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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9
10 Patrick Keith Sherrill,
11 Plaintiff,

12 v.

13 Douglas Van Cleave, Jr.; and United States
14 of America,

15 Defendants.
16

No. CV-22-01274-PHX-DGC

ORDER

17 A state court granted Plaintiff Patrick Sherrill’s petition for an injunction against
18 harassment. Doc. 1-5. Defendant Douglas Van Cleave then removed the action to this
19 Court and Defendant United States substituted into the case and filed a motion to dismiss
20 for lack of subject matter jurisdiction. Docs. 1, 4, 6. Plaintiff filed no response. For
21 reasons stated below, the Court will grant the motion and vacate the injunction.

22 **I. Background.**

23 Sherrill and Van Cleave work for the United States Department of Veterans Affairs.
24 Van Cleave is a Supervisory General Engineer for Capital Projects and his official duties
25 include managing and supervising Sherrill, who is an engineer in the Capital Projects
26 section. Doc. 4 at 3. On July 1, 2022, Sherrill filed a petition for an injunction against
27 harassment in the Country Meadows Justice Court in Avondale, Arizona. Doc. 1-4 at 2;
28 *see Sherrill v. Van Cleave*, No. CC2022-107441 (Maricopa Cnty. Justice Ct. July 1, 2022).

1 The petition alleges that Van Cleve made inappropriate comments to Sherrill, yelled and
2 pointed his finger in Sherrill’s face, blocked Sherrill from leaving a room, and struck a
3 shelf near Sherrill’s face. Doc. 1-5 at 4. The state court entered an ex parte injunction
4 prohibiting Van Cleve from having contact with Sherrill and going near his residence and
5 their workplace at the Carl T. Hayden Veterans’ Administration Medical Center in
6 Phoenix, Arizona. *Id.* at 2-3. The injunction is effective until July 11, 2023, one year from
7 the date of service. *Id.* at 2; Docs. 1-4 at 2, 1-6 at 2.¹

8 On July 28, 2022, Van Cleve removed the case to this Court pursuant to a federal
9 officer removal statute, 28 U.S.C. §1442(a), which provides that a defendant in a state court
10 action may remove the action to federal court if the defendant is an “officer (or any person
11 acting under that officer) of the United States” and the action “relat[es] to any act under
12 color of such office[.]” 28 U.S.C. § 1442(a)(1); *see* Doc. 1 ¶ 4. The primary purpose of
13 this removal statute “is to protect the lawful activities of the federal government from
14 undue state interference[.]” and § 1442(a) “serves to overcome the ‘well-pleaded
15 complaint’ rule that would otherwise preclude removal even if a federal defense is
16 asserted.” *Weis v. DSM Copolymer, Inc.*, 160 F. Supp. 3d 954, 962 (M.D. La. 2016) (citing
17 *Mesa v. California*, 489 U.S. 121, 126, 136 (1989)); *see also Arizona v. Manypenny*, 451
18 U.S. 232, 242 (1981) (explaining that the right of removal “is absolute for conduct
19 performed under color of federal office, and . . . the policy favoring removal should not be
20 frustrated by a narrow, grudging interpretation of § 1442(a)(1)”); *Hendy v. Bello*, 555 F.
21 App’x 224, 226 (4th Cir. 2014) (finding removal under § 1442(a)(1) to be proper because,
22 “[a]s a postal worker, Bello acted under an ‘officer’ of the United States, and the dispute
23 related to a federal workplace disciplinary action”) (citations omitted).

24 The United States Attorney’s Office has certified that Van Cleve was acting within
25 the scope of his employment with the Department of Veterans Affairs at the time of the
26 workplace conduct alleged in Sherrill’s petition. Docs. 1-1 at 1-2, 6 ¶ 10 (citing 28 U.S.C.

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28 ¹ Van Cleve accepted a new position at the Veteran Affairs office in San Francisco,
California, and planned to transfer to that position on August 13, 2022. *See* Doc. 4 at 2
n.2, 4-1 at 4.

1 § 2679(d)(1)). This certification “conclusively establishes, for the purpose of removal, that
2 [Van Cleave] was acting within the scope of his employment, and thus under color of
3 office[.]” *Gilbar v. United States*, No. C-3-98-11, 1998 WL 1632693, at *4 (S.D. Ohio
4 July 10, 1998); see *Dickson v. Wojcik*, 22 F. Supp. 3d 830, 836 (W.D. Mich. 2014) (same).
5 Sherrill has not filed a motion to remand or otherwise challenged the propriety of removal
6 under § 1442(a)(1).²

7 Because Sherrill is proceeding pro se, the Court issued a notice informing him about
8 available resources for pro se litigants, including this District’s Handbook for Self-
9 Represented Litigants, the Federal Court Advice-Only Clinic which offers free legal help
10 to pro se litigants through the Volunteer Lawyers Program, the Federal Rules of Civil
11 Procedure, and the Court’s Local Rules of Civil Procedure. Doc. 3 at 6-7.³ The notice also
12 warned Sherrill that if he failed to respond to a motion, the Court may assume he consents
13 to the motion under Local Rule of Civil Procedure 7.2(i). *Id.* at 6.

14 On August 4, 2022, the United States filed a notice substituting itself for Van Cleave
15 as the defendant in this case and moved to dismiss under Federal Rule of Civil Procedure
16 12(b)(1). Docs. 4, 6 (citing 28 U.S.C. § 2679(b)(1) (providing that a suit against the United
17 States under the Federal Tort Claims Act shall be the exclusive remedy for persons with
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20 ² Although the workplace misconduct alleged in Sherrill’s petition may constitute
21 intentional torts on the part of Van Cleave, he was still acting under color of federal office
22 for purposes of § 1442(a)(1). See *Dickson*, 22 F. Supp. 3d at 836 (“Employment
23 encompasses acts taken to further the employer’s purpose. This holds true even if the
24 actions amount to intentional torts or disobedience of the employer’s express or implied
25 orders.”) (citations omitted); *Phinney v. Crowder*, No. 2:08CV00186 SWW/JTR, 2009 WL
26 1616006, at *2 (E.D. Ark. June 8, 2009) (finding that the alleged defamation occurred
under color of office because the defendant’s only contact with the plaintiff occurred while
he was working as a correctional officer at a federal institution); *Willingham v. Morgan*,
395 U.S. 402, 409 (1969) (“If the question raised is whether [petitioners] were engaged in
some kind of ‘frolic of their own’ in relation to respondent, then they should have the
opportunity to present their version of the facts to a federal, not a state, court. This is
exactly what the removal statute was designed to accomplish.”).

27 ³ See U.S. District Court, District of Arizona, *Rules, General Orders, and Forms*,
28 <https://www.azd.uscourts.gov/>; *Information for those Proceeding Without an Attorney*
(*Pro Se*), <https://www.azd.uscourts.gov/proceeding-without-attorney>; *Federal Court*
Advice-Only Clinic – Phoenix, <https://www.azd.uscourts.gov/federal-court-advice-only-clinic-phoenix> (last visited Oct. 20, 2022).

1 claims resulting from the tortious acts of federal employees taken within the scope of their
2 employment)).

3 **II. Subject Matter Jurisdiction and the Rule 12(b)(1) Standard.**

4 Federal courts are courts of limited jurisdiction, “possess[ing] only that power
5 authorized by Constitution and statute[.]” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
6 U.S. 375, 377 (1994). Once jurisdiction is challenged in a Rule 12(b)(1) motion, “[i]t is to
7 be presumed that a cause lies outside this limited jurisdiction, and the burden of
8 establishing the contrary rests upon the party asserting jurisdiction[.]” *Id.* (citations
9 omitted); see *Kingman Reef Atoll Invs., L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th
10 Cir. 2008) (same). To establish jurisdiction over claims brought against the United States
11 and its employees, the plaintiff must demonstrate both “statutory authority granting subject
12 matter jurisdiction over the claims” and “a waiver of sovereign immunity.” *E.J. Friedman*
13 *Co. v. United States*, 6 F.3d 1355, 1357 (9th Cir. 1993) (citation omitted). Unless the
14 plaintiff “satisfies the burden of establishing that [his] action falls within an unequivocally
15 expressed waiver of sovereign immunity by Congress, it must be dismissed.” *Dunn &*
16 *Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007).

17 A Rule 12(b)(1) motion can be either a facial or factual attack on jurisdiction. See
18 *Thornhill Publ’g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). A
19 facial attack asserts that the allegations in the operative pleading, even when taken as true,
20 are “insufficient on their face to invoke federal jurisdiction.” *Safe Air for Everyone v.*
21 *Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A factual attack “disputes the truth of the
22 allegations that, by themselves, would otherwise invoke federal jurisdiction.” *Id.*

23 **III. The Motion to Dismiss.**

24 The United States’ motion to dismiss is a facial attack on jurisdiction. Doc. 4 at 4.
25 The United States notes, correctly, that it enjoys sovereign immunity from civil suits absent
26 its consent, and that this immunity extends to federal officials and employees acting within
27 their statutory authority or scope of employment. *Id.* at 5 (citing *Dugan v. Rank*, 372 U.S.
28 609, 622 (1963); *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 688 (1949));

1 *see also Hendy*, 555 F. App'x at 226 (“A suit against a government officer in her official
2 capacity is really ‘a suit against the official’s office,’ and so officers acting within their
3 authority generally also receive sovereign immunity.”) (quoting *Will v. Mich. Dep’t of State*
4 *Police*, 491 U.S. 58, 71 (1989)); *Simpkins v. Shalala*, 999 F. Supp. 106, 119 (D.D.C. 1998)
5 (“[F]ederal employees enjoy absolute immunity for torts committed while acting within
6 the scope of their employment” and a plaintiff’s “sole remedy . . . is against the government,
7 even if the government would not be liable due to sovereign immunity.”) (citing 28 U.S.C.
8 § 2679; *United States v. Smith*, 499 U.S. 160, 166 (1991)). The United States argues that
9 the Court lacks subject matter jurisdiction because the petition alleges misconduct in a
10 federal workplace and the United States has not waived sovereign immunity to allow an
11 injunction against harassment by one federal employee against a supervisory employee in
12 the federal workplace. Doc. 4 at 4-9.⁴

13 Given his pro se status, the United States provided notice to Sherrill regarding the
14 nature of the motion to dismiss under Rule 12(b)(1) and Sherrill’s obligation to respond to
15 the motion. Doc. 5; *see Rand v. Rowland*, 154 F.3d 952, 960 (9th Cir. 1998) (discussing
16 the notice required for summary judgment motions and concluding that “either the court or
17 the moving party may provide the requisite notice”); *Stratton v. Buck*, 697 F.3d 1004, 1008
18 (9th Cir. 2012) (requiring a notice similar to the notice described in *Rand* for motions to
19 dismiss for failure to exhaust administrative remedies). Despite this notice and the Court’s
20 separate warning, Sherrill has filed no response to the motion to dismiss and the time for
21 doing so has passed. *See* LRCiv 12.1(b), 56.1(d) (providing 30 days to file a response).

22 **A. Conduct in the Federal Workplace.**

23 The injunction against harassment entered by the state court provides that Van
24 Cleave “shall have no contact with [Sherrill] except through attorneys, legal process, [and]

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26 ⁴ The United States also notes that no waiver of sovereign immunity can be found
27 under the Federal Tort Claims Act (“FTCA”), 28 U.S.C. §§ 1346(b), 2671-80, because:
28 (1) Sherrill has not exhausted his administrative remedies as required under the FTCA;
(2) the FTCA’s waiver of immunity does not apply to assault, battery, and false
imprisonment claims – the substantive thrust of the conduct alleged in Sherrill’s petition;
and (3) the FTCA does not provide for non-monetary relief such as an injunction against
harassment. *Id.* at 9-12.

1 court hearings,” and “shall not go to or near” Sherrill’s residence or workplace at the
2 Department of Veterans Affairs. Doc. 1-5 at 2.

3 To the extent the injunction restrains Van Cleave from having contact with Sherrill
4 at the federal workplace and going to the workplace, the Court agrees with the United
5 States that the injunction is barred by sovereign immunity. See Doc. 4 at 4-9. “The
6 challenged acts were taken by [Van Cleave] under color of his office as a supervisor for
7 the United States [Department of Veterans Affairs], an agency of the federal government.
8 [Sherrill] has not alleged or shown any possible basis for a waiver of sovereign immunity,
9 such as the [FTCA], which does not apply to claims for equitable relief[.]” *Leak v. Gomez*,
10 No. 21-2024-JWB, 2021 WL 3051873, at *3 (D. Kan. July 20, 2021). Indeed, ““federal
11 courts regularly dismiss removed state court petitions for restraining orders or peace orders
12 filed by federal employees, based on alleged misconduct in the workplace,’ . . . on
13 sovereign immunity grounds.” *Cui v. United States*, No. CV 22-470, 2022 WL 2664348,
14 at *4 (E.D. La. July 9, 2022) (quoting *Perkins v. Dennis*, 2017 WL 1194180, at *2 (D. Md.
15 Mar. 30, 2017) (collecting cases)); see *Chambers v. Reid*, No. CV TDC-19-0137, 2019 WL
16 1992348, at *3 (D. Md. May 6, 2019) (“[T]o the extent the Petition seeks to restrain Reid
17 from contacting Chambers at the Germantown Post Office based on workplace conduct, it
18 is dismissed on sovereign immunity grounds.”); *Hendy*, 555 F. App’x 225-27 (dismissing
19 a postal worker’s petition for an order restraining her supervisor from going to their
20 workplace); *Harris v. Weaver*, No. 4:19-cv-02937-AGF, 2020 WL 601610, at *2 (E.D.
21 Mo. Feb. 7, 2020) (restraining orders pertaining to harassment in a federal workplace are
22 barred by sovereign immunity) (citing *Figueroa v. Baca*, No. ED CV 17-1471 PA (AGRx),
23 2018 WL 2041383, at *3 (C.D. Cal. Apr. 30, 2018); *Sidler v. Snowden*, No. AW-13-658,
24 2013 WL 1759579, at *2 (D. Md. Apr. 23, 2013)); see also *Clark v. United States*, No.
25 C21-507 MJP, 2021 WL 3129623, at *2 (W.D. Wash. July 23, 2021) (“[T]he allegations
26 in the petition cut against jurisdiction because the relief sought would interfere with duties
27 carried out by a federal employee at a federal workplace, in conflict with the Supremacy
28 Clause. . . . The relief sought would restrict Mr. Ryan’s conduct at work in various ways,

1 including by restraining him from the Parties’ workplace for over a year. Courts
2 considering similar circumstances have reached the same conclusion – there is no subject-
3 matter jurisdiction here.”) (citing *Hendy*, 555 F. App’x at 226-27).

4 Because the United States has not waived sovereign immunity, the Court will vacate
5 the injunction to the extent it restrains Van Cleave from having contact with Sherrill at
6 their federal workplace and going to the workplace, and dismiss Sherrill’s petition in this
7 regard for lack of subject matter jurisdiction. *See Munns v. Kerry*, 782 F.3d 402, 412 (9th
8 Cir. 2015) (“Absent a waiver of sovereign immunity, courts have no subject matter
9 jurisdiction over cases against the federal government.”) (citations and brackets omitted);
10 *Cui*, 2022 WL 2664348, at *4 (“Sovereign immunity ‘is a jurisdictional issue that cannot
11 be ignored, for a meritorious claim to that immunity deprives the court of subject matter
12 jurisdiction of the action.’”) (citation omitted); *Leak*, 2021 WL 3051873, at *2 (“Federal
13 courts do not have subject matter jurisdiction over claims that are barred by sovereign
14 immunity.”).⁵

15 **B. Conduct Outside the Federal Workplace.**

16 As already noted, the state court’s injunction covers more than workplace conduct:
17 it prohibits Van Cleave from going to or near Plaintiff’s residence. Doc. 1-5 at 2. Because
18 such conduct would not fall within Van Cleave’s scope of employment or under color of
19 his office as a supervisor for the Department of Veterans Affairs, it would not implicate
20 sovereign immunity. *See Chambers*, 2019 WL 1992348, at *3.

21 But Sherrill’s petition is limited to Van Cleave’s actions in the federal workplace.
22 Doc. 1-5 at 4-5. It does not allege that Van Cleave ever visited Plaintiff’s residence or
23 attempted to contact or harass Sherrill outside the workplace. The petition therefore
24 provides no basis for an injunction or any other judicial action for conduct outside the
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27 ⁵ This dismissal in no way condones any alleged mistreatment of Sherrill by Van
28 Cleave. Relief from such conduct, if warranted, lies with the federal Equal Employment
Opportunity process. *See Chambers*, 2019 WL 1992348, at *3; U.S. Equal Employment
Opportunity Commission, <https://www.eeoc.gov/federal-sector/overview-federal-sector-eeo-complaint-process> (last visited Oct. 20, 2022).

1 workplace. As a result, the Court will vacate the injunction and dismiss this action to the
2 extent it concerns Van Cleave's conduct outside the federal workplace.

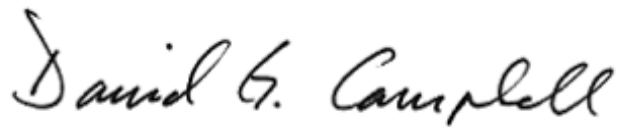
3 **IT IS ORDERED:**

4 1. The United States' motion to dismiss for lack of subject matter jurisdiction
5 (Doc. 4) is **granted**.

6 2. The injunction against harassment entered by the Country Meadows Justice
7 Court (Doc. 1-5 at 2-3) is **vacated** and Plaintiff's petition (*id.* at 4-5) is **dismissed**.

8 3. The Clerk of Court shall terminate this action.

9 Dated this 25th day of October, 2022.

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David G. Campbell
14 Senior United States District Judge
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