No. 05-1284

In the Supreme Court of the United States

LISA WATSON, ET AL., PETITIONERS

v.

PHILIP MORRIS COMPANIES, INC., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a private party 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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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the mere fact that a private party's conduct is subject to federal regulatory requirements can suffice to establish that the party is "acting under" a federal officer for purposes of the federal officer removal statute, 28 U.S.C. 1442(a). The United States has a substantial interest in the resolution of that question. Permitting persons who are properly viewed as acting under a federal officer to remove state law actions to federal court ensures that state courts will not interfere with the operations of the federal government. At the same time, allowing persons who are not properly viewed as persons acting under a federal officer to remove may significantly alter the traditional federal-state balance in the adjudication of state law claims. The United States also has an interest in this case because the court below based its decision on its understanding that respondent marketed its "light" cigarettes pursuant to detailed and specific regulation by a federal agency—the Federal Trade Commission (FTC). At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. In general, an action brought in state court may be removed to federal court only if a federal district court would have original jurisdiction of the action. See 28 U.S.C. 1441(a). For a case to fall within the district 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 generally does not 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 state courts do not unduly 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 (1880).

To remove an action 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 (citation and internal quotation marks deleted).

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 au-

thority 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 FTC's 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 Adver. Guides*, 6 Trade Reg. Rep. (CCH) ¶ 39,012.70, at 41,602 (Oct. 6, 2004).

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 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 adopted a rule, however, a number of major tobacco companies (including respondent Philip Morris) entered into a voluntary agreement among themselves to disclose Cambridge Method test data in all cigarette advertisements. Pet. App. 3a. That private agreement prompted the FTC to end its rulemaking proceedings. 36 Fed. Reg. 784 (1971); 62 Fed. Reg. at 48,158.

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 official regulatory definitions of terms such as "light" or "low tar." 62 Fed. Reg. at 48,163. In several reports to Congress, the FTC used the term "low tar" to refer to cigarettes containing 15 milligrams or less of tar. See, *e.g.* FTC, *Report to Congress Pursuant to the Public Health Cigarette Smoking Act for the Year 1978*, at 3 (Dec. 24, 1978). Those references, however, did not reflect an official FTC regulatory position.

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 48,158. That request made clear 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." *Id.* at 48,163. The FTC did not take any regulatory action in response to that request. In 2002, Philip Morris petitioned the FTC to promulgate a trade regulation 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 1, 32-35, *Tar and Nicotine Testing and Disclosure* (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 Marlboro 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 Marlboro Lights are lighter than regular cigarettes. *Id.* at 64a. Petitioners seek to represent a class of persons who purchased Cambridge Lights or Marlboro 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). *Id.* at 58a-60a.

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 and citation omitted). Applying its "acting under" test, the court concluded that the FTC had engaged in detailed regulation of tobacco companies because it had specified details of the Cambridge Method test, published the ratings, and monitored cigarette advertisements. *Id.* at 9a-10a.

The court rejected the argument that the tobacco companies' use of the Cambridge Method test was the result of a voluntary agreement rather than government compulsion. Pet. App. 9a-10a. The court reasoned that the FTC "effectively used its coercive power to cause the tobacco companies to enter the agreement." *Id.* at 10a. The court also concluded that the FTC had effectively enforced the agree-

ment by making "comments" that "suggest[ed] 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 concluded that there was a "causal connection" linking the FTC's actions 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.

Judge Gruender filed a concurring opinion. He stated that the court's decision depended on the "extraordinary" level of control that the FTC exercises over tobacco companies. Pet. App. 18a.

SUMMARY OF ARGUMENT

The federal officer removal statute limits private party removal to persons who are "acting under" federal officers. 28 U.S.C. 1442(a). A person acts under a federal officer within the meaning of that statute only when that person acts on behalf of or otherwise assists the officer in carrying out the officer's duties. A private party that acts for its own purposes is not acting under a federal officer merely because it acts in compliance with federal regulation.

A. The phrase "acting under" is commonly used to refer to a person in a subordinate position who assists a person in a superior position in carrying out the superior's duties. The evolution and judicial construction of the federal officer

removal statute show that the statutory phrase "acting under" is properly understood in that sense.

The first federal officer removal statute authorized removal by any customs officer and any other person "aiding or assisting" such officer in the discharge and performance of the official's duties. Act of Feb. 4, 1815, ch. 31, §§ 7, 8, 3 Stat. 197-198. Later versions of the statute used the "acting under" formulation, making explicit what had been implicit in the original formulation: that the person aiding the officer must act subject to the supervision, guidance, or oversight of the officer, rather than as an officious intermeddler. But no expansion in the class of persons entitled to remove was intended. Indeed, in *City of Greenwood* v. *Peacock*, 384 U.S. 808, 823 n.20 (1966), the Court explained that the "acting under" formulation drew on the "comparable characterization" of the persons entitled to remove under the original statute.

Peacock's construction of a related removal statute confirms that the two formulations were designed to reach the same class of persons. The removal statute at issue in *Peacock* did not include an "acting under" limitation, but the Court held that the statute implicitly contained such a requirement. 384 U.S. at 821. Of crucial importance here, the Court equated persons acting under federal officers with "persons assisting such officers in the performance of their official duties." *Id.* at 815. The understanding that persons act under federal officers only when they assist such officers in carrying out their official duties is also reflected in the two cases in which the Court has interpreted the "acting under" language in the federal officer removal statute.

B. Limiting the removal right to persons who assist federal officers in carrying out their duties is consistent with the statute's purpose of preventing state court interference with "the operations of the general government." *Tennes-*

see v. *Davis*, 100 U.S. 257, 263 (1880). If the federal government could not receive the help it needs from private parties to carry out its operations, the government's ability to function effectively could be seriously jeopardized. The same cannot be said, however, when a private party is sued in state court for conduct undertaken for purely private purposes, even if the private party was subject to detailed and specific regulatory requirements in so acting. Such persons are not engaged in conduct that serves to advance the government's operations.

C. At the same time, permitting such parties to remove would potentially shift into federal court a wide range of traditional state law claims. Manufacturers of medical devices, cars, pesticides, and consumer products are all subject to detailed and specific federal regulation. It is highly improbable that Congress intended to shift traditional state law claims against such manufacturers into federal court through the federal officer removal statute. Detailed and specific federal regulation may well supply a federal preemption defense. But except in the case of complete preemption, the existence of such a defense has never been viewed as a sufficient basis to transfer a traditional state law claim against a private party into federal court. It is implausible that Congress silently authorized wholesale evasion of that established principle by means of the federal officer removal statute.

D. Court of appeals decisions illustrate the proper scope of removal under the "acting under" provision of the federal officer removal statute. As those cases establish, the provision is critically important in protecting those who assist federal officers in performing their work, in both the law enforcement context and in other settings. But it does not extend to those subject to a federal regulatory regime, even a pervasive one.

E. Tobacco manufacturers that market "light" cigarettes do not remotely act under federal officers. Such manufacturers hardly market "light" cigarettes on the FTC's behalf; they do so solely to further their own economic interest. Nor does it matter that they pursue their own interest in asserted compliance with federal law. Compliance is just what the law expects. It does not transform a private party that acts to further its own economic interest into a party assisting federal officers in carrying out their duties. Because respondent did not act on behalf of or otherwise assist federal officers in carrying out their official duties, it had no right to remove petitioner's state law action to federal court.

ARGUMENT

A PERSON ACTS "UNDER" A FEDERAL OFFICER ONLY WHEN THAT PERSON ACTS ON BEHALF OF OR OTHERWISE ASSISTS THE OFFICER IN CARRYING OUT THE OFFICER'S OFFICIAL DUTIES

As relevant here, the federal officer removal statute, 28 U.S.C. 1442(a), affords a right of removal to any "officer (or any person acting under that officer) of the United States * * * for any act under color of such office." The court of appeals in this case held that a private entity is "acting under" a federal officer for purposes of that statute whenever it acts pursuant to "detailed and specific regulations." Pet. App. 6a (citation and internal quotation marks omitted); see *ibid.* ("comprehensive and detailed regulation"); *id.* at 13a ("comprehensive and detailed control") (citation omitted). That reading of the statute expands it far beyond its intended scope. A private person acts under a federal officer within the meaning of the federal officer removal statute only when that person acts on behalf of or otherwise assists the officer in carrying out the officer's official duties. A

private party that acts for its own private purposes is not "acting under" a federal officer merely because it does so in compliance with detailed and specific federal regulations.

A. The Text, Evolution, And Judicial Construction Of The Federal Officer Removal Statute Make Clear That It Permits Removal By Private Parties Only When They Act On Behalf Of Or Otherwise Assist Federal Officers In Carrying Out Their Official Duties

As presently codified, Section 1442(a) confers removal rights on persons "acting under" a federal officer. In ordinary parlance, the term "under" indicates, *inter alia*, "subjection, guidance, or control," or "[s]ubject to the guidance and instruction of." *Webster's New International Dictionary of the English Language* 2765 (2d ed. 1958); see *Funk & Wagnalls New Standard Dictionary of the English Language* 2604 (1946) ("[s]ubordinate or subservient to," "[s]ubject to guidance, tutorship, or direction of"); see also *The Random House Dictionary of the English Language* 1543 (1966) (defining "under" to mean, *inter alia*, "in the position or state of * * * supporting [or] sustaining"). Thus, when used to describe conduct by one person in relationship to another, "under" is commonly used to describe a person or entity in a subordinate position who acts on behalf of or otherwise assists the person in the superior position to carry out the superior's duties. *Webster's* 2765 ("he fought *under* Cromwell"); *Random House* 1543 ("a bureau functioning under the prime minister"). The evolution and judicial construction of the federal officer removal statute confirm that the statutory phrase "acting under" is properly understood in that sense.

1. The current version of the federal officer removal statute is the end-product of a series of congressional enactments beginning in the early years of our Nation's history,

and an examination of those historical antecedents sheds considerable light on the statute's scope and purpose. See *City of Greenwood* v. *Peacock*, 384 U.S. 808, 814-815 (1966) (interpreting related removal statute in light of its historical antecedents). The "primordial" federal officer removal statute, *id.* at 821 n.17, was enacted in 1815 "as 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. The 1815 Act allowed removal by customs collectors and other officers involved in enforcement of the customs laws "*or any other person aiding or assisting*" under color of that statute. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198 (emphasis added). The statute elsewhere indicated that the private parties entitled to remove were citizens called upon by a customs officer to "aid and assist such officer in the discharge and performance of his duty," such as by seizing embargoed goods. § 6, 3 Stat. 197.

The 1815 removal provision expired at the end of the War, but in 1833, in response to South Carolina's threats of nullification, see *Willingham*, 395 U.S. at 405, Congress authorized removal by "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States." Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633. While that provision referred to any "other person" rather than to "any person aiding or assisting," there is no indication that a substantial difference in meaning was intended. In addition to the persons covered by the previous provision, the statute contemplated only two additional classes of persons who would have a right to remove: members of the land, naval, or militia forces empowered to protect the customs officers from unruly mobs, § 1, 4 Stat. 632, and persons who claimed title to land under the authority of the revenue laws, § 3, 4 Stat. 633. Inclu-

sion of the latter class may have caused Congress to use the term "person" rather than "person aiding or assisting." *Peacock*, 384 U.S. at 821 n.17.

Congress enacted a series of federal officer removal statutes during the Civil War "which applied mainly to cases growing out of the enforcement of the revenue laws." *Willingham*, 395 U.S. at 405-406. One such statute separately protected any revenue officer, "any person acting under or by authority of any such officer on account of any act done under color of his office," or "any person holding property or estate by title derived from any such officer." Act of July 13, 1866, ch. 184, § 67, 14 Stat. 171. The statute elsewhere made clear that the category of persons "acting under" revenue officers were persons engaged in acts under or by the authority of revenue officers "for the collection of taxes." § 67, 14 Stat. 172. Thus, while using different language, the 1866 Act gave a right of removal to essentially the same class of persons as the original federal officer removal statute: persons aiding federal officers in the enforcement of revenue laws. The "acting under" formulation made explicit what had been implicit in the original formulation: that the person assisting the officer must be subject to the supervision, guidance, or oversight of the officer, rather than an officious intermeddler. But no expansion in the class of persons entitled to remove was intended.

Indeed, the Court made clear in *Peacock* that the "acting under" terminology adopted in the 1866 Act did not signal a substantive departure from the original 1815 Act's reference to "any other person aiding or assisting" a federal revenue officer. Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198. The Court explained that "[a]lthough, in the revenue officer removal provision of the Revenue Act of 1866 * * *, Congress expressly characterized the 'other person' as one 'act-

ing under or by authority of any [revenue] officer,' that statute obviously drew on the *comparable characterization* of the 'other person' in the Customs Act of 1815." 384 U.S. at 823 n.20 (emphasis added).

The 1866 version of the removal provision was eventually codified into a permanent statute. See Rev. Stat. § 643 (1874); Judicial Code of 1911, ch. 231, § 33, 36 Stat. 1097. As part of the 1948 recodification of the Judicial Code, Congress enacted the provision containing the critical language at issue here. Act of June 25, 1948, ch. 646, § 1, 62 Stat. 938 (28 U.S.C. 1442(a)). That enactment expressly expanded the right of removal to encompass any federal officer and any person "acting under" any such officer.

The expansion of the removal right from any *revenue* officer to any *federal* officer necessarily worked a corresponding expansion in the class of private parties entitled to remove. While the previous statute allowed private parties to remove when they assisted revenue officers in their duty to enforce the revenue laws, the 1948 statute allows private parties to remove when they assist *any* federal officer in carrying out that officer's duties, regardless of whether those duties involve enforcement of the revenue laws, or indeed enforcement activity of any kind. See U.S. Cert. Stage Amicus Br. 17-18.

That expansion was significant, but the 1948 provision did not expand the class of private parties eligible to remove in any other way. In particular, while Congress did expand the universe of federal officers directly covered by the provision, it did not expand the scope of derivative coverage for those assisting any federal officer directly covered by the statute—whether a revenue officer or a federal officer included for the first time. There is nothing in the text of that provision to suggest that Congress intended a novel expansion of the removal right to encompass persons

who are not involved in assisting federal officers in the performance of their duties, but instead are simply the objects of detailed and specific government regulation.

Nor is there anything in the legislative history that would support that sweeping expansion of the class of persons eligible to remove. Indeed, other than federal officers, the legislative history refers to only one class of persons eligible to remove—federal "employees." H. R. Rep. No. 308, 80th Cong., 1st Sess. A-134 (1947). Not only do federal employees assist federal officers in the performance of their official duties; that is their job. To be sure, the committee report's reference to federal "employees" cannot be understood to suggest that private parties are categorically ineligible for removal under Section 1442(a)(1); the text and genesis of the statute preclude that result. The point is simply that the legislative history affords no basis for uprooting the statute from its historic context by construing it to encompass not only persons who assist federal officers in the performance of their official duties, but also persons who are the object of detailed and specific government regulation.

2. The Court's decision in *Peacock* reinforces the conclusion that the federal officer removal statute applies to private parties only when they act on behalf of or otherwise assist federal officers in the performance of their official duties. In *Peacock*, the Court interpreted a related removal provision, 28 U.S.C. 1443(2). That provision authorizes removal of a civil action "for any act under color of authority derived from any law providing for equal rights." In light of that provision's text and history, the Court held that it was implicitly "limited to federal officers and those acting under them." 384 U.S. at 821. Of crucial importance here, the *Peacock* Court equated the phrase persons "acting under" federal officers with "persons assisting such officers in

the performance of their official duties," *id.* at 815, and with persons "authorized to act with or for them in affirmatively executing duties under any federal law." *Id.* at 824.

As a matter of logic and interpretive consistency, the Court's construction of the implicit "acting under" limitation at issue in *Peacock* is equally applicable to the express "acting under" limitation contained in the federal officer removal statute. Indeed, as discussed above, the *Peacock* Court suggested as much, noting that Congress's adoption of the "acting under" terminology in 1866 for purposes of the federal officer removal statute "obviously drew on" the "comparable characterization" in the 1815 Act, *i.e.*, persons "aiding or assisting" federal revenue officers. 384 U.S. at 823 n.20. Similarly, the Court described the 1874 codification of the federal officer removal statute (which employed the same "acting under" terminology) as "applicable to federal officers *and persons assisting them*." *Id.* at 820 n.17 (emphasis added). Accordingly, in accordance with *Peacock*, the "acting under" limitation in the federal officer removal statute must be understood to confine private-party removal to "persons assisting [federal] officers in the performance of their official duties." *Id.* at 815.

3. That understanding is also reflected in the two cases in which the Court has interpreted the "acting under" language in the federal officer removal statute. In both cases, the Court held that persons act under a federal revenue officer when they assist the officer in the performance of the officer's duties.

In *Davis* v. *South Carolina*, 107 U.S. 597 (1883), a corporal of the United States infantry was detailed to assist a revenue officer in making an arrest under the revenue laws. After a state criminal prosecution arising out of the arrest was brought against him, he sought to remove the case to federal court under a predecessor statute that authorized

removal by persons acting under or by the authority of a revenue officer. The Court held that the corporal was entitled to remove because the removal statute "shields all who lawfully assist [a revenue officer] in the performance of his official duty," and the corporal "was acting in that capacity." *Id.* at 600.

Similarly, in *Maryland* v. *Soper*, 270 U.S. 9 (1925), federal prohibition agents and their chauffeur sought to remove a state criminal prosecution to federal court. The predecessor statute at issue authorized removal by officers appointed under the federal revenue laws and persons acting under or by their authority. The Court held that the four prohibition agents were officers acting under the authority of the revenue laws within the meaning of the removal statute. *Id.* at 31. The Court further observed that, because the chauffeur was acting as a "helper to the four officers under their orders," he had "the same right to benefit of [the removal statute] as they." *Id.* at 30.

The Court in *Soper* ultimately concluded that the defendants had not sufficiently alleged that the prosecution was for official acts and that they therefore were not entitled to remove the case. 270 U.S. at 35. But the relevant point for purposes of this case is the Court's recognition that a person acting as a "helper" to a federal officer in the performance of his official duties is "acting under" that officer for purposes of the removal statute. *Davis* and *Soper* thus confirm that a person acts under a federal officer when he assists the officer in the performance of his official duties.

B. Limiting Private-Party Removal To Persons Assisting Federal Officers In The Performance Of Official Duties Accords With The Purpose Of The Federal Officer Removal Statute

Limiting removal to persons who assist federal officers in the performance of their official duties is consistent with

the purpose of the federal officer removal statute. This Court has recognized that the purpose of the statute is to prevent state court interference with the operations of the federal government. *Willingham*, 395 U.S. at 406; *Davis*, 100 U.S. at 263. The Court in *Davis* described the purpose of the officer removal statute as follows (*ibid.*):

> [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, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members.

The need to prevent state court interference with the federal government's own operations is directly implicated when a State seeks to hold a private party accountable for actions that assisted a federal officer in carrying out that officer's duties. If the federal government could not receive help from private parties to carry out its operations, the federal government's ability to function effectively could be placed in serious jeopardy. But the compelling need to protect the government's own operations is generally not implicated when a private party is sued in state court for conduct undertaken for purely private purposes, even if the private party was subject to detailed and specific federal regulatory requirements in so acting. Such conduct is not engaged in on behalf of or for the assistance of federal officers in the performance of their official duties, and thus does not serve to advance "the operations of the general government."

Indeed, the existence of a detailed federal regulatory regime may well be an indication that the private conduct at issue, far from advancing the government's own operations, is instead potentially harmful, hazardous, or otherwise disfavored under federal law.

C. Permitting Removal By Private Parties Subjected To Detailed And Specific Federal Regulation Would Potentially Shift Into Federal Court A Wide Range Of Traditional State Law Claims

This Court has long interpreted removal statutes against the background understanding that, except when overwhelming federal interests are implicated, Congress ordinarily intends to respect the interest of the States in providing state forums for the vindication of state law claims against private parties, even if they possess a substantial federal law defense. That understanding of congressional intent is reflected in the well-pleaded complaint rule, under which (absent diversity jurisdiction) a state court action involving state law claims ordinarily may not be removed to federal court under the general removal provision, 28 U.S.C. 1441(a), even when the merits of a federal defense may be the dispositive issue in the litigation. See *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936).

Similarly, the Court has held more recently that the existence of a federal law counterclaim is not sufficient to satisfy the well-pleaded complaint rule. *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830-832 (2002). The Court explained that permitting defendants to secure removal to federal court by alleging a federal law counterclaim "would radically expand the class of removable cases, contrary to the due regard for the rightful independence of state governments that [the Court's] cases

addressing removal require." *Id.* at 832 (internal quotation marks, brackets, and citation omitted).

Due regard for the States' interest in providing state law forums for the vindication of state law claims has also informed the Court's decisions that identify when the presence of a federal law ingredient in a state law cause of action may provide a basis for removal under Section 1441(a). For example, in *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), the Court held that state law negligence actions asserting that alleged violations of a federal law standard constitute presumptive negligence are not removable under Section 1441(a). As the Court subsequently explained, *Merrell Dow* interpreted Section 1441(a) to preclude removal of such an action because permitting removal would "have heralded a potentially enormous shift of traditionally state cases into federal courts," and it was "improbable" that Congress would have wanted to alter the traditional state-federal balance in that manner. *Grable & Sons Metal Prods., Inc.* v. *Daure Eng'g & Mfg.*, 545 U.S. 308, 319 (2005).

Thus, this Court will not lightly conclude that a removal statute has dramatically altered the usual federal-state balance. That principle is directly implicated here, because the rule of law adopted by the court below—which would permit removal to federal court whenever a private party is sued for conduct that was subject to a detailed and specific federal regulatory regime—has the potential to transfer to federal court a wide array of traditional state law cases.

That is particularly true in light of the court of appeals' relatively lax standard for determining whether regulatory conduct qualifies as "detailed and specific" so as to make removal available. Pet. App. 6a. In this case, petitioners have alleged that respondent designed Cambridge Lights

and Marlboro Lights to register lower levels of tar and nicotine on the Cambridge Method test than would be delivered to actual smokers, and that it did so to support its false and misleading representations that those cigarettes are lighter than regular cigarettes. *Id.* at 63a-64a. In holding that respondent was subject to detailed and specific federal regulation with respect to those alleged marketing activities, the court of appeals pointed to essentially three factors: that the FTC had developed and specified the details of the Cambridge Method test; that the FTC had published the results of the tests; and that the FTC had monitored cigarette advertisements and brought deceptive advertising claims in some cases. Pet. App. 9a-10a. The court viewed that level of regulation as sufficiently detailed and specific to satisfy its removal standard even though: (1) the FTC has never required tobacco companies to use the Cambridge Method to determine tar levels or to report the results of those tests in advertising; (2) the FTC has never adopted any official regulatory definitions of the terms "light," or "low tar"; and (3) the FTC has neither requested nor required tobacco companies to describe or advertise their cigarettes using those or any other such descriptors. See pp. 3-5, *supra*.

If that level of regulation is sufficiently detailed and specific to justify removal of petitioners' claims under the court of appeals' standard, then that standard would potentially allow removal into federal court of a large number of traditional state law cases. Numerous private entities are subject to government regulation that is at least as detailed and specific as that identified by the court of appeals here, and would seemingly be in a position to remove to federal court any state-law challenges to their regulated conduct. Although the concurring opinion suggested that the circumstances of this industry are unique, the essence of what the

court of appeals required—a detailed regulatory structure with a regulatory safe harbor (for federal law purposes) for products that comply with the federal regulatory requirements—is far from unique.

For example, manufacturers of Class III medical devices must undergo a rigorous pre-market approval process that examines the safety and effectiveness of the product. *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 477 (1996). Manufacturers of Class III devices must also comply with FDA standards for the manufacturing and labeling of their products. *Id.* at 497. And the FDA has issued detailed regulations that specify how certain products must be tested or labeled. *E.g.*, 21 C.F.R. 800.20, 801.430, 801.420, 801.435.

Similarly, vehicle manufacturers must comply with specific design and performance standards issued by the Department of Transportation's National Highway Traffic Safety Administration (NHTSA). 49 C.F.R. Pt. 571; see *Geier* v. *American Honda Motor Co.*, 529 U.S. 861, 875-877 (2000); *Freightliner Corp.* v. *Myrick*, 514 U.S. 280, 284 & n.2 (1995). Automobile manufacturers must also comply with detailed fuel efficiency and testing standards issued by the Environmental Protection Agency (EPA). 40 C.F.R. Pt. 86.

There are numerous other examples of extensive federal regulation. Pesticide manufacturers must comply with a "comprehensive regulatory statute" that requires registration of the pesticide with EPA, an EPA determination of safety and effectiveness, and compliance with EPA labeling standards. *Bates* v. *Dow Agrosciences LLC*, 544 U.S. 431, 437-438 (2005). The Department of Energy establishes detailed energy and water conservation standards for a wide range of home products, such as kitchen appliances, air conditioners, and television sets, and prescribes the specific method for testing the products to ensure that they

meet those standards. 10 C.F.R. Pt. 430. The Consumer Product Safety Commission has established specific safety standards for numerous consumer products, such as bicycle helmets, baby cribs, and sleepwear as well as tests for determining compliance with its standards. 16 C.F.R. Pts 1000-1750. See *e.g.* 16 C.F.R. Pt. 1616. And the Occupational Safety and Health Administration (OSHA) has issued detailed and specific regulations that require employers to limit the exposure of their employees to certain hazardous substances. 29 C.F.R. Pt. 1910.

In each of those areas, States may have established their own consumer protection standards and provided for enforcement of those standards in their own courts. Under the court of appeals' "detailed and specific regulation" removal test, those actions would potentially be subject to removal under the federal officer removal statute. It is improbable, to say the least, that Congress intended for the federal officer removal statute to serve as the vehicle for the removal of such a large number of traditional state law suits to federal court.

To be sure, the existence of an extensive federal regulatory regime could well furnish a preemption defense to a state law claim. But except in the rare case of complete preemption, the existence of a preemption defense has never been viewed as a sufficient basis for a private party to remove a state law claim to federal court. See *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6-8 (2003); *Gully*, 299 U.S. at 116. It is simply not plausible that Congress silently authorized wholesale evasion of that established principle by means of the federal officer removal statute.

D. A Proper Understanding Of The Scope Of The Federal Officer Removal Statute Leaves Ample Room For Removal By Private Parties In Appropriate Cases

Courts of appeals applying the federal officer removal statute in the context of private-party removal have generally focused on the degree of federal oversight or control of the private party's activities, sometimes without explicitly considering whether the private party was acting on behalf of or otherwise assisting federal officers in the performance of their duties. As has been discussed, a proper understanding of the text, evolution, judicial construction, and purposes of the federal officer removal statute makes clear that consideration of those latter factors should guide the removal analysis. Nonetheless, the decisions of a number of courts of appeals serve to illustrate the proper scope of private-party removal under Section 1442(a)(1), and how far outside the proper scope the decision below ventures.

For example, in *Venezia* v. *Robinson*, 16 F.3d 209 (7th Cir.), cert. denied, 513 U.S. 815 (1994), a state employee solicited a bribe as part of a sting operation conducted by FBI agents. Because the state employee was soliciting the bribe in aid of a sting operation run by federal officers, the court correctly concluded that the employee was acting under federal officers within the meaning of the federal officer removal statute. *Id.* at 211-212.

Similarly, in *Camacho* v. *Autoridad de Telefonos*, 868 F.2d 482 (1st Cir. 1989), telephone companies participated in the wiretapping of certain phone lines under the direction of federal agents. Because the telephone companies were assisting federal officers engaged in "official" law enforcement activity, and they were doing so at "federal behest," the court properly held that they were acting under

federal officers within the meaning of the federal officer removal statute. *Id.* at 486.

As those cases and the historical background of the removal statute demonstrate, the federal officer removal statute is most obviously implicated when private individuals are aiding law enforcement activity. Persons eligible for removal under that rationale would include not only undercover agents or informants who participate in a sting operation and telephone companies that place a wiretap on a line at federal behest, but also cooperating witnesses who aid a federal investigation by providing needed information. See Act of Feb. 4, 1815, ch. 31, §§ 7, 8, 3 Stat. 198 (an "informer" providing information leading to forfeiture is a person "aiding or assisting" a customs officer in the enforcement of the customs laws).

Because the federal officer removal statute now extends to all federal officers, and is not limited to those who engage in law enforcement activity, however, private-party removal under the statute is not limited to those private parties who provide aid to federal law enforcement officers. Rather, the right of removal extends to any private person who assists a federal officer in performing the officer's duties, regardless of the nature of those duties.

Thus, a surgeon who is subject to the authority of officers in the Veterans Administration (VA) acts under a federal officer when he performs surgery at a VA hospital. *Noble* v. *Employers Ins. of WAUSAU*, 555 F.2d 1257, 1258-1259 (5th Cir. 1977). Such a person aids VA officers in carrying out their duty to provide health care to veterans.

Similarly, a bank that is designated as a financial agent of the United States to provide banking services on a military base and that is subject to the direction of the Secretary of the Treasury regarding the services to be provided is properly characterized as acting under a federal officer

in providing those services. *Texas* v. *National Bank of Commerce*, 290 F.2d 229, 231 (5th Cir.), cert. denied, 368 U.S. 832 (1961). Such a bank, while not engaged in law enforcement, is therefore entitled to remove to federal court an action filed in state court claiming that its provision of banking services violates state law. *Ibid.*

Finally, a private citizen delegated authority to inspect aircraft by the Administrator of the Federal Aviation Administration (FAA) acts under a federal officer in conducting such an inspection and issuing a certificate of airworthiness. *Magnin* v. *Teledyne Cont'l Motors*, 91 F. 3d 1424 (11th Cir. 1996). That is true regardless of whether the private individual is viewed as performing a law enforcement role or a safety protection role. The critical point is that the individual acts on behalf of the FAA Administrator in conducting the inspection.

In each of the foregoing cases, the defendant was acting on behalf of or otherwise assisting a federal officer in the performance of the officer's duties, and the overall activity at issue was subject to some form of federal guidance, direction, or oversight. In those circumstances, a private party is properly characterized as acting under a federal officer within the meaning of the federal officer removal statute. Such conduct is far removed from the actions of a party who does not directly assist in a federal officer's duties, but is merely subject to a pervasive federal regulatory regime.

E. The Court Of Appeals' Reasons For Holding That Respondent Was Acting Under A Federal Officer In Marketing "Light" Cigarettes Are Unpersuasive

In contrast to the foregoing cases, the decision below reflects a misapplication of the federal officer removal statute. Section 1442(a)(1) does not remotely encompass to-

bacco manufacturers that market their cigarettes as "light," 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; it does so solely in furtherance of its own economic interest. Nor does it matter that respondent pursues its economic interest in alleged conformity with a federal regulatory safe harbor. "Compliance is just what the law expects." *Walling* v. *Harnischfeger Corp.*, 242 F.2d 712, 713 (7th Cir. 1957). Mere compliance with federal law does not transform a private party that is acting solely to further its own economic interests into a party that is acting on behalf of or otherwise assisting federal officers in carrying out their duties.

The court of appeals gave three reasons for holding that respondent was acting under a federal officer in marketing light cigarettes. None is persuasive.

1. First, the court of appeals sought to rely on cases holding that federal contractors act under a federal officer when they perform their work in accordance with detailed and specific contract standards. Pet. App. 6a-8a. But there is a fundamental difference between federal contractors and respondent. Federal contractors supply products or services that the government affirmatively seeks and desires to support its own operations, and, in so doing, they perform tasks that the government would otherwise have to perform itself through its own employees. Accordingly, while federal contractors undoubtedly act for their own commercial gain, in appropriate circumstances, they may also reasonably be viewed as assisting federal officers in

carrying out their official duties within the meaning of the federal officer removal statute.[1]

Tobacco companies that market "light" cigarettes do not share the relevant characteristics of government contractors. They are not providing a product that the government affirmatively seeks for its own purposes, and they are not producing a product or service that the government would otherwise be forced to produce for itself through its own employees. Instead, they are acting solely for their own commercial gain. Tobacco companies marketing "light" cigarettes therefore cannot reasonably be viewed as acting on behalf of or otherwise assisting federal officers in carrying out their official duties.

2. Second, the court concluded that it was required by this Court's decisions in *Willingham*, 395 U.S. at 407, and *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932), to give the

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[1] In *Logue* v. *United States*, 412 U.S. 521 (1973), this Court held that employees of federal government contractors are not employees of the United States for purposes of federal tort liability under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), and are not "persons acting on behalf of a federal agency in an official capacity" for purposes of 28 U.S.C. 2671, when (as is generally the case) the federal government lacks authority to control the day-to-day physical activities of the contractor's employees. A determination that a particular government contractor was assisting a federal officer in carrying out the officer's duties by, for example, supplying goods or services in furtherance of those duties would not support a determination that the contractor's employees were employees of the United States for purposes of the FTCA, 28 U.S.C. 2671, or any other purposes, because the category of persons acting under a federal officer is not limited to those persons whose day-to-day activities are controlled by a federal officer. The key criterion under Section 1442(a)(1) is instead whether the private person is assisting the federal officer in the performance of the officer's duties, and generalized federal oversight or guidance (as opposed to specific and detailed day-to-day control) is sufficient to justify removal when that key criterion is satisfied.

federal officer removal statute "a broad and liberal interpretation." Pet. App. 12a-13a. The federal government does not have a quarrel with those salutary principles, but they provide no basis for extending the statute to entities that do not help federal officials perform their duties, but rather are the subjects of pervasive federal regulation. Moreover, the federal officer removal statute must not only be interpreted in keeping with its important purpose of protecting federal officials and those who assist them, but must also be informed by the statute's historical antecedents, *Peacock*, 384 U.S. at 814-815, and the principle that the Court will not lightly assume that Congress has effected a potentially dramatic shift in the federal-state balance. *Grable,* 545 U.S. at 319; *Holmes Group*, 535 U.S. at 832. For the reasons previously discussed, when the statutory text is interpreted in light of those considerations, it compels the conclusion that a person acts under a federal officer only when he acts on behalf of or otherwise assists the officer in carrying out official duties—a standard that respondent cannot satisfy.

3. Ultimately, the court of appeals bottomed its decision on its assessment that respondent marketed its "light cigarettes in compliance with detailed and specific FTC regulation. Pet. App. 6a-13a. For reasons discussed in this brief (p. 21, *supra*), and at greater length in the government's brief at the petition stage (Br. 8-12), the court of appeals' assessment is incorrect. Far from issuing detailed and specific regulations that govern respondent's marketing of light cigarettes, the FTC has not issued any such regulations at all. Of particular importance, the FTC has neither requested nor required tobacco companies to describe their products as "light."

More fundamentally, for the reasons discussed, the court of appeals' exclusive focus on the presence or absence of

detailed and specific federal regulatory control is both over- and under-inclusive. The federal officer removal statute does not permit removal when a private commercial actor merely pursues its own economic interests, even when it does so in accordance with detailed and specific government regulations. Instead, private-party removal is permissible only when the private party acts on behalf of or otherwise assists a federal officer in carrying out that officer's official duties—a category of private conduct that will necessarily entail some form of federal oversight, but not necessarily (or even usually) "detailed and specific" control. Because respondent marketed "light" cigarettes for its own commercial gain and not to assist federal officers in carrying out their official duties, it had no right to remove petitioner's state law claim to federal court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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