was arbitrary or capricious). Federal agencies and departments also generally have regulations – called "*Touhy* regulations" after the Supreme Court case that upheld them as lawful – that set limits for agency employees' disclosure of official information and establish centralized procedures for processing requests for such information. If any basis exists for complying with the State court subpoena, a Federal court should decide what the agency's *Touhy* regulations require. Even in the absence of *Touhy* regulations, for example where a Member of Congress or an officer of the courts is subject to a subpoena issued by a State court, the Member or officer has a right to have a Federal court determine, as a matter of Federal law, whether compliance with the subpoena is required.

The proposed amendments would clarify an ambiguity in current law about *when* a subpoena matter can be removed to Federal court. Currently, some courts have held that removal is proper when a subpoena is issued, while others have concluded that a Federal officer or agency must wait until the court has taken some action to enforce the subpoena before he or she can seek removal. This legal uncertainty creates risks for Federal officers or agencies because removal proceedings must be instituted within thirty days of the matter's becoming removable. In jurisdictions where the timing rule is unclear, removal motions that would be timely in one court might be premature or late in others. The proposed amendment would provide a welcome clarification by establishing that Federal officers or agencies may seek removal when a subpoena is sought or issued in State court proceedings. It would also allow the Federal government to seek removal before becoming deeply embroiled in State proceedings. By removing the existing uncertainty in the law and allowing Federal officers or agencies to seek a Federal forum at an early stage of their involvement in judicial proceedings, this legislation would protect Federal officers' and agencies' ability to litigate in a Federal forum. We believe that clarification may also be useful regarding the timing for seeking removal and we would be pleased to work with the Subcommittee on this issue.

The Department likewise believes that the proposed amendment to the appeal provision, 28 U.S.C. § 1447, would improve its representation of its clients. Under current law, if a Federal district court decides, rightly or wrongly, to send a dispute involving a Federal officer or agency back to the State courts, the Federal government has no right to appeal that decision and will

have no choice but to participate in the State court litigation and to have the State court decide the questions of Federal law. The proposed legislation would give Federal officers and agencies a right to appeal the district judge's remand order and thus afford them an opportunity to correct any legal error in the judge's decision to remand. A successful appeal would allow the Federal officers and agencies to return to Federal court for resolution of the questions affecting their authority or obligations at issue in the State court proceedings.

The amendment granting appeal rights to Federal officers and agencies, officers of the courts, and Members of Congress would establish an important safeguard by allowing them to seek review of remand orders they believe to be erroneous to the appropriate United States Court of Appeals, instead of being forced to litigate in State courts even when they lack authority over the Federal government. It would thus offer an important procedural check that is absent from the current system, where the remand decisions of Federal district judges are conclusive even if they are grounded in a misunderstanding of Federal law.

As important as the appeal right would be for Federal officers or agencies, as a practical matter we expect the change in existing law to be limited in scope. While the amendment to Section 1447(d) would create a new category of orders subject to interlocutory appeal, the actual number of cases that the Federal government seeks to remove from State court each year is small, and we expect the occasions on which the Department would need to appeal a remand order are likely to be few.

Allowing Federal officers and agencies to appeal remand orders would be fully consistent with existing exceptions to the no-appeal rule where there is a similarly strong Federal interest in a Federal forum. Current law allows appeals from remand orders involving civil rights actions, actions involving the Federal Deposit Insurance Corporation, and actions for the foreclosure and sale of certain Indian lands. Extending the same appeal rights to the Executive Branch, Federal judicial officers, and Members of Congress would strengthen important protections for the United States when its interests are at stake in State court proceedings.

We would be happy to work with you as the legislation moves forward. I would be pleased to address any questions that you may have.