No. 05-1284

In the Supreme Court of the United States

LISA WATSON, ET AL., PETITIONERS

v.

PHILIP MORRIS COMPANIES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Federal Trade Commission's role in preventing deceptive advertising by tobacco companies is sufficient to establish that a tobacco company was "acting under" a federal officer for purposes of 28 U.S.C. 1442(a)(1), when the tobacco company marketed cigarettes as "light."

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the decision below was mistaken, but does not merit this Court's review.

STATEMENT

1. In general, an action brought in state court may be removed to federal court only if a federal court would have original jurisdiction over the claim. See 28 U.S.C. 1441(a). To remove a claim within the court's federal question jurisdiction, the federal question must ordinarily appear on the face of the complaint; a federal defense to a state law claim does not ordinarily suffice. See *Louisville & Nashville R.R.* v. *Mottley*, 211 U.S. 149, 152 (1908).

The federal officer removal provision, 28 U.S.C. 1442(a), creates an exception to that general rule. It authorizes

removal of any civil action filed in state court against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office." 28 U.S.C. 1442(a). Suits that fall within the scope of Section 1442(a) may be removed even when the federal question arises only by way of a defense to a state law claim. See *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999). The purpose of the federal officer removal statute is to ensure that States in general and state courts in particular do not interfere with the operations of the federal government. *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969); *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1879).

To remove to federal court successfully under the federal officer removal statute, a defendant must satisfy three requirements. First, the defendant must be a federal officer, a federal agency, or a person acting under a federal officer. 28 U.S.C. 1442(a). Second, the defendant must assert a "colorable" federal defense. *Mesa* v. *California*, 489 U.S. 121, 129, 139 (1989). And third, the defendant must establish that the suit is "for any act under color of such office." 28 U.S.C. 1442(a)(1). In order to satisfy the third requirement, the defendant "must show a nexus, a 'causal connection' between the charged conduct and asserted official authority." *Jefferson County*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 409).

2. The Federal Trade Commission (FTC) has authority under Section 5(a)(1) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45(a)(1), to prevent "unfair or deceptive acts or practices in or affecting commerce." That authority extends to most industries, including the tobacco industry.

The FTC exercises its authority under Sections 5 and 13 of the FTC Act in two ways. First, the agency may bring an administrative or judicial enforcement action. 15 U.S.C. 45, 53; see 16 C.F.R. 3.1 *et seq*. Such actions are frequently resolved through negotiated consent agreements. See 16 C.F.R. 3.25. Second, the FTC may promulgate trade regulation rules that apply to an entire industry. 15 U.S.C. 57b-3; 16 C.F.R. 1.7-1.20. Rulemaking proceedings require an initial publication of the proposed rule, the opportunity for public comment, and a formal vote by the commissioners. *Ibid*.

In the 1950s, the FTC became concerned that tobacco companies' advertising claims were inaccurate and misleading to consumers. *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). After initially advising tobacco companies in 1955 not to make representations about the tar and nicotine levels of their cigarettes, *ibid.*, the FTC issued a policy statement in 1966 stating that a factual statement of the tar and nicotine content based on the "Cambridge Filter Method" (Cambridge Method) would not be treated as deceptive as long as there were no express or implied representations that the specified level of tar or nicotine reduced or eliminated health hazards. *Cigarette Advertising Guides*, 6 Trade Reg. Rep. (CCH) ¶ 39,012 (Sept. 22, 1955).

The Cambridge Method "utilizes a smoking machine that takes a 35 milliliter puff of two seconds' duration on a cigarette every 60 seconds until the cigarette is smoked to a specified butt length. The tar and nicotine collected by the machine is then weighed and measured." *Brown & Williamson*, 778 F.2d at 37. Because smoking behavior varies from person to person, the Cambridge Method does not attempt to replicate the actual amount of tar and nicotine inhaled by human smokers. Pet. App. 3a. The FTC

nonetheless endorsed the test "to provide smokers seeking to switch to lower tar cigarettes with a single, standardized measurement with which to choose among the existing brands." 62 Fed. Reg. 48,158 (1997).

In 1970, the FTC initiated formal rulemaking proceedings to require tobacco manufacturers to disclose the tar and nicotine yields determined by the Cambridge Method test. 35 Fed. Reg. 12,671 (1970). Before the FTC placed such a rule into effect, however, a number of major tobacco companies (including respondent Philip Morris) entered into a voluntary agreement to disclose Cambridge Method test data in all cigarette advertisements. Pet. App. 3a. That private agreement prompted the FTC to end its formal rulemaking proceedings. 36 Fed. Reg. 784 (1971); 62 Fed. Reg. 48,158 (1997).

The FTC originally conducted Cambridge Method tests through its own laboratory and published the results in the Federal Register. Pet. App. 3a, 27a; 62 Fed. Reg. at 48,158. An organization funded by major tobacco companies, the Tobacco Institute Testing Lab (TITL), also conducted independent Cambridge Method tests. After the FTC ceased conducting the tests in 1987, the TITL continued to conduct them. *Id.* at 48,158 & n.5.

The FTC has never promulgated definitions of terms such as "light" or "low tar." 62 Fed. Reg. at 48163. One FTC report to Congress used the term "low tar" to refer to cigarettes containing 15 milligrams or less of tar. See FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1978*, at 3 (Dec. 24, 1978). That was not, however, a statement of the FTC's regulatory position. In its reports, the FTC has assured Congress that it had never formally defined "'ultra-low tar', or any term related to 'tar' level." FTC, *Report to Congress Pur-*

suant to the Public Health Cigarette Smoking Act for the Year 1979, at 11 n.8 (undated).

In 1997, the FTC requested comments on whether it should regulate the tobacco industry's use of descriptive terms in advertising and labeling. 62 Fed. Reg. at 48,163. That request reiterated that "[t]here are no official definitions" for terms such as "low tar," "light," or "ultra light," but explained that "they appear to be used by the industry to reflect ranges of FTC tar ratings." *Ibid.* The FTC did not take any regulatory action in response to that request. In 2002, Philip Morris petitioned the FTC to promulgate a trade rule that would require tobacco companies to: (1) disclose the average tar and nicotine yields of cigarette brands; (2) define and regulate the use of descriptors such as "light" and "ultra light;" and (3) mandate the use of disclaimers with respect to the average tar yield and the health effects of low yield cigarettes. Petition for Rulemaking Preliminary Statement 1, 32-35 (FTC filed Sept. 18, 2002). That petition is still pending before the FTC.

3. Petitioners Lisa Watson and Loretta Lawson filed suit in Arkansas state court against respondent Philip Morris, Inc., alleging that respondent had engaged in unfair business practices in connection with the sale of Cambridge Lights and Marboro Lights. Pet. App. 1a-2a. Petitioners specifically alleged that respondent designed those cigarettes to register lower levels of tar and nicotine on the Cambridge Method test than would be delivered to actual smokers. *Id.* at 63a-64a. They further alleged that respondent engaged in that conduct in order to achieve support for false and misleading claims that Cambridge Lights and Marboro Lights are lighter than regular cigarettes. *Id.* at 64a. Petitioners seek to represent a class of persons who purchased Cambridge Lights or Marboro Lights in Arkansas for personal consumption. *Id.* at 66a.

Relying on the federal officer removal statute, 28 U.S.C. 1442(a), respondent removed the case to the United States District Court for the Eastern District of Arkansas. Pet. App. 74a-75a. Petitioners moved to remand the case, but the district court denied the motion. *Id.* at 20a-60a. It reasoned that respondent was "acting under" a federal officer in its advertising of light cigarettes and that removal was therefore appropriate under Section 1442(a). *Id.* at 41a-46a. The court certified for interlocutory review the question whether removal was appropriate under Section 1442(a).

4. The court of appeals accepted the appeal and affirmed. Pet. App. 1a-19a. The court held that the question whether a defendant is "acting under" a federal officer "depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." *Id.* at 6a. The court explained that while "[m]ere participation in a regulated industry" does not establish grounds for removal, removal is appropriate when "the challenged conduct is closely linked to detailed and specific regulations." *Ibid.* (internal quotation marks omitted). Applying that analysis, the court concluded that the FTC had engaged in detailed regulation of tobacco companies because it had conducted the Cambridge Method test, published the ratings, and monitored cigarette advertisements. *Id.* at 9a-10a. The court characterized the FTC's involvement in the tobacco industry as "unprecedented." *Id.* at 13a.

The court next concluded that the FTC had compelled compliance with its directions. Pet. App. 9a. The court rejected the argument that government compulsion was absent because the tobacco companies voluntarily agreed to use the Cambridge Method to measure tar and nicotine levels. *Id.* at 10a. The court reasoned that the FTC "effec-

tively used its coercive power to cause the tobacco companies to enter the agreement." *Ibid.* The court also concluded that the FTC had effectively compelled compliance with the agreement by making "comments" that "suggest it would bring an action for deceptive advertising or reinstitute formal rulemaking proceedings if a company did not disclose the tar and nicotine ratings" produced by the Cambridge Method. *Id.* at 11a.

The court of appeals next held that there was a "causal connection" linking the FTC's directions to the acts challenged in petitioners' complaint. Pet. App. 13a-14a. The court reached that conclusion based on its view that petitioners' suit challenges the FTC's policy judgment that despite the deficiencies in the Cambridge Method, its results "should still be included in advertising, even if alongside 'light' descriptors," in order to prevent deception. *Id.* at 16a. Finally, the court concluded that respondent had raised a colorable federal defense. *Id.* at 16a-17a.

In a concurring opinion, Judge Gruender emphasized that the panel's ruling should "not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like Philip Morris, acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations." Pet. App. 18a. In Judge Gruender's view, this was a "rare case" in which "the FTC's direction and control of the testing and marketing practices at issue [was] extraordinary." *Ibid.*

ARGUMENT

The court of appeals' conclusion that the FTC has exercised comprehensive control over respondent's advertising of light cigarettes is incorrect. The conclusion that this case is removable under the federal officer removal statute is substantially wide of the mark. That error, however, re-

flects a misunderstanding of the nature and significance of the underlying facts. Because that error is fact-bound, it does not warrant review.

The court of appeals' comprehensive control test for determining when a defendant is "acting under" a federal official does not conflict with the legal standard adopted by any other circuit, and it is too early to assess its practical importance. While some language in the opinion could suggest that a broad range of cases could be removed under the opinion's logic, the concurring judge emphasized the limited and context-specific nature of the court's holding. Moreover, the question of the appropriate test for determining when a private party is acting under a federal officer would benefit from further consideration in the circuits. Thus, even though the court of appeals' comprehensive control test appears to stray from the best reading of Section 1442(a), and its application in this case is clearly incorrect, the petition for a writ of certiorari should be denied.

A. The Court Of Appeals Erred In Concluding That The FTC Exercises Comprehensive Control Over Respondent's Challenged Advertising, But That Fact-Specific Error Does Not Warrant Review

1. The court of appeals held that a private party is acting under a federal officer when the government controls the private party's actions through detailed and specific directions. Pet. App. 6a. Applying that standard, the court concluded that removal was appropriate in this case because the FTC has controlled respondent's advertising of light cigarettes through detailed and specific directions. *Id.* at 9a-13a. The court seriously erred, however, in the application of its own standard to the historical record. In marketing its cigarettes as "light" based on the results achieved on the Cambridge Method tests, respondent acted on its

own. The FTC has not issued any directions, much less specific and detailed directions, that required respondent to engage in that activity.

The key facts are these: The FTC has not required respondent to use the Cambridge Method to determine tar and nicotine levels or to report the results of those tests in its advertising. The FTC has not adopted any regulatory definitions of the terms "light" or "low tar." And the FTC has neither requested nor required respondent to describe or advertise its cigarettes using those or any other such descriptors. See pp. 3-5, *supra*. In those circumstances, the court of appeals erred in concluding that respondent marketed its cigarettes as "light" pursuant to the FTC's comprehensive direction and control.

2. In reaching the conclusion that the FTC comprehensively controls respondent's marketing of light cigarettes, the court of appeals relied on a number of factors. None of those factors provides any support for the court's conclusion.

As the court of appeals noted (Pet. App. 10a), in 1970 the FTC proposed for public comment a draft regulation that, if adopted, would have required disclosure of the tar and nicotine levels determined by the Cambridge Method. 35 Fed. Reg. 12,671 (1970). The FTC never adopted such a regulation, however. Pet. App. 10a. Instead, the FTC abandoned its regulatory effort after the major tobacco companies, including respondent, entered into a voluntary agreement among themselves to disclose Cambridge Method data in cigarette advertisements. *Ibid.*

The court of appeals treated the companies' agreement as if it were the equivalent of an FTC regulation. But the FTC was not a party to that agreement; it had no authority to enforce the agreement; and it did not establish the agreement's terms as a "Trade Regulation Rule" pursuant to 15

U.S.C. 57a. See *FTC* v. *Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985). The court of appeals equated the agreement with an FTC requirement because it believed that the parties would not have entered into that agreement had the FTC not sought public comment on its proposal to require disclosure of the Cambridge Method results. But even if that were so, it could not transform a private voluntary agreement that cannot be enforced by the FTC into an FTC regulatory requirement.

The court of appeals also relied on the FTC's advice that reporting tar and nicotine levels based on a method other than the Cambridge Method could constitute deceptive advertising. Pet. App. 11a. Such advice, however, is far different from a requirement to report the Cambridge Method results.

The D.C. Circuit's decision in *Brown & Williamson* illustrates the distinction. In that case, the FTC successfully argued that respondent's representation of tar levels based on a different test was deceptive. But that conclusion was based on findings that consumers had come to rely on the Cambridge Method, that the cigarette at issue delivered disproportionately more tar than other similarly rated cigarettes, and that disclaimers explaining the difference would have proven ineffective. 778 F.2d at 41-42. While the D.C. Circuit affirmed the finding of deceptiveness on those facts, it made clear that tobacco companies could rely on non-Cambridge Method data so long as their advertising claims "provide[d] sufficient data to avoid deceptiveness due to confusion" with the Cambridge Method. *Id.* at 45. The court explained that because the 1970 agreement was "a voluntary disclosure plan," and the "FTC had not adopted [the Cambridge Method] of testing pursuant to a Trade Regulation Rule * * * one cannot say that the FTC

system constitutes the only acceptable one available for measuring milligrams of tar per cigarette." *Id.* at 36, 44.

The court of appeals in this case also relied on the fact that the FTC developed the Cambridge Method and, at one time, conducted the tests itself. Pet. App. 13a. But the FTC's involvement in those activities does not demonstrate that the FTC exercised comprehensive control of respondent's marketing of "light" cigarettes. The fact remains that the FTC has never mandated the disclosure of the results of the Cambridge Method; it has not adopted any regulatory definitions of "light" or "low" tar; and it has neither requested nor required the marketing of "light" cigarettes.

The court of appeals also cited an FTC report to Congress that used the term "low" tar in referring to cigarettes with 15 milligrams or less tar. Pet. App. 15a. But that report did not purport to define "low" tar for regulatory purposes. Indeed, the FTC made clear in reports to Congress that it had not adopted a regulatory definition of descriptors related to tar levels. And in requesting comments on whether it should define descriptive terms in 1997, the FTC reiterated that there was no official definition of low tar. 62 Fed. Reg. 48,158, 48,163 (1997).

Finally, the court of appeals relied on a 1971 consent decree between the FTC and American Brands. Pet. App. 15a (citing *In re Am. Brands, Inc.*, 79 F.T.C. 255 (1971)). A consent decree, however, binds only the parties to that decree. In any event, that decree did not reflect an FTC position on the proper definition of low tar. Instead, without defining the terms "low," "lower" or "reduced" tar, the decree merely prohibited American Brands from using those terms in cigarette advertising, unless accompanied by a disclosure of the tar and nicotine yields of the advertised cigarette.

3. Of course, even if the court of appeals had been correct about the degree of the FTC's regulation of respondent's marketing of low-tar cigarettes, that would not provide a sufficient basis for removing this case to federal court. The mere fact than an entity has been the target of pervasive federal regulation or has been permitted to engage in conduct by a regulatory scheme does not establish that the regulated entity acts under a federal officer. See pp. 18-19, *infra*, at (explaining the proper test). But here the court of appeals misapplied its own test in concluding that respondent was "acting under" a federal officer in marketing its cigarettes as "light." That error was based on a misunderstanding of the nature and significance of the underlying facts regarding the extent of the FTC's regulation of a specific type of conduct in a particular industry. That kind of fact-specific error does not warrant the Court's review.

B. There Is No Conflict In The Circuits On The Legal Standard For Determining When A Private Party Is Acting Under A Federal Officer

Petitioners do not seek review based on the court of appeals' mistaken evaluation of the underlying facts relating to the FTC's regulation of respondent's marketing of light cigarettes. Rather, they argue (Pet. 10-17) that review is warranted because the court of appeals' legal standard for determining whether a private party is acting under a federal officer conflicts with the standard established in other circuits. In particular, petitioners contend (Pet. 10-13; Reply Br. 1-5) that the decision below conflicts with the First Circuit's decision in *Camacho* v. *Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1989), the Seventh Circuit's decision in *Venezia* v. *Robinson*, 16 F.3d 209, cert. denied, 513 U.S. 815 (1994), and the Eleventh Circuit's decision in

Magnin v. *Teledyne Continental Motors*, 91 F.3d 1424 (1996). There is, however, no conflict.

In *Camacho*, the First Circuit held that telephone companies and their officials were acting under federal officers when they participated in wiretapping under the direction of federal agents. The court explained that the defendants were acting "strictly and solely at federal behest," the federal agents were engaged in "official government business," and that "[i]n such circumstances, the reach of section 1442(a)(1) extends to private persons * * * who act under the direction of federal officers." 868 F.2d at 486.

In *Venezia*, the Seventh Circuit held that an undercover informant was acting under a federal officer when he solicited a bribe as part of a sting operation conducted by FBI agents. The court explained that "[a] federal agent or informant who asserts that he was (or is) acting in the course of a criminal investigation is entitled to remove under § 1442(a)(1)." 16 F.3d at 212.

And in *Magnin*, the Eleventh Circuit held that a person delegated authority to inspect aircraft by the Federal Aviation Administration (FAA) was acting under a federal officer when he issued a certificate of airworthiness that allegedly led to an airline crash. The court explained that because the complaint alleged that the inspector was exercising official authority delegated by the FAA when he signed the certificate, and that the certification was the proximate cause of the accident, removal under Section 1442(a)(1) was proper. 91 F.3d at 1482-1429.

Petitioners contend (Pet. 9-13, Reply Br. 1-3) that those three decisions conflict with the decision below because they hold that a person is acting under a federal officer only when he is carrying out official government functions. Petitioners are mistaken. None of those decisions adopts such a stringent rule. Rather, without announcing any overarch-

ing legal test, the court in each case simply held that removal was appropriate on the facts of that case. At most, the decisions are consistent with the view that carrying out an official government function is a *sufficient* basis for removal. None of the cases, however, suggests that carrying out an official government function is a *necessary* condition for obtaining removal. The cases simply did not address that issue. There is therefore no conflict between those cases and the decision below.

Petitioners also contend (Pet. 16-17; Reply Br. 4) that the decision below conflicts with the Ninth Circuit's decision in *California* v. *H&H Ship Service Co.*, No. 94-10182, 1995 WL 619293 (Oct. 17, 1995) and the Tenth Circuit's decision in *Greene* v. *Citigroup Inc.*, No. 99-1030, 2000 WL 647190 (May 19, 2000). According to petitioners (Pet. 16; Reply 4), those decisions conflict with the decision below because they allow removal when a private party acts under the government's general supervision, while the court below allows removal only when the government exercises detailed and comprehensive control over the private actor. The two decisions cited by petitioner, however, are both unpublished. They are therefore not binding precedents in those circuits. See 9th Cir. R. 36-3; 10th Cir. R. 36.3.

It is also far from clear that those decisions conflict with the decision below. In each case, the court noted that the private party was engaged in an environmental clean-up activity pursuant to a direct order from a federal officer. *H&H Ship Serv.*, 1995 WL 619293, at *1; *Greene*, 2000 WL 647190, at *2. In any event, if, as petitioners contend (Reply 4), those decisions are more permissive of removal than is the decision below and would allow nearly all private regulated parties to remove a case to federal court, they presumably would have allowed removal in the circumstances presented here. Thus, even if those decisions were binding

and petitioners' reading of them were correct, this case would not be an appropriate vehicle for resolving any disagreement between those decisions and the decision below. And to the extent they are not more permissive, but simply deal with a distinct fact pattern, they do not contribute to any clear split of authority that would warrant the Court's review.*

C. The Practical Importance Of The Court's Decision Depends On How It Is Interpreted In Future Cases

Petitioners contend (Pet. 26-30) that the decision below warrants review because it would allow all regulated industries to remove state law claims to federal court, divesting state courts of large areas of their jurisdiction. The scope of the court's ruling, however, is far from clear. The court of appeals based its decision in part on its view that "[t]he FTC involved itself in the tobacco industry to an unprecedented extent." Pet. App. 13a. In his concurring opinion, Judge Gruender emphasized his view that the FTC's direction and control over respondent's activities was "extraordinary," and that the decision therefore "should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like [respondent], acts at the direction of a federal officer merely because it tests or

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* A case involving the same issue in the same factual context is currently pending in the Seventh Circuit. In *Kelly* v. *Martin & Bayley, Inc.*, No. 05-CV-0409-DRH, 2006 WL 44183 (S.D. Ill. Jan. 9, 2006), the district court relied on the court of appeals' ruling in this case to allow respondent to remove another "light" cigarettes suit to federal court. The Seventh Circuit accepted interlocutory review of that ruling, see *Kelly* v. *Martin & Bayley, Inc.*, Nos. 06-1756, 06-8007 (7th Cir.), and oral argument was held on September 18, 2006, but a decision has not yet been issued. Regardless of the disposition of that case, however, review is not warranted here for the reasons expressed in the text.

markets its products in accord with federal regulations." *Id.* at 18a.

As discussed above, the court erred in concluding that the FTC engaged in unprecedented control over respondent's activities and erred in articulating its general test. But because the court reached its conclusion in this case based in part on its (mistaken) perception that the FTC's control over respondent's activities was extraordinary, and because the concurrence emphasized the limited nature of the decision, the extent to which other regulated industries may be able to take advantage of the decision below is, at this point, entirely unclear.

That is particularly true because comprehensive and detailed government regulation is only one feature of the court of appeals' test. Under the court of appeals' standard, a removing defendant must also show that the particular acts challenged by the plaintiffs were performed pursuant to the government's comprehensive and detailed regulation. Pet. App. 13a. Given that nexus limitation, the extent to which other regulated industries will be able to take advantage of the decision is even more uncertain. Because the effect of the court's decision depends on how it is interpreted it future cases, review at this time would be premature.

D. *Peacock* Does Not Limit The Federal Officer Removal Provision To Persons Involved In Enforcing Federal Law

1. Petitioners contend (Pet. 20; Reply 5) that the court of appeals' comprehensive control test is inconsistent with *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), because *Peacock* allows a private party to remove under Section 1442(a)(1) only when the private party affirmatively assists a federal officer in enforcing federal law. Petitioners' reading of *Peacock* is incorrect.

In *Peacock*, private parties sought removal under 28 U.S.C. 1443(2), not under the federal officer removal statute. Section 1443(2) allows removal "[f]or any act under color of authority derived from any law providing for equal rights." 28 U.S.C. 1443(2). Based on the history underlying that and related provisions, the Court held that Section 1443(2) authorizes private parties to remove an action only when they are assisting or acting with or for federal officials in enforcing equal rights laws. 384 U.S. at 814-824; see *id.* at 815 ("persons assisting such officers in the performance of their official duties"); *id.* at 816 ("persons acting in association with" covered federal officers); *id.* at 819 n.17 ("federal officers and persons assisting them").

As petitioners note (Pet. 20), the Court relied in part on the predecessors to the current federal officer removal statute in determining the scope of Section 1443(2). See 384 U.S. at 820 n.17, 823 n.20. In particular, the Court concluded that because the predecessors to the federal officer removal statute were limited to private parties who were "aiding or assisting" customs officers in enforcing customs laws, Section 1443(2) should be limited to private parties who assist federal officers in official enforcement activity. *Ibid.*

That analysis, however, does not suggest that the *current* version of the officer removal statute should similarly be limited to private persons who assist federal officers in enforcement activities. In 1948, Congress expanded the officer removal statute to all federal officers who act under color of their authority, regardless of whether they are engaged in enforcement activity or other duties. See *Willingham* v. *Morgan*, 395 U.S. 402, 406 (1969). Because the "acting under" clause in Section 1442(a) is directly linked to the class of federal officers who are entitled to seek removal, the 1948 expansion of the class of covered officers

necessarily effected a corresponding expansion of the class of private parties who may remove. Accordingly, while predecessors to the federal officer removal statute allowed private parties to remove when they acted on behalf of, or otherwise assisted, a federal officer in enforcing the revenue laws, the current federal officer removal statute allows private parties to remove when they act on behalf of, or otherwise assist, any federal officer in carrying out that officer's duties, regardless of whether those duties involve enforcement activity.

2. While that analysis suggests that petitioners' enforcement test is incorrect, it also suggests that the court of appeals' comprehensive control test is flawed. Under the proper standard, a private party's mere compliance with federal regulatory requirements, no matter how pervasive, does not make removal appropriate under the federal officer provision. Pervasive regulation may give rise to a preemption *defense*, but absent the rare circumstances of complete preemption, that is no basis for removal.

On the other hand, removal is not necessarily foreclosed merely because the federal officer has failed to exercise comprehensive control over the private party. Instead, removal would be appropriate if the private party acted on behalf of a federal officer or otherwise assisted a federal officer in carrying out that officer's duties. Such a relationship need not feature close supervision. In appropriate circumstances, the proper standard is broad enough to encompass contractors who act in accordance with a federal contract to produce a product desired by the federal government, companies that engage in environmental clean-up activities under federal supervision, and individuals who testify as prosecution witnesses. That standard would not, however, remotely encompass tobacco manufacturers that market "light" cigarettes, because in so doing the tobacco

companies are not acting on behalf of federal officers or otherwise assisting federal officers in carrying out their duties. Respondent hardly markets "light" cigarettes on the FTC's behalf.

Interpreting Section 1442(a)(1) to encompass private parties who act on behalf of federal officers or otherwise assist federal officers in carrying out their duties is not only consistent with the text and history of the federal officer removal provision; it is also consistent with its purposes. As the Court has explained, that purpose is to prevent state interference with federal government operations. *Willingham*, 395 U.S. at 406 *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1879). A state law claim that challenges the actions of a person who is acting on behalf of a federal officer or is otherwise assisting a federal officer in carrying out his duties is a direct threat to the federal government's operations. Actions that fall outside that category do not present the same threat to the effective functioning of the federal government. Indeed, the extensive regulation emphasized by the court of appeals may suggest that the regulated entity is relatively disfavored by the federal government.

At the same time, the proposed standard respects the traditional role of the States in administering state law claims in their courts, even when there are potential federal defenses to those claims. While a decision that errs in permitting removal under the federal officer removal provision does not directly implicate federal interests in the way that a decision that improperly denies removal does, a broader reading of Section 1442(a)(1) could threaten to undercut that traditional state role.

3. Although the court of appeals' standard appears to be flawed, this case nonetheless does not appear to warrant review. As discussed above, there is no present conflict in the circuits on the proper legal standard for determining

when a private party is acting under a federal officer; the effect of the court of appeals' decision depends on how it is interpreted in future cases; and this Court's decision in *Peacock* does not dictate the outcome here. Moreover, it does not appear that either the parties to this case or the courts below have advanced what the government believes to be the correct interpretation of Section 1442(a)(1), nor is that interpretation addressed in the appellate decisions on which the parties rely. Under these circumstances, the most appropriate course would appear to be to allow the issue to be further ventilated in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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