

No. _____

IN THE
Supreme Court of the United States

LISA WATSON AND LORETTA LAWSON, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., A CORPORATION;
AND PHILIP MORRIS, INCORPORATED, A CORPORATION,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a private actor doing no more than complying with federal regulation is a “person acting under a federal officer” for the purpose of 28 U.S.C. § 1442(a)(1), entitling the actor to remove to federal court a civil action brought in state court under state law.

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Petitioners Lisa Watson and Loretta Lawson, individually and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

INTRODUCTION

This case presents issues of exceptional importance to the balance of judicial authority between the state and federal judicial systems. Before the court of appeals, defendant Philip Morris argued that this case – a class action brought under Arkansas law related to Philip Morris’s marketing and promotion of light cigarettes – “is exactly the type of case for which the federal officer removal statute was created.” Appellee’s Br. 34. The Eighth Circuit agreed with that extraordinary proposition, holding that Philip Morris was a “person acting under” a federal officer. 28 U.S.C. § 1442(a)(1). The court held that Philip Morris had a right to defend this action in federal rather than state court, simply because Philip Morris was subject to comprehensive and detailed regulation by the Federal Trade Commission (“FTC”) in marketing and promoting its light cigarettes. That holding is at odds with this Court’s precedents, conflicts with the text and purpose of the statute, defies common sense, and furthers already profound confusion in the federal courts as to the proper interpretation of the statute.

The Eighth Circuit’s decision is not an aberration, but rather reflects a pervasive confusion in the federal courts concerning the proper interpretation of the federal officer removal statute in cases involving private parties. The courts of appeals have articulated markedly differing tests for when a private actor is “acting under” a federal officer within the meaning of the statute. The First, Seventh, and Eleventh Circuits, for example, have embraced an official function approach that looks to whether a private actor is standing in the shoes of a federal officer in enforcing federal law. Under the law of those circuits, Philip Morris unquestionably does not qualify as a person

“acting under” a federal officer and is thereby not entitled to remove an action to federal court. The Eighth Circuit followed the Fifth Circuit, however, in making dispositive the comprehensiveness and detail of federal control over the activities of a private actor. And, in the Ninth and Tenth Circuits, a private actor must show only that it is under the general supervision of a federal officer. The current articulation of “acting under” in four circuits, therefore, differs markedly from the official function test adopted by three circuits.

This Court’s review is urgently needed to bring clarity to the test for determining if and when a private actor is “acting under” a federal officer for purposes of federal officer removal. Left uncorrected, the Eighth Circuit’s approach to interpreting § 1442(a)(1) will have significant consequences. By radically expanding the category of cases in which removal is appropriate, the Eighth Circuit’s rule threatens the established interest of States in having state courts be the primary forums for the adjudication of state law. The Eighth Circuit’s rule will invite regulated parties of all types to remove cases from state court, based on no more than artful characterizations of the regulatory regime to which the party is subject. Channeling ordinary state lawsuits to federal courts in this manner will drastically stretch federal judicial resources and undermine the interests of States in having their judicial systems available to vindicate the interests of their citizens.

OPINIONS BELOW

The court of appeals’ opinion (Pet. App. 1a-19a) is reported at 420 F.3d 852. The district court’s opinion denying petitioners’ motion to remand (Pet. App. 20a-60a) is unreported (but available at 2003 WL 23272484).

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2005. A petition for rehearing was denied on November 18, 2005. *See* Pet. App. 61a. On February 9,

2006, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including March 20, 2006, and on March 14, 2006, further extended the time within which to file a petition to and including April 17, 2006. *See id.* at 100a-101a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutes are set forth at Pet. App. 98a-99a.

STATEMENT OF THE CASE

A. The Federal Officer Removal Statute

The federal officer removal statute, 28 U.S.C. § 1442(a), governs the removal to federal court of criminal and civil actions in which federal officers and agencies are defendants. The statute provides that “[a] civil action . . . commenced in a State court . . . may,” in certain circumstances, “be removed . . . to the district court of the United States for the district and division embracing the place wherein it is pending.” 28 U.S.C. § 1442(a). The first subsection of § 1442(a) defines one such circumstance as when “[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, [is] sued in an official or individual capacity for any act under color of such office.” *Id.* § 1442(a)(1). By providing federal officers with the statutory right to remove a civil action based on state law, § 1442(a)(1) functions as an exception to the well-pleaded complaint rule. *See generally Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908).

“The federal officer removal statute has had a long history.” *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). The first federal officer removal statute was enacted during the War of 1812. *See* Richard H. Fallon, Jr., *et al.*, *Hart & Wechsler’s The Federal Courts and the Federal System* 951 (4th ed. 1996) (“Hart & Wechsler”). The provision “was part of an attempt to enforce an embargo on trade with England over the opposition of the New England States, where the War of 1812 was quite unpopular.”

Willingham, 395 U.S. at 405. To that end, the statute provided for the removal of actions brought in state court against “any collector, naval officer, surveyor, inspector, or any another officer . . . or any other person aiding or assisting” in enforcing the customs provisions of the act. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 195, 198. By its terms, the removal provision expired at the end of the war. *See Willingham*, 395 U.S. at 405.

The next iteration of a federal officer removal statute came in the Force Act of 1833, enacted in response to South Carolina’s threat of nullification. *See* Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 632, 633-34. *See generally* Hart & Wechsler at 951. The removal provision of that Act authorized the removal of suits against federal officers or “other person[s]” on account of acts done in enforcing the customs laws. § 3, 4 Stat. 633.

Congress enacted a new series of federal officer removal statutes during the Civil War, authorizing the removal of cases brought against federal officers for acts committed during the rebellion and justified under the authority of the President or Congress. *See* Hart & Wechsler at 951. These provisions “were eventually codified into a permanent statute which applied mainly to cases growing out of enforcement of the revenue laws.” *Willingham*, 395 U.S. at 405-06. The permanent removal statute was amended several times prior to 1948, at which time the statute was broadened, as a part of the Judicial Code of 1948, to include *all* federal officers. *Id.* at 406.

In 1996, Congress amended § 1442(a)(1) to include federal agencies within the compass of the removal provision. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850.

B. FTC “Regulation” of Light Cigarettes

In the 1950s, the FTC became alarmed about the accuracy of representations made in cigarette advertising about the tar and nicotine content of cigarettes. The FTC published guidelines “advising manufacturers to make no

representations about the tar and nicotine content of a cigarette that could not be supported with reliable scientific evidence.” *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 37 (D.C. Cir. 1985).

In 1967, the FTC sought to standardize tar and nicotine testing by endorsing a method to test the tar and nicotine levels of cigarettes known as the Cambridge Filter Method. *See id.*; *see also Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967). The Cambridge Filter Method was intended to provide a means for making factual statements in advertising about tar and nicotine content of cigarettes. In August 1970, the FTC sought comment on a formal agency rule that would have made it “an unfair or deceptive act or practice . . . to fail to disclose, clearly and prominently, in all advertising the tar and nicotine content [of the cigarettes] . . . based on the most recently published” data resulting from tests using the Cambridge Filter Method. *Advertising of Cigarettes*, 35 Fed. Reg. 12,671, 12,671 (1970).

Later that year, however, five leading cigarette companies, including Philip Morris, agreed to a “voluntary program” by which the companies would disclose tar and nicotine data culled from FTC test results on advertising, although cigarette companies have never entered into any such agreement regarding labeling on packages or cartons. *See Federal Trade Commission, Report to Congress*, App. C (Dec. 31, 1970). Upon reviewing the voluntary agreement, the FTC suspended its proposed rulemaking indefinitely. *Brown & Williamson Tobacco Corp.*, 778 F.2d at 37.

C. Proceedings in State and District Court

This case arises out of a civil action brought against Philip Morris by Lisa Watson and Loretta Lawson in Arkansas state court for violations of Arkansas state law. Petitioners, acting on behalf of a class of all persons who purchased two brands of so-called “light” cigarettes – *viz.*, Marlboro Lights and Cambridge Lights – in Arkansas, have alleged that Philip Morris engaged in unfair and

deceptive business practices in connection with promoting and marketing its light cigarettes.

Specifically, petitioners' complaint alleges that Philip Morris, "[w]hile marketing and promoting decreased tar and nicotine deliveries, . . . designed Cambridge Lights and Marlboro Lights to register lower levels of tar and nicotine on the [Cambridge Filter Method] . . . than would be delivered to the consumers of the product." Pet. App. 63a-64a (¶ 9). Petitioners have averred that Philip Morris falsely represented its cigarettes as light or low tar by "[i]ntentionally manipulating the design and content" of its cigarettes to lower artificially the results of the testing method used to measure tar and nicotine levels. *See id.* at 64a-65a (¶¶ 12-13). Based on those allegations, petitioners seek relief under the Arkansas Deceptive Trade Practices Act (Counts I and II).

Philip Morris removed petitioners' action to the United States District Court for the Eastern District of Arkansas, relying on, among other provisions, the federal officer removal statute. Philip Morris argued that removal of a "private party [is appropriate] where it is sued for actions taken under the direction of a federal officer." *Id.* at 76a. Philip Morris insisted that "[t]he 60-year history of FTC mandates" caused Philip Morris to be a federal officer or a "person acting under" a federal officer. *Id.* at 88a.

Philip Morris argued further that it had a "colorable federal defense" because petitioners' claims "inevitably conflict with the FTC's policy judgments, giving rise to a valid preemption defense." *Id.* at 90a-91a. Philip Morris also maintained a causal connection existed between FTC regulation and the challenged acts because petitioners sought to impose liability "for conduct . . . that was undertaken at the express direction" of the FTC. *Id.* at 92a.

Petitioners moved to remand the case to Arkansas state court, challenging Philip Morris's entitlement to avail itself of § 1442(a)(1). Petitioners argued that they were not challenging the use of FTC testing procedures "but rather the company's deceptive practices in labeling its products

as low tar and nicotine . . . accomplished by manipulation of the [FTC] testing procedures.” Appellants’ Br. xii (citing Motion for Remand ¶¶ 4-5). Furthermore, petitioners maintained that Philip Morris’s marketing of light cigarettes subject to FTC regulation did not make the company a “person acting under” a federal officer. *Id.*

On December 12, 2003, the district court denied petitioners’ motion to remand. The court held that “[t]he ‘person acting under’ element and the causal nexus element tend to converge into a single issue: whether the actions that form the basis of the state suit were performed pursuant to comprehensive and detailed federal government regulation.” Pet. App. 36a. After surveying the landscape of federal cases passing on the subject, the court then held that, because FTC “regulation of cigarette testing and advertising spans over forty years and is detailed and specific,” “Philip Morris acted under the direction of a federal officer within the meaning of § 1442(a)(1) when it cited the tar and nicotine values derived from the FTC Method in its [cigarette] advertisements.” *Id.* at 41a.

Recognizing that its decision expanded the scope of § 1442(a)(1) and created a split in the federal courts, the district court certified the question for interlocutory review under 28 U.S.C. § 1292(b). *See id.* at 57a-60a.

D. The Court of Appeals’ Decision

The Eighth Circuit affirmed the district court’s denial of petitioners’ motion to remand. The court of appeals opined that it was obliged not to give § 1442(a)(1) a “‘narrow’ or ‘limited’ interpretation.” Pet. App. 4a. The court then held that Philip Morris qualified as a “person acting under” a federal officer, even though it noted that that decision was contrary to that of “every other district court confronted with tobacco companies alleging they were acting under a federal officer.” *Id.* at 6a. In holding that Philip Morris *was* entitled to invoke § 1442(a)(1), the Eighth Circuit articulated a test that looked to whether the FTC exercised “comprehensive, detailed regulation” over Philip Morris. *See id.* at 8a; *see also id.* at 6a

(whether “acting under” condition is satisfied depends on “detail and specificity of the federal direction of the defendant’s activities”). Relying primarily upon analogy to the Fifth Circuit’s decision in *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 398 (5th Cir. 1998), the Eighth Circuit held the FTC did exercise “comprehensive, detailed regulation” over Philip Morris, and thereby satisfied the “acting under” condition. Pet. App. 7a-8a.

Furthermore, the court deemed it irrelevant that the FTC “regulations” that Philip Morris claimed rendered it a federal officer were never adopted and that the industry acted by voluntary agreement. The court decided that “[t]he FTC effectively used its coercive power to cause the tobacco companies to enter the agreement.” *Id.* at 10a.

The Eighth Circuit also held that a causal connection existed between Philip Morris’s challenged conduct and the acts regulated by the FTC. The court explained that petitioners’ complaint both “directly implicates the enforcement and wisdom of the FTC’s tobacco policies” and “challenge[s] the FTC’s policy judgment that despite the failure of the Cambridge Filter Method . . . the test results should still be included in advertising.” *Id.* at 15a-16a.

In addition, the Eighth Circuit decided that, although petitioners’ claims were entirely under Arkansas state law, Philip Morris had a colorable federal defense of preemption that supported its claim to removal under the federal officer removal statute. *Id.* at 16a-18a.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit’s decision that Philip Morris may remove to federal court further divides the courts of appeals on the important jurisdictional issue of when a private actor is “acting under” a federal officer such that the party may avail itself of the federal officer removal statute. The First, Seventh, and Eleventh Circuits have each adopted a framework for interpreting the “acting under” requirement that looks to whether a private actor is performing an official governmental function; under that

framework, removal jurisdiction for Philip Morris would have been improper. The Eighth Circuit, however, followed an approach similar to that of the Fifth Circuit in making dispositive the detail or comprehensiveness of federal control. By contrast, the Ninth and Tenth Circuits have each held that general supervision by a federal officer may be sufficient to support removal jurisdiction.

This Court’s review is needed to give clarity to an important jurisdictional provision aimed at maintaining a proper division between state and federal judicial authority when federal officers are sued in state court. Absent correction by this Court, the Eighth Circuit’s decision encourages private regulated actors of all types to assert an immunity from suit in state court for alleged violations of state law based on nothing more than that the party is subject to comprehensive and detailed federal regulation.

THE EIGHTH CIRCUIT’S DECISION DIVIDES THE FEDERAL COURTS ON SIGNIFICANT ISSUES PERTAINING TO THE PROPER APPLICATION OF THE FEDERAL OFFICER REMOVAL STATUTE

A. Federal Courts Are Divided Or Otherwise In Disarray With Respect To When A Private Party Is “Acting Under” A Federal Officer Within The Meaning Of § 1442(a)(1)

The courts of appeals are deeply divided over the legal test for determining when a private party is “acting under” a federal officer.¹ Although the “acting under” clause

¹ Ordinarily, a division among the courts of appeals signals most plainly the need for this Court’s intervention. Although that is also true here, we also highlight the deep confusion among the district courts because an order granting or denying a motion to remand to state court is not reviewable on interlocutory appeal. *See* 28 U.S.C. § 1447(d) (“order remanding a case to the State court from which it was removed is not reviewable on appeal”); *Angelides v. Baylor College of Medicine*, 117 F.3d 833 (5th Cir. 1997) (no jurisdiction under § 1447(d) or collateral order doctrine to review remand order); *Krangel v. General Dynamics Corp.*, 968 F.2d 914, 915 (9th Cir. 1992) (per curiam) (declining to make exception to § 1447(d) for “orders deciding important legal issues for the first time”); *In re Diet Drugs Prods. Liab. Litig.*, 93 Fed.

serves a crucial function in differentiating private parties from federal actors, courts of appeals’ decisions interpreting the clause run the gamut from those holding that a private party availing itself of the statute must be carrying out official governmental functions, to those requiring comprehensive and detailed federal control over the removing party, to those looking only to whether the federal government exercises *any* control, broadly defined. Philip Morris made a similar point before the Eighth Circuit, arguing that “[c]ourts have articulated different legal tests to describe the level of federal direction necessary to bring a defendant within the ‘acting under’ provision of the federal officer removal statute.” Appellee’s Br. 35.²

1. The First, Seventh, and Eleventh Circuits have adopted an official function test

In *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989), the First Circuit upheld removal by a telephone company sued for its alleged involvement in electronic surveillance by federal agents. *See id.* at 486. The plaintiffs specifically alleged that the

Appx. 345, 348 (3d Cir. 2004) (court of appeals lacked appellate jurisdiction, under 28 U.S.C. § 1291, to entertain appeal from denial of motion to remand; jurisdiction was not proper under collateral order doctrine). Many cases, therefore, that would further demonstrate the divergent approaches of the courts simply do not reach the courts of appeals for lack of appellate jurisdiction. Petitioners accordingly look both to the federal courts of appeals and to the federal district courts – the forums in which, as a practical matter, this important jurisdictional issue is often ultimately resolved – to demonstrate the urgency of action by the Court.

² *See also McMahon v. Presidential Airways, Inc.*, 410 F. Supp. 2d 1189, 1196 (M.D. Fla. 2006) (observing that “there are varying formulations of the test for removal under the federal officer provision”); *Lalonde v. Delta Field Erection*, No. Civ. A. 96-3244-B-M3, 1998 WL 34301466, at *2 (M.D. La. Aug. 6, 1998) (“Neither the Supreme Court nor the Fifth Circuit have established what is required to show that a government contractor is ‘acting under’ an officer of the United States or of an agency thereof. Cases from other federal district courts . . . vary in their approach to what is required under this element.”).

telephone company “wiretapped and/or offered technical assistance to federal agents to wiretap.” *Id.* Without a word as to whether federal control over the telephone company was comprehensive or detailed – the factors deemed dispositive by the Eighth Circuit – the First Circuit there held that the defendant’s “involvement in the electronic surveillance” – which was “official government business” – “was strictly and solely at federal behest.” *Id.*³ Thus, the First Circuit’s approach makes the official or private character of the performed acts determinative of whether the private actor is “acting under” the federal officer for removal purposes.

In *Venezia v. Robinson*, 16 F.3d 209 (7th Cir. 1994), the Seventh Circuit adopted a comparable approach – looking to whether the removing party was acting in an official capacity in enforcing federal law – in deciding whether a state officer was entitled to removal under § 1442(a)(1). In that case, a civil suit was brought against an officer of the Illinois Liquor Control Commission in connection with a seizure of video gaming machines. The state officer sought removal on the ground that he was acting as a part of an FBI investigation and thus was a “‘person acting under’ a federal agent.” *Id.* at 211. The court of appeals agreed, reasoning 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), presenting to the federal tribunal all questions of justification and immunity.” *Id.* at 212 (emphasis added).⁴

³ *Cf. Maine Ass’n of Interdependent Neighborhoods v. Commissioner, Maine Dep’t of Human Servs.*, 876 F.2d 1051, 1054 (1st Cir. 1989) (Breyer, J.) (commissioner of state agency “might be considered a ‘person acting under’ the Secretary [of Health and Human Services]” insofar as state agency is “*administering* the AFDC rules and regulations”) (emphasis added).

⁴ The Seventh Circuit’s decision has been viewed by a district court outside that circuit as supporting the notion that private parties performing official governmental functions may be entitled to be treated

The Eleventh Circuit followed a similar path in *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996). There, the court of appeals upheld a refusal to remand to state court a state-law action for negligent inspection and wrongful certification of an aircraft engine. The Eleventh Circuit, consistent with the First and Seventh Circuits, found that the defendant, an “authorized agent of the [Federal Aviation Administration (“FAA”)],” was entitled to removal because there was a connection between the defendant’s acts “under asserted official authority” and the civil action brought against him. *Id.* at 1427-28 (internal quotation marks omitted). The Eleventh Circuit deemed it crucial that the defendant had acted “in his capacity as an agent of the FAA” with respect to all claims alleged against him in the complaint. *Id.* at 1428.⁵ Underscoring the divide in the circuits, the Eleventh Circuit did not feature the issue of whether the federal government exercised comprehensive and detailed control with respect to engine inspections, but instead focused upon whether the defendant was performing the official delegated functions of the federal government. *See id.* (noting that defendant was “acting on behalf of the FAA, under the authority granted to him by the FAA”).

Relatedly, federal district courts have applied variations of the official function test, holding that the conduct of a private party invoking § 1442(a)(1) must be tantamount to official governmental conduct, and that this test is not satisfied by showing merely that the private actor complied with the law. In *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530 (W.D. Ky. 1996), for example, the court denied removal to a defendant testify-

as federal officers. *See Reiser v. Fitzmaurice*, No. 94 Civ. 7512, 1996 WL 54326, at *4-*5 (S.D.N.Y. Feb. 8, 1996).

⁵ *But cf. Lovell Mfg. v. Export-Import Bank of the United States*, 843 F.2d 725, 734 n.13 (3d Cir. 1988) (“it is not at all clear that a mere agency-principal relationship between [a government agency] and [a private corporation] would be sufficient to support jurisdiction” under § 1442(a)(1)).

ing pursuant to a subpoena, reasoning that he was not acting under a federal officer because he “ha[d] not been directed to perform *official functions* as an officer or agent of the government.” *Id.* at 533 (emphasis added). Contrary to the framework employed by the Eighth Circuit, the court explained that testifying before a grand jury is “something private citizens are regularly required to do” and “such testimony does not make a citizen a federal official or agent.” *Id.*⁶

In short, under the official function approach taken by the First, Seventh, and Eleventh Circuits, Philip Morris – a private corporation doing no more than complying with federal law – would not have been entitled to removal.

2. *The approach of the Eighth and Fifth Circuits rests on the comprehensiveness and detail of federal control*

The Eighth Circuit’s framework tracks an approach taken by the Fifth Circuit in making the comprehensive-

⁶ See also *Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1150 (D. Colo. 2002) (“Because [§ 1442(a)(1)] is premised on the protection of *federal* activity and an anachronistic mistrust of state courts’ ability to protect and enforce *federal* interests and immunities from suit, private actors seeking to benefit from its provisions bear a special burden of establishing the official nature of their activities.”); *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (bank was not “acting under” federal officer based on federal regulation because removal is permitted only “when the corporation is so intimately involved with government functions as to occupy essentially the position of an employee of the government”); *Kaplansky v. Associated YM-YWHA’s of Greater New York, Inc.*, No. 88 CV 1292, 1989 WL 29938, at *3 (E.D.N.Y. Mar. 27, 1989) (parties complying with subpoena were not “acting under” federal officer because defendants were not “asked to stand in the shoes of [federal] officers or agents and perform ‘official’ functions”); *Northern Colorado Water Conservancy Dist. v. Board of County Comm’rs*, 482 F. Supp. 1115, 1118 (D. Colo. 1980) (county and regional council were not “acting under” federal officer in participating in Clean Water Act program because, although “the federal clean water program provides for the use of various agencies of state and local government in pursuing environmental goals, it does not constitute a grant of substantive powers to political subdivisions of another sovereign”).

ness and detail of control exercised by a federal officer both necessary and sufficient to permit removal by a private party under § 1442(a)(1).

In *Winters*, the Fifth Circuit invoked the principle that § 1442(a)(1) should be interpreted liberally, and held that a chemical manufacturer sued for harm allegedly caused by Agent Orange was entitled to remove a case because of the federal government’s “strict control” and “on-going supervision” of the Agent Orange production process, as well as its “detailed and direct orders . . . to supply a certain product.” 149 F.3d at 398-400 (internal quotation marks omitted); *see also Miller v. Diamond Shamrock Co.*, 275 F.3d 414, 417-18 (5th Cir. 2001) (reading *Winters* as applying a “strict control” test). Numerous federal district courts in a variety of other circuits have followed the Fifth Circuit or applied similar control tests, none of which asks whether a private party is performing an official function in enforcing federal law, as does the test of the First, Seventh, and Eleventh Circuits.⁷

⁷ *See, e.g., Parks v. Guidant Corp.*, 402 F. Supp. 2d 964, 967 (N.D. Ind. 2005) (removing party must show conduct is “linked to detailed and specific regulations”); *Kaye v. Southwest Airlines Co.*, No. Civ. A. 3:05CV0450-D, 2005 WL 2074327, at *4 (N.D. Tex. Aug. 29, 2005) (Southwest Airlines not entitled to remove claims relating to failure to refund passenger charge because, “[a]lthough [the regulations] demonstrate that Southwest was compelled to take certain actions concerning” the charge, Southwest did not establish, under *Winters*, “the *detailed* control necessary for a private party to avail itself of removal”); *Edwards v. Blue Cross/Blue Shield of Texas*, No. Civ. 3:05CV0144-H, 2005 WL 1240577, at *4 (N.D. Tex. May 25, 2005) (“acting under” test not satisfied because company did not take challenged acts “pursuant to the direct and detailed control of an officer of the United States”); *Kennedy v. Health Options, Inc.*, 329 F. Supp. 2d 1314, 1318 (S.D. Fla. 2004) (contractual relationship “does not in itself constitute the direct and detailed control that is required to assert federal jurisdiction”); *In re Wireless Telephone Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 562-63 (D. Md. 2004) (applying “direct and detailed” federal control test); *In re ‘Agent Orange’ Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004) (“acting under” clause is satisfied by showing “substantial degree of direct and detailed federal control”); *Haller v. Kaiser Found. Health Plan of the Northwest*, 184 F. Supp. 2d

Moreover, a court in the Second Circuit applying a comprehensive and detailed control test has allowed federal officer removal on the basis of regulated corporations' compliance with federal environmental regulations. That ruling suggests the unbounded nature of a test based only upon the comprehensiveness and detail of federal control. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 342 F. Supp. 2d 147, 156 (S.D.N.Y. 2004) (defendants had "sufficiently alleged that they added MTBE to gasoline at the direction of the [Environmental Protection Agency ("EPA")], a federal agency, thereby meeting the ["acting under"] requirement of removal pursuant to section 1442(a)(1)", *clarified on other grounds*, 341 F. Supp. 2d 386 (S.D.N.Y. 2004)).⁸

1040, 1044 (D. Or. 2001) (private individuals may be "acting under" federal officer when the officer has "direct and detailed control over the defendant") (internal quotation marks omitted); *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346-47 (S.D. Miss. 1994) (generalized rules not sufficient to establish direct and detailed control); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572-73 (N.D. Cal. 1992) ("acting under" clause satisfied because Navy monitored contract performance "at all times" and exercised "direct and detailed" control over contractor) (internal quotation marks omitted).

⁸ Even district courts applying a variation of the comprehensive and detailed control test have found, in similar circumstances, that Philip Morris is not entitled to removal. *See Paldrmic v. Altria Corporate Servs., Inc.*, 327 F. Supp. 2d 959, 966 (E.D. Wis. 2004) ("acting under" clause is satisfied when a defendant establishes "direct and detailed control," but that standard was not satisfied because Philip Morris was sued "primarily" for "the manner in which it designed and manufactured light cigarettes, which actions were not taken pursuant to FTC direction"); *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 845, 846 (N.D. W. Va. 2004) (although private actor can claim protection of § 1442(a)(1) when "it is threatened with liability for actions taken on behalf of a federal officer," FTC did not require Philip Morris to employ testing method or to "disseminate misleading information"); *Pearson v. Philip Morris USA, Inc.*, No. 03-CV-178-HA, 2003 U.S. Dist. LEXIS 24508, at *11-*12 (D. Or. Aug. 8, 2003) (following *Tremblay*); *Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411, 419 (D.N.H. 2002) (removal inappropriate because plaintiffs did not "challenge the enforcement or wisdom of any FTC policy, procedure or regulation" but rather the "conduct of a private corporation, acting without direction from a

3. *The Ninth and Tenth Circuits construe the “acting under” clause to permit removal if the federal officer had general supervision over a private actor*

Differing from the comprehensive and detailed control test adopted by the Eighth and Fifth Circuits and contrary to the official function test embraced by the First, Seventh, and Eleventh Circuits, the Ninth and Tenth Circuits have construed the “acting under” clause more broadly, requiring only that a federal officer have had general supervision over the defendant.

In *California v. H&H Ship Service Co.*, No. 94-10182, 1995 WL 619293 (9th Cir. Oct. 17, 1995) (judgment noted at 68 F.3d 481), the Ninth Circuit held that companies cleaning up a hazardous waste spill under the auspices of a remediation plan approved by the Coast Guard were “acting under” a federal officer. Specifically, the defendants argued that removal was appropriate because “their actions were taken as part of a removal action *supervised* by the United States Coast Guard.” *Id.* at *1 (emphasis added). Although noting that the question was “difficult,” the Ninth Circuit reasoned that the defendants were acting under a federal officer because the Coast Guard had a general “on-scene command over the removal” of the hazardous waste and “the defendants were present at the site in order to execute a removal that was under the direction and control of a federal officer.” *Id.* at *1-*2. Notably, the court analyzed neither the comprehensiveness nor the detail of the Coast Guard’s on-scene command or

federal officer or agency”); *see also City of Livingston v. Dow Chem. Co.*, No. C05-03262-JSW, 2005 WL 2463916, at *3 (N.D. Cal. Oct. 5, 2005) (Dow Chemical *not* entitled to removal because “merely being subject to federal regulations, even if extensive, is insufficient to demonstrate that a private litigant acted under the direction of a federal officer”) (internal quotation marks omitted). By contrast, the District Court for the Southern District of Illinois, expressly following the reasoning of *Watson*, permitted Philip Morris to remove. *See Kelly v. Martin & Bayley, Inc.*, No. 05-CV-0409-DRH, 2006 WL 44183, at *3-*4 (S.D. Ill. Jan. 9, 2006). The Seventh Circuit has accepted interlocutory review of that issue. *See Order, In re Kelly*, No. 06-8007 (7th Cir. Mar. 6, 2006).

control. Nor did it assess whether the private actors were performing an official governmental function. Federal district courts have sometimes taken a broad analytic approach.⁹

Similarly, the Tenth Circuit, in *Greene v. Citigroup Inc.*, No. 99-1030, 2000 WL 647190 (10th Cir. May 19, 2000) (judgment noted at 215 F.3d 1336), held that a private company was “acting under” a federal officer in engaging in the remediation of a hazardous waste site. In so holding, the court of appeals, without assessing the comprehensiveness or detail of federal control or whether the remediation was an official governmental function, explained only that the company “implemented a remedy selected by the EPA, pursuant to CERCLA, and it was subject to civil penalties for failure to comply with that directive.” *Id.* at *2.

In sum, there is deep confusion in and a mature split among the courts of appeals with respect to the proper interpretation of the “acting under” clause. That confusion is consequential. The phrase distinguishes private parties from government officials, and thus acts as a key limitation of the jurisdictional statute. But, owing to a dizzying array of doctrinal formulations, the outcome of a removal decision pertaining to a private regulated actor will depend upon the circuit – or even the district – in which removal is sought. In order to bring consistency and clarity to this important area of jurisdictional law, this Court should grant certiorari.¹⁰

⁹ See *Crocker v. Borden, Inc.*, 852 F. Supp. 1322, 1326 (E.D. La. 1994) (“acting under” test was met merely because private corporation was “acting under the direction of the Navy in the construction of the marine turbines”); *Pack v. AC & S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993) (“acting under” requirement satisfied by “direct control,” which is “established by showing strong government intervention and the possibility that a defendant will be sued in state court as a result of the federal control”).

¹⁰ Adding to the doctrinal confusion, the Fifth Circuit, as well as numerous district courts, has merged the “acting under” and “under

B. In Holding That Philip Morris May Avail Itself Of The Federal Officer Removal Statute, The Eighth Circuit Misinterpreted This Court’s Precedents, Reaching An Outcome Inconsistent With Statutory Text And Purpose

By permitting Philip Morris to remove under the federal officer removal statute, the Eighth Circuit departed from any reasonable interpretation of § 1442(a)(1) and this Court’s precedents.

1. *The Eighth Circuit embraced an interpretation of “acting under” that does not accord with the statutory text viewed in light of this Court’s precedents*

a. The Eighth Circuit fundamentally erred in holding that the “acting under” clause was satisfied merely by showing that “the acts . . . were performed pursuant . . . to comprehensive and detailed regulations.” Pet. App. 6a (internal quotation marks omitted, first ellipsis in original). The Eighth Circuit’s test – which has never been endorsed by this Court – is inconsistent with § 1442(a)(1)’s text.

color of such office” inquiries under § 1442(a)(1). *See Winters*, 149 F.3d at 398 (without undertaking independent “acting under” analysis, asking whether “government specified the composition of Agent Orange so as to supply the causal nexus between the federal officer’s directions and the plaintiff’s claims”); *New Jersey Dep’t of Env’tl. Protection v. Exxon Mobil Corp.*, 381 F. Supp. 2d 398, 404 (D.N.J. 2005) (“To establish that it was ‘acting under’ an officer of the United States, Defendant must show a causal nexus between the conduct charged . . . and the acts performed by Defendant at the direction of official federal authority.”); *Freiberg*, 245 F. Supp. 2d at 1149 (private party may remove “as long as the private actor asserts a colorable federal defense” and “demonstrates a sufficient causal nexus between what it has done under asserted official authority and the acts giving rise to the state claims”); *Good v. Armstrong World Indus., Inc.*, 914 F. Supp. 1125, 1128 (E.D. Pa. 1996) (“The ‘acting under’ language in the statute forces [the defendant] to show a causal nexus between the plaintiff’s claims and the conduct taken pursuant to direction from a federal officer.”); *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 823 (E.D. Tex. 1994) (treating “acting under” limitation as a causation requirement).

The wording of § 1442(a)(1) gives good reason to believe that regulation of a private corporation, however comprehensive or detailed, cannot support removal by a private party. The statute states that a removing defendant must be sued in “an official or individual capacity for any act under color of such office,” bespeaking Congress’s expectation that a defendant will have been acting in an official capacity – that is, that the private actor was functionally standing in the shoes of a federal officer in carrying out the challenged acts. *Cf. Jefferson County v. Acker*, 527 U.S. 423 (1999) (“under color of office” requirement demands showing “a causal connection between the charged conduct and asserted *official authority*”) (internal quotation marks omitted, emphasis added). The language adjoining the “acting under” clause thus strongly supports a reading of the clause that excludes a private actor, such as Philip Morris, that has not carried out an official governmental function. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (under “doctrine of *noscitur a sociis*,” a “word is known by the company it keeps”); *Neal v. Clark*, 95 U.S. 704, 708 (1878) (“It is a familiar rule in the interpretation of . . . statutes that a passage will be best interpreted by reference to that which precedes and follows it.”) (internal quotation marks omitted).

This Court’s decision in *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), underscores that textual point. In that case, the Court decided whether private parties could avail themselves of the civil rights removal provision of 28 U.S.C. § 1443(2), which authorizes removal for “any act under color of authority derived from any law providing for equal rights.” In resolving that question, the Court looked to a predecessor statute of § 1443(2), which limited removal to “officer[s]” or “other person[s].” 384 U.S. at 816. The Court concluded that the “other person” clause protected only “officers and agents” of the Freedmen’s Bureau charged with enforcing the Civil Rights Act of 1866. *Id.* at 816-17. The Court explained that those agents derived their authority from the Freedmen’s

Bureau legislation and were entitled to removal, if not as officers, then “based upon their enforcement activities under the Freedmen’s Bureau legislation and the Civil Rights Act.” *Id.* at 818. Although interpreting § 1443(2), the Court held that the “other person” clause of that provision tracked the “acting under” clause of a predecessor to § 1442(a)(1). *Id.* at 820 n.17, 823 n.20; *see also id.* at 820 n.17 (“The limitation of 28 U.S.C. § 1443(2) to official enforcement activity . . . draws support from analogous provisions in the removal statutes available to federal revenue officers.”).

Thus, *Peacock* supports the proposition that the “acting under” clause of § 1442(a)(1) should encompass only “federal officers or agents and those authorized to act with or for them in affirmatively executing duties under . . . federal law.” *Id.* at 824. The Eighth Circuit’s framework – which looks to whether a private party is subject to comprehensive and detailed control – is inconsistent with that teaching, as it confuses those private parties authorized to *enforce* federal law (such as a private party imbued with authority to enforce the Civil Rights Act) with those that *comply* with federal law (such as Philip Morris in marketing light cigarettes).

b. The court below also erred in thinking that it should give a “broad” interpretation to the “acting under” clause. Ordinarily, statutes affording removal jurisdiction are strictly construed, a corollary of the principle that federal courts are courts of limited jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). The court of appeals rested on this Court’s decision in *Willingham*, however, to interpret the statute broadly in deciding that Philip Morris was “acting under” a federal officer. *See Pet. App.* 4a-5a.

The Eighth Circuit’s reliance on *Willingham* was entirely misplaced. In *Willingham*, this Court rejected the view that doubt as to whether a federal officer could claim official immunity rendered removal improper, explaining that, “[a]t the very least,” the statute “is broad enough to

cover all cases where *federal officers* can raise a colorable defense arising out of their *duty to enforce federal law*.” 395 U.S. at 406 (emphases added). Properly construed, the upshot of *Willingham* is that the removal by a federal officer sued based on the performance of official duties should not be frustrated by a narrow interpretation of § 1442(a)(1). That principle has no bearing in a context, such as this, where the very question to be answered is whether a defendant stands in the shoes of a federal officer.¹¹ Indeed, in analogous circumstances in which the scope of the statute has been at issue, this Court has adopted narrowing constructions of § 1442(a)(1). See *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 81-82 (1991) (rejecting defendant agency’s broad interpretation of “officer of the United States”); see also *Mesa v. California*, 489 U.S. 121, 132-35 (1989) (removal requires the “averment of a federal defense”).

2. *The Eighth Circuit’s control test is inconsistent with the purpose of § 1442(a)(1)*

The distinction between being authorized to enforce federal law and complying with federal law explains why a comprehensive and detailed control test, which treats a private actor doing no more than complying with regulation in engaging in commercial activity as a federal officer, is flatly inconsistent with the purpose of § 1442(a)(1). This Court has frequently looked to the history and purpose of the statute in resolving interpretive disputes about the statute’s scope. See *Arizona v. Manypenny*, 451 U.S. 232, 241-42 (1981); *Willingham*, 395 U.S. at 405-06; *Gay v. Ruff*, 292 U.S. 25, 32-33 (1934); *Colorado v. Symes*, 286 U.S. 510, 517-19 (1932). The purpose, this Court has said, “is not hard to discern.” *Willingham*, 395 U.S. at

¹¹ See *Freiberg*, 245 F. Supp. 2d at 1152 n.6 (“Given the purpose of § 1442 and its basis in a mistrust of states and state courts to protect federal interests, [the statute] should be read expansively only when the immunity of individual federal officials, and not government contractors, is at issue.”).

406. The statute rests on the premise that “the Federal Government ‘can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, . . . the operations of the general government may at any time be arrested at the will of one of its members.’” *Id.* (quoting *Tennessee v. Davis*, 100 U.S. 257, 263 (1880)).¹² Expanding the federal officer removal statute to encompass a private corporation doing business in compliance with federal regulation does not honor that purpose.¹³

Furthermore, because Philip Morris is complying with rather than enforcing federal law in marketing light cigarettes, Philip Morris faces no plausible risk that state court animus against the enforcement of federal law – a key historical rationale for removal – will be directed against it. *See Manypenny*, 451 U.S. at 241-42 (“Historically, removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense arising out of his official duties. The act of removal permits a trial upon the merits of the state-law question free from local interests or prejudice.”) (footnote omitted); *Ruff*, 292 U.S. at 32 (Force Act removal provision was designed to

¹² *See Willingham*, 395 U.S. at 406 (federal officer removal statute rests upon “very basic interest in the enforcement of federal law through federal officials”); *see also* Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3727, at 125 (3d ed. 1998) (§ 1442 authorized removal by those “who are acting in the course of their employment by or on behalf of the United States”) (emphasis added); *Symes*, 286 U.S. at 517 (federal officer removal statutes were enacted to “safeguard[] officers and others acting under federal authority against peril of punishment for violation of state law . . . by reason of opposing policy on the part of those exerting or controlling state power”).

¹³ *See United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) (“The specific advertisements which the Government claims were intentionally misleading . . . were certainly not mandated by the FTC.”).

quell South Carolina’s threat of nullification by “protect[ing] those engaged in the enforcement of the federal revenue law from attack by means of prosecutions and suits in a state court for violation of state law”).

Nor does the Eighth Circuit’s comprehensive and detailed control test find support in other, secondary, purposes of § 1442(a)(1). This Court has explained, for example, that “one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court.” *Willingham*, 395 U.S. at 407; *see also International Primate Protection League*, 500 U.S. at 86-87 (one justification for § 1442(a)(1) is that federal officers need protection of a federal forum “because of the manipulable complexities involved in determining [federal officers’] immunity”). The Eighth Circuit, however, made no mention of that purpose, which weighs heavily against an interpretation of § 1442(a)(1) that includes a private actor, such as Philip Morris, with no claim whatsoever to official immunity.¹⁴

3. *The federal government’s suit against Philip Morris for acts similar to those at issue here underscores the consequence of the distinction between private actors and federal officers*

One of the great paradoxes of the Eighth Circuit’s ruling is that the federal government is currently locked in a lengthy legal dispute with several tobacco companies, including Philip Morris, over their non-compliance with federal law. Indeed, the very acts that Philip Morris alleges were required by the federal government to qualify it for “federal officer” removal purposes are the very same acts that the federal government alleges constituted a RICO conspiracy in which Philip Morris, and other conspirators,

¹⁴ *See Richardson v. McKnight*, 521 U.S. 399, 404-10 (1997) (privately employed prison guards of for-profit corporation running state correctional center not entitled to qualified immunity because “[h]istory does *not* reveal a ‘firmly rooted’ tradition of immunity” for prison guards and immunity would not serve purposes of the doctrine).

“did the exact opposite of what the Government and public health community called for” and “fraudulently exploited the FTC test method to target and benefit financially by deceiving smokers.” Post-Trial Br. of the United States of America at 70-71, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Aug. 24, 2005). In fact, the federal government itself has taken the position that the Eighth Circuit’s decision in this case was in grave error by pointing out that “[e]very other court to consider Philip Morris’s claim for removal under [§ 1442(a)(1)] has rejected it.” Reply Mem. in Support of the Post-Trial Br. of the United States of America at 28 n.31, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Sept. 19, 2005) (“U.S. Reply Mem.”) (discussing *Watson*).

The government’s suit against Philip Morris therefore brings into high relief the common sense difference between a private commercial actor allegedly complying with regulation and a federal officer performing official duties, a difference that the Eighth Circuit’s approach to federal officer removal entirely elides.

4. *The Eighth Circuit’s approach conflates ordinary preemption analysis with the justification for federal officer removal*

Underlying the Eighth Circuit’s badly mistaken decision is the court’s apparent confusion between the requisites for preemption of state law and the standards and justifications for federal officer removal. The court of appeals explained, for example, that “[w]hether Philip Morris’s labeling of cigarettes as ‘lights’ is deceptive directly implicates the enforcement and wisdom of the FTC’s tobacco policies.” Pet. App. 15a. But it is the law of preemption, not federal officer removal, that safeguards federal interests in carrying out regulatory objectives vis-à-vis regulated parties. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992) (reconciling, under preemption principles, various state common law damage actions with federal regulation of cigarettes). A necessary premise of

the Eighth Circuit’s holding, therefore, is that Congress, through § 1442(a)(1), decided that state courts are not competent to hear preemption defenses raised by private regulated parties.

This Court has squarely rejected that premise in two ways. First, “a case may *not* be removed to federal court on the basis of a federal defense, *including the defense of pre-emption*, even if the defense is anticipated in the plaintiff’s complaint, and even if both parties concede that the federal defense is the only question truly at issue.” *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) (second emphasis added). And, second, “when a state proceeding presents a . . . pre-emption issue, the proper course is to seek resolution of that issue by the state court,” as state courts are “presumed competent to resolve federal issues.” *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988).

In sum, the Eighth Circuit erred in adopting a framework in which “[t]he applicability of [the federal officer] removal statute depend[ed] in large part on the role the FTC plays in regulating the tobacco industry.” Pet. App. 2a. By asking a fundamentally misguided question, the Eighth Circuit arrived, predictably, at the wrong answer – a result incompatible with this Court’s precedents and out of keeping with any reasonable rendition of § 1442(a)(1). A private regulated corporation doing no more than abiding by federal regulation cannot avail itself of the protection of the federal officer removal statute.

C. This Case Presents An Excellent Vehicle To Resolve The Issues Presented

This case is a particularly suitable vehicle for this Court to bring needed clarity to the law of federal officer removal. The district court certified the issue of whether Philip Morris was entitled to federal officer removal pursuant to 28 U.S.C. § 1292(b), finding that its ruling “involve[d] a controlling question of law” and that there was a “substantial ground for difference of opinion” on that issue. *See* Pet. App. 57a; *see also id.* at 58a (“The facts

surrounding the FTC’s involvement with cigarette testing and advertising are not in dispute. This question is purely a legal one.”). The legal errors committed by the Eighth Circuit pertained to important jurisdictional issues that are wholly separate from the merits of petitioners’ claims and that can be resolved as questions of law. Furthermore, it is common ground that Philip Morris is an entirely private corporation and that Philip Morris was not performing an official governmental function in abiding by FTC regulations. And Philip Morris has acknowledged that “[t]he facts relating to the history of the FTC’s regulation . . . are not in dispute.” Appellee’s Br. 8. This Court will accordingly have the opportunity to fashion a framework for federal officer removal unhampered by an incomplete record or by equivocal or disputed facts.

The interlocutory character of the court of appeals’ decision does not at all weigh against this Court’s review. Where, as here, “there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status.” Robert L. Stern, *et al.*, *Supreme Court Practice* 259 (8th ed. 2002). As we set forth above, those conditions are unarguably satisfied in this case. Indeed, this Court has granted certiorari in order to review similar decisions certified under 28 U.S.C. § 1292(b) on many recent occasions. *See, e.g., Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005); *Norfolk Southern Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004).

D. The Eighth Circuit’s Decision Raises Jurisdictional Issues Of Exceptional Importance

Because § 1442(a)(1) regulates an exceptionally important intersection of the interest of States in the enforcement of their own laws in their own forums and the interest of the federal government in the supremacy of federal law, this Court has long recognized the importance of maintaining legal clarity in the test for federal officer removal. *See Symes*, 286 U.S. at 518 (federal officer

removal statute reflects important “equality” of interests of States and federal government). Indeed, issues pertaining to the removal statute, this Court has said, are “of great importance, bringing . . . into consideration the relation of the general government to the government of the States.” *Davis*, 100 U.S. at 260; *see also id.* at 273 (Clifford, J., dissenting) (“[q]uestions of greater importance than those certified . . . could hardly be presented for discussion”); *Manypenny*, 451 U.S. at 239 (certiorari was granted to resolve issue of jurisdiction arising from § 1442(a)(1) “[b]ecause it is an issue that carries significance for federal-state relations”).

In other contexts, this Court has zealously protected States’ interest in enforcing both state and federal law in state courts. *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (state courts have concurrent jurisdiction over civil RICO claims because under “system of dual sovereignty . . . state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States”). The need for such protection is even greater in this type of case, in which a statutory removal provision is used to wrest an action based on state law from state court. *See Shamrock Oil*, 313 U.S. at 109 (“Due regard for the rightful independence of state governments, which should actuate federal courts, requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.”) (internal quotation marks omitted).

The Eighth Circuit’s reasoning will, predictably, invite regulated entities of all types to assert that they, too, have a statutory right not to be sued under state law in state court. In concurrence, Judge Gruender, recognizing the expansiveness of the Eighth Circuit’s framework, attempted to restrict the holding, suggesting that, because the FTC’s regulation of Philip Morris was “extraordinary,” the decision should not be “an invitation to every participant in a heavily regulated industry to claim that it . . . acts at the direction of a federal officer merely because it

tests or markets its products in accord with federal regulation.” Pet. App. 18a. Judge Gruender’s effort at damage limitation, however, is deeply flawed. It rests on a mistaken appraisal of FTC regulation and misunderstands the comprehensiveness and detail of other federal regulatory regimes.¹⁵

FTC regulation of light cigarettes is anything but extraordinary. It is undisputed that the FTC has regulated neither the design nor the manufacturing of light cigarettes. Nor has the FTC required that tobacco companies advertise their cigarettes as “light” or “low tar.” In fact, the FTC has never even defined those significant terms. See Notice, *Cigarette Testing; Request for Public Comment*, 62 Fed. Reg. 48,158, 48,163 (1997) (observing that there are no “official definitions” for cigarette descriptors such as “low tar” and “light”). Indeed, this Court has expressly recognized statutory limitations on the FTC’s regulatory authority over cigarettes. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 149-50 (2000). It is thus hardly surprising that the federal government submitted evidence in its suit against Philip Morris squarely “reject[ing] [Philip Morris’s] claim that the FTC has given special focus to cigarette advertising.” U.S. Reply Mem. at 29.¹⁶

¹⁵ In addition to being a party “acting under” a federal officer, a removing party must also be sued for an “act under color of such office.” 28 U.S.C. § 1442(a)(1). Under *Willingham*, however, the “under color of office” limitation is satisfied merely by an allegation that the party was acting in an official capacity in performing the charged conduct. See 395 U.S. at 409. Thus, once a private actor is judged to be acting under a federal officer by the Eighth Circuit’s control test, it will be easy to maintain that the challenged acts were under color of office. It is therefore imperative that this Court provide guidance on the proper interpretation of the “acting under” clause.

¹⁶ The majority opinion also found it significant that the FTC’s “actually conduct[ing] the testing [of cigarettes] itself for over twenty years, instead of delegating that task to the industry, was outside the government’s normal course of conduct.” Pet. App. 13a. But the court of appeals offered no explanation – and none is apparent – for why that fact is at all relevant to judging whether governmental regulation is

Indeed, federal regulation in other regulatory contexts is *at least* as comprehensive and detailed as is the FTC's regulation of light cigarettes.¹⁷ The National Highway Traffic Safety Administration ("NHTSA"), for example, has long broadly regulated automobile safety measures, including mandating detailed specifications for crash tests. *See Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1253-57 (D.C. Cir. 2004) (detailing NHTSA regulation of automobile airbag regulations, including testing procedures); *see also Geier v. American Honda Motor Co.*, 529 U.S. 861, 874-81 (2000) (describing history of federal regulation of passive restraints). Federal regulation of other consumer products, such as pesticides, medical devices and drugs, and recreational boats, is similarly expansive and detailed. *See, e.g., Bates v. Dow AgroSciences LLC*, 125 S. Ct. 1788, 1794-97 (2005) (detailing broad federal regulation of pesticide labeling, packaging, and

comprehensive or detailed. Thus, it offers no logical basis, under the court's own test, upon which to distinguish between regulation by the FTC and regulation by other federal agencies.

¹⁷ *See Wells Fargo Bank N.A. v. Boutris*, 419 F.3d 949, 966 (9th Cir. 2005) ("[Office of the Comptroller of the Currency] regulations [of national bank subsidiaries] establish a comprehensive and finely calibrated scheme for the creation of operating subsidiaries."); *Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 369 (4th Cir. 2005) (Secretary of Labor has "promulgated comprehensive regulations" of employers under Family and Medical Leave Act of 1993); *Chapman v. Lab One*, 390 F.3d 620, 624 (8th Cir. 2004) ("Congress specifically required the Secretary of Transportation to develop comprehensive regulations regarding controlled substance testing and laboratory procedures" for mandatory drug testing in railroad industry); *Waymire v. Norfolk & Western Ry. Co.*, 218 F.3d 773, 775 (7th Cir. 2000) (Secretary of Transportation is authorized "to implement comprehensive and detailed railroad safety regulations"); *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 369 (3d Cir. 1999) ("[T]he Administrator of the FAA has implemented a comprehensive system of rules and regulations, which promotes flight safety by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules.") (footnotes omitted); *Swirsky v. National Ass'n of Sec. Dealers*, 124 F.3d 59, 61 (1st Cir. 1997) ("The Securities Exchange Act of 1934 and its subsequent amendments create a detailed, comprehensive system of federal regulation of the securities industry.").

distribution); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 476-80 (1996) (describing comprehensive federal regulation of distribution of medical devices); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56-59 (2002) (detailing comprehensive federal regulation of recreational boats). Yet, in each of those latter circumstances, the federal regulation is not so “comprehensive” as to preempt state-law claims, much less to support federal officer removal.

Given that the system of voluntary regulation underlying Philip Morris’s claimed entitlement to removal is less formal and certainly no more comprehensive or detailed than many other federal regulatory regimes, there is no reasonable prospect that the damage from the Eighth Circuit’s rule can be contained. The wave of removals sure to follow in the wake of the Eighth Circuit’s decision thus calls for intervention by this Court. Apart from divesting States of the ability to enforce state laws in their own forums against private companies alleged to have harmed their citizens, a wave of removals will severely, and unnecessarily, tax the resources of the federal judiciary. *Cf. City of Indianapolis v. Chase Nat’l Bank*, 314 U.S. 63, 76-77 (1941) (federal diversity statute is strictly construed to avoid “offense to state sensitiveness” and to “reliev[e] the federal courts of the overwhelming burden of business that intrinsically belongs to the state courts”) (internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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