No. 06-1756

IN THE
United States Court of Appeals
FOR THE SEVENTH CIRCUIT

MICHAEL KELLY, as Administrator of the Estate of EVERETT KELLY, deceased, and PATTY KELLY,

Plaintiffs-Appellants,

v.

MARTIN & BAYLEY, INC., d./b/a/ HUCK'S CONVENIENCE STORE, and PHILIP MORRIS USA, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Illinois
Case No. 05-409-DRH
David R. Herndon, United States District Judge

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS SEEKING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, amicus curiae Public Citizen, Inc., states that it is a nonprofit, non-stock corporation that has no parent corporations and has issued no publicly held stock; hence, no publicly held company owns ten percent or more of its stock.

The only law firm that has appeared or is expected to appear on behalf of Public Citizen, Inc., in this Court or in any other court or administrative agency in this matter is Public Citizen Litigation Group.

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INTEREST OF AMICUS CURIAE

With the consent of all parties, Public Citizen, Inc., submits this brief as amicus curiae in support of the plaintiffs-appellants because the decision below directly implicates its interest in defending the role of state courts in providing consumer remedies under state law. Public Citizen believes that its experience in federal regulatory matters will allow it to assist the Court by presenting information not in the briefs of the parties that bears directly on a critical issue in this case: Whether cigarette manufacturers have been so pervasively regulated as to justify singling them out from among other regulated entities and allowing them to invoke the federal officer removal provisions of 28 U.S.C. § 1442(a)(1).

Public Citizen, Inc., is a consumer advocacy organization founded in 1971. On behalf of approximately 100,000 members nationwide, it appears before Congress, administrative agencies, and the courts on a wide range of issues and works for enactment and effective enforcement of laws protecting consumers, workers, and the general public. Public Citizen is particularly concerned with improving public health laws and regulations and ensuring access to the court system for the redress of injuries and illnesses caused by unsafe and defective products. Public Citizen thus has an interest in both the substantive and procedural aspects of litigation involving tobacco products, which have caused grievous illness and injury to so many people. More generally, Public Citizen seeks to counter the misuse of

procedural devices such as removal as well as the substantive defense of implied preemption, which are increasingly invoked by defendants in litigation involving public health and safety to burden plaintiffs and escape liability under state law.

For these reasons, Public Citizen was granted leave to file an amicus brief in support of the rehearing petition in *Watson v. Philip Morris Cos.*, 420 F.3d 852 (8th Cir. 2005), the opinion on which the district court relied in this case. With consent of all parties including Philip Morris, Public Citizen also filed an amicus brief in the United States Supreme Court in support of the petition for certiorari in *Watson* (No. 05-1284).[1] Public Citizen has filed amicus briefs in many other cases involving tobacco, including *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001), *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *Price v. Philip Morris, Inc.*, _ N.E.2d _, 2005 WL 3434368 (Ill. Dec. 15, 2005). In addition, Public Citizen and its attorneys have participated in numerous appellate cases in which defendants raised preemption defenses, including *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), and *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005). And Public Citizen often

[1] On May 22, 2006, the Supreme Court issued an order directing the Solicitor General to file a brief stating the views of the United States on whether the Court should grant review in *Watson*, an order that would appear to reflect that the Court has serious doubts about the correctness of that decision.

participates in federal rulemaking proceedings, providing it with a perspective that is useful in evaluating whether federal regulation of cigarettes is genuinely extraordinary in degree or kind, as the district court concluded.

The decision of the district court to follow the Eighth Circuit's decision in *Watson* implicates Public Citizen's concerns in a number of respects. The *Watson* decision places an unwarranted procedural obstacle in the way of plaintiffs asserting state-law tort claims in state courts by cloaking cigarette companies in the guise of federal government actors and providing them the same right to remove a case to federal court as a federal officer sued for actions under color of his office. Moreover, by treating a company that is merely subject to some federal *regulation* as if it were a federal officer or agency, the *Watson* rule, if it were adopted by this and other circuits, would likely give rise to many more removal attempts. Other companies subject to much greater federal regulation than the tobacco industry would seek to take advantage of the expansion of the federal officer removal statute by asserting that they, too, acted at the direction of federal officers and were being sued for actions under color of federal office.

Public Citizen believes a brief reflecting its perspective may help the Court determine whether to adopt the Eighth Circuit's novel holding. In particular, Public Citizen believes it may be useful to the Court to receive detailed information about how the supposedly "unusual" and "unique" regulation of cigarettes by the Federal

Trade Commission compares to the much more extensive and detailed regulation of other products by other federal agencies. That information demonstrates that, far from justifying a special status for cigarette companies as federal agents entitled to remove actions against them to federal court, the FTC's interactions with cigarette companies provide no basis for granting them special protections unavailable to other industries that are, in truth, more heavily regulated.

INTRODUCTION AND SUMMARY OF ARGUMENT

In May 1878, federal internal revenue agent James Davis raided a moonshine still in the hills near Tracy City, Tennessee. Before he and his companion could destroy the still, seven armed men attacked them. Returning fire, Davis killed one of his assailants, wounded another, and captured a third, but he was forced to retreat without destroying the still. According to a contemporary newspaper account, the raid caused "intense excitement" in the neighborhood.[2]

A local grand jury indicted Davis for murder. With the support of the Attorney General of the United States, Davis invoked the predecessor to 28 U.S.C. § 1442(a)(1) and removed the case to federal court on the ground that he had acted in the discharge of his duties as a federal officer and was immune from state prosecution. In *Tennessee v. Davis*, 100 U.S. 257 (1880), the Supreme Court affirmed

[2] www.tngenweb.org/monroe/news3.txt.

the removal, holding that because the federal government "can act only through its officers and agents," the ability to remove state court actions brought against federal officers and agents for actions within the scope of their duties was essential to the vindication of federal authority. *Id.* at 263. The Supreme Court has repeatedly pointed to *Davis* as exemplifying the core purposes of § 1442(a)(1)'s authorization for removal of cases by federal officers and persons acting under their direction who are sued in state court for the performance of official acts. *See, e.g., Mesa v. California*, 489 U.S. 121, 126-27 (1989); *Arizona v. Manypenny*, 451 U.S. 232, 241 n.16 (1981); *Willingham v. Morgan*, 395 U.S. 402, 406 (1969).

This case is a far cry from *Davis*. Here, Philip Morris, a purely private enterprise, has been sued for fraudulently misrepresenting the hazardous nature of its products—so-called "light" cigarettes. There is no claim that, in promoting and selling its cigarettes, Philip Morris was carrying out any official function of the United States. Rather, the company's claim to removal here, as in the *Watson* case, rests solely on the supposed "regulation" of certain aspects of the cigarette industry's activities by the Federal Trade Commission, as a result of which Philip Morris claims to have been "acting under" a federal officer.[3]

[3] Philip Morris apparently discovered it was "acting under" a federal officer surprisingly late in the game, given its claim that there is a long and unique history of federal regulation of its activities: The first reported decision addressing federal *(footnote continued)*

The *Watson* decision, which was adopted by the district court below, departs from all previous federal appellate case law on federal officer removal by permitting removal based solely on the extent of federal regulation of private business activity that is not performed for the benefit of the federal government. The justification offered by the Eighth Circuit and accepted by the court below—that the FTC's regulation of cigarette companies is so "extraordinary" or, indeed, "unique" as to justify treating cigarette makers as if they were federal agents—is patently wrong. Many industries are subject to much more detailed and extensive regulation than the cigarette industry. Thus, if the Eighth Circuit's reasoning were extended beyond cigarette companies, its decision could result in a tremendous expansion of federal removal jurisdiction.

To be sure, both the Eighth Circuit and the court below purported to confine their holdings to Philip Morris and other cigarette companies. But any such attempt to cabin the *Watson* decision, even if successful, would result in an equally significant distortion of federal law: A special dispensation would be granted to the very industry whose claim to such an indulgence is weakest.

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officer removal by a cigarette company did not come until 2002, *see Tremblay v. Philip Morris, Inc.*, 231 F. Supp. 2d 411 (D.N.H. 2002), and, even in the Eighth Circuit, one of Philip Morris's attempted removals has been held untimely. *Craft v. Philip Morris Cos.*, C.A. No. 05-1531, 2006 WL 744415 (E.D. Mo. Mar. 17, 2006).

ARGUMENT

I. The District Court's Ruling That Federal Regulation of Private Business Activity Permits Removal Under Section 1442(a)(1) Cannot Be Squared with the Statute.

The federal officer removal statute, 28 U.S.C. § 1442(a)(1), provides for removal when "any officer (or any person acting under that officer) of the United States or any agency thereof" is sued in a state court "for any act under color of such office." On its face, the statute requires not only that the *actor* who is sued be an officer or person acting under him, but also that the *action* for which he is sued be an official one—that is, an act under color of office. The under-color-of-office requirement is a critical limitation of the statute, reflecting its core purpose of providing for removal "broad enough to cover all cases where *federal officers* can raise a colorable defense *arising out of their duty to enforce federal law*." *Willingham*, 395 U.S. at 406-07 (emphasis added).

Selling cigarettes is not action *under color of federal office*. *See Brown v. Philip Morris Inc.*, 250 F.3d 789, 801 (3d Cir. 2001) (accepting Philip Morris' argument that federal regulation of its marketing practices did not make them actions "under color of federal law" for purposes of a *Bivens* action). The Eighth Circuit departed from the statute's plain meaning by extending removal to a lawsuit based on the defendant's purely self-interested private conduct just because it was subject to some federal regulation. The Supreme Court has made clear that

even "extensive" regulation of the activities of a business does not make its actions under color of law; rather, a private person acts under color of law only when its action "may be fairly treated as that of the [government] itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *accord Blum v. Yaretsky*, 457 U.S. 991 (1982). For the same reason, removal of suits based on actions taken by federal officers or their subordinates under color of office is properly limited to cases where the defendant was "effectively an agent or employee of the government" performing "official functions" on its behalf. *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846, 845 (N.D. W. Va. 2004). Indeed, except for *Watson*, we are aware of no other case where a federal appellate court has permitted removal under § 1442(a)(1) by a defendant who was not performing some function for the federal government, such as participating in an federal undercover law enforcement operation,[4] implementing a federal wiretap,[5] inspecting airplane engines as an agent for a federal agency,[6] or supplying war matériel to the U.S. military.[7]

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[4] *See Venezia v. Robinson*, 16 F.3d 209 (7th Cir. 1994).

[5] *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989).

[6] *See Magnin v. Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996).

[7] *See Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998).

II. The FTC's "Regulation" of Cigarettes Was Not Uniquely or Even Unusually Extensive.

Both the district court and the Eighth Circuit paid lip-service to the principle that mere regulation is not enough to permit federal officer removal, but held that particularly extensive or intrusive regulation can suffice. Thus, the district court, quoting Judge Gruender's concurrence in *Watson*, asserted that because FTC regulation of cigarette marketing was "extraordinary," the decision to allow removal by Philip Morris "should not be construed as an invitation to every participant in a heavily regulated industry to claim that it, like Philip Morris, acts at the direction of a federal officer merely because it tests or markets its products in accord with federal regulations." Slip op. 8 (quoting 420 F.3d at 863-64). Similarly, the majority in *Watson* stated that the regulation to which the cigarette industry was subject was "unprecedented," "unusual," and so "unique" as to differentiate Philip Morris from other regulated businesses and justify a special rule of removal for cigarette cases. 420 F.3d at 860-61. But the Eighth Circuit's characterization of the regulation of cigarette companies as "unique" and "unprecedented" is baseless. If followed here and in other cases, the reasoning of *Watson* will lead either to a potentially vast expansion of federal officer removal, as other more heavily regulated businesses seek the same benefit afforded Philip Morris by the Eighth Circuit, or to a completely unprincipled special rule benefiting only the cigarette industry.

A. The FTC's Weak "Regulation" of Cigarettes Did Not Compel Philip Morris to Take the Actions for Which It Has Been Sued.

The *Watson* opinion is long on adjectives characterizing the supposedly extensive regulation to which Philip Morris was subjected by the FTC. The undisputed, public-record facts, however, fall far short of justifying those characterizations. Indeed, they fail to do so *as a matter of law*. The critical points, which are not disputed, are:

- The FTC has *never* promulgated regulations requiring cigarette makers to test the tar and nicotine levels of cigarettes, let alone regulations defining how such tests must be conducted, how the results must be disclosed, or how test results may be used in cigarette advertising.
- The major cigarette makers' adherence to the "FTC method" of testing cigarettes was the result of a voluntary agreement they entered into *among themselves* to stave off formal regulation and/or enforcement actions under the FTC's general authority to sanction "unfair or deceptive acts or practices in or affecting commerce" under § 5 of the FTC Act, 15 U.S.C. § 45(a). *See* FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. 48158 (Sept. 12, 1997). The FTC is not even a party to the agreement.
- The agreement of the major cigarette companies was only that they would include tar and nicotine levels measured with the FTC's method in their

advertising. The agreement did not address the use of terms such as "low tar," "lowered tar," or "lights," nor did it address cigarette labeling.

- Absent agreement by the manufacturers to use the FTC's test method, the FTC could not, as a matter of law, foreclose use of other methods unless it could prove that advertising their results would be unfair or deceptive under the generally applicable standards of the FTC Act. As the D.C. Circuit held in *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 44 (D.C. Cir. 1985), "[b]ecause the FTC has not adopted its system of testing pursuant to a Trade Regulation Rule under section 18 of the FTC Act, 15 U.S.C. § 57a (1982), one cannot say that the FTC system constitutes the only acceptable one available for measuring milligrams of tar per cigarette."
- Although the Eighth Circuit insisted that the FTC "defines 'low tar' as 15 mg. or less tar," *Watson*, 420 F.3d at 861, the court acknowledged it could cite no FTC regulation or other formal action of the Commission embodying such a definition. *See id.* at 861 n.5. As the FTC itself has stated, "Cigarette manufacturers use a number of descriptive terms (such as 'low tar,' 'light,' 'medium,' 'extra light,' 'ultra light,' 'ultra low,' and 'ultima') in advertising and labeling information about their cigarettes. … *There are no official definitions for these terms* but they appear to be used by the in-

dustry to reflect ranges of FTC tar ratings." FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. at 48163 (emphasis added).

- The most that can be said is that the FTC at one point followed an *informal* enforcement policy of not acting against cigarette companies that marketed cigarettes as "light" or "low tar" based on test results using the Cambridge method. More recently, however, the FTC has said it is considering whether such descriptive terms are deceptive to consumers. *See id.*
- The United States is now suing Philip Morris and other cigarette manufacturers for precisely the conduct that Philip Morris insists in this case it undertook as an agent of the federal government acting under color of federal office. The district court in that case has rejected the defendants' argument that they were merely following FTC mandates, noting that the advertisements in which they suggested that "light" cigarettes were less hazardous "*were certainly not mandated by the FTC*." *United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) (emphasis added).
- Most importantly, whatever the FTC may or may not have "directed" Philip Morris to do, Philip Morris does not claim—because it cannot—that the FTC ever *required* it to sell "low tar" cigarettes, *compelled* it to call its cigarettes "lights" or say they had "lowered tar," or otherwise *ordered* it to use advertising that would mislead consumers by suggesting, on the basis

of measured tar and nicotine levels, that "light" cigarettes are somehow healthier than "regular" cigarettes.

B. Other Industries Face Much More Extensive, Specific, and Formal Regulation than Do Cigarette Companies.

The "regulation" of cigarette testing and advertising by the FTC is by no means "unique," "extraordinary," or "unusual" in its intrusiveness. Indeed, federal regulatory actions are typically much more formal and prescriptive than the FTC's actions regarding cigarettes. And although it may have been "unprecedented" *for the FTC* to involve itself in product testing to the degree it did with cigarettes, detailed federal product-testing mandates are common, and are usually set forth in regulations with the force of law rather than adopted informally and by agreement with regulated companies, as in the case of the FTC's cigarette testing regime.

The National Highway Traffic Safety Administration (NHTSA), for example, conducts its own program of crash and rollover testing of automobiles, gives vehicles one- to five-star ratings as a result, and tells car manufacturers how to use those ratings in automobile advertising. *See* www.SaferCar.gov. NHTSA's testing activities, which are at least as extensive as the FTC's, are carried out not pursuant to voluntary agreements or informally adopted policies, but under a specific statutory mandate. 49 U.S.C. § 30168.

Moreover, unlike the FTC, NHTSA does more than merely test vehicles and instruct automakers concerning the use of those test results in advertising. It also

formally promulgates specific design and performance standards for vehicles, known as Federal Motor Vehicle Safety Standards (FMVSSs). Those mandatory standards, codified at 49 C.F.R. Part 571, fill approximately 700 pages of the Code of Federal Regulations. FMVSSs typically specify not only what safety features manufacturers are required to install in vehicles and what standards of protection they must provide, but also exactly how manufacturers must *measure* their performance. For example, NHTSA's standard governing seatbelts and airbags, 49 C.F.R. § 571.208, which by itself is 87 pages long, prescribes exactly what crash tests manufacturers must conduct to test their passenger protection systems, including the speed and angle at which vehicles must be crashed, the forces that must be measured, and the precise "anthropomorphic test devices" (*i.e.*, crash-test dummies) that must be used.

Similarly, EPA regulations define exactly how automakers must test the fuel economy of their vehicles, and further provide for testing by the agency itself of a significant percentage of vehicles as a double-check on the manufacturers' own testing. *See generally* www.epa.gov/fueleconomy/index.htm; www.fueleconomy.gov. Again, unlike the FTC's cigarette testing program, fuel economy testing is mandated by regulations with the force of law. *See* 40 C.F.R. Parts 86 & 600. And those regulations not only specify precisely how automakers must disclose fuel

economy test results to consumers, but also define fleet fuel economy performance standards (CAFE standards) that the auto industry is *required by law* to meet.

Such regulation is hardly confined to the automobile industry. Drug and medical device manufacturers must comply with detailed standards governing FDA approval of the marketing of new drugs and medical devices. The regulatory schemes for prescription drugs and "Class III" medical devices (those that pose potential unreasonable risks of illness or injury or that have particularly significant medical applications) require submission of detailed testing information demonstrating the safety and effectiveness of the drug or device, together with specific information about the product's formulation or design and the precise terms of the manufacturer's proposed label for the drug or device. Formal FDA approval is necessary before such drugs and devices may be marketed, and once they are approved, manufacturers may not make significant changes to their formulation or design, or to their labeling, without further FDA approval. *See generally* 21 C.F.R. Parts 314 (drugs) & 814 (devices); *see also Riegel v. Medtronic, Inc.*, _ F.3d _, 2006 WL 1328835 (2d Cir. May 16, 2006). FDA regulation of drugs and devices also imposes binding legal requirements with respect to the contents of product advertisements, *see* 21 C.F.R. §§ 202.1 (drugs) & 814.82(a)(3) (devices), and, once approved, drugs and devices are subject to formal regulations that define manufacturing practices to which their makers must conform. *See* 21 C.F.R. Parts 210

(drugs) & 820 (devices). Again, the regulatory scheme for drugs and medical devices differs from the FTC's cigarette testing program both in that it involves regulations with the force of law, and in that it requires not merely that products be tested but also that they receive formal federal approval based on test results.[8]

FDA regulations applicable to specific types of medical devices also set forth detailed product testing requirements that manufacturers are legally required to follow. For instance, the FDA has promulgated a regulation prescribing in detail how surgical gloves must be tested for leaks, which calls not only for testing by manufacturers, but also for sampling and testing by the agency itself. 21 C.F.R. § 800.20. Unlike the FTC's test program for cigarettes, the FDA's testing has teeth: gloves that fail are "adulterated within the meaning of section 501(c) of the Federal Food, Drug, and Cosmetic Act, and are subject to regulatory action, such as detention … and seizure …." *Id.* § 800.20(d).

The FDA's glove regulation is by no means unusual. Other FDA regulations provide detailed testing and labeling requirements for tampons, 21 C.F.R. § 801.430, impact-resistant eyeglass lenses, *id.* § 801.410, hearing aids, *id.* § 801.420, and condoms. *Id.* § 801.435. The tampon regulation, for example,

[8] Similarly, food additives are subject to FDA approval and regulation, *see* 21 C.F.R. Part 171, and new pesticides require EPA approval under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 et seq.

requires manufacturers to use an absorbency test conforming to the detailed descriptions and diagrams set forth in the regulatory text, and to report the results on package labels using specifically defined terms. Again, the regulation has the force of law, and any noncomplying tampons are "misbranded" within the meaning of the Food, Drug, and Cosmetic Act.

Other consumer products are also subject to detailed regulatory testing regimes. Under regulations promulgated by the Department of Energy, 10 C.F.R. Part 430, manufacturers of refrigerators, freezers, dishwashers, water heaters, clothes washers and dryers, air conditioners, television sets, home heating equipment, kitchen ranges and ovens, fluorescent light tubes, showerheads, faucets, and toilets must use prescribed test methods to measure the energy and water consumption of their products. And unlike the FTC's cigarette testing program, the Energy Department's regulations not only require product testing, but also require that the products meet specific energy and water conservation standards.

The Consumer Product Safety Commission (CPSC), in addition to engaging in voluntary efforts to improve product safety similar to the FTC's interactions with cigarette companies, also promulgates mandatory safety standards for consumer products, ranging from bicycle helmets to lawn mowers to cigarette lighters to baby cribs. Mandatory CPSC standards are formally promulgated as regulations and published in 16 C.F.R. Chapter II. Typically, they set forth design and/or

performance standards that manufacturers are required to meet, and they specify the exact test methods that must be used to determine compliance.

The CPSC's standards for flammability of children's sleepwear (sizes 7 through 14) are illustrative. The standards, set forth at 16 C.F.R. Part 1616, occupy 30 pages of the Code of Federal Regulations, and specify not only what criteria affected products must meet and how they must be labeled, but also how manufacturers must sample fabric for testing, how testing must be conducted (including eight pages of engineering drawings describing the test chamber), what records manufacturers must keep, the Commission's enforcement policy, the Commission's role in testing, and the consequences of noncompliance. As to the latter, the regulations state that "[t]he Commission will test fabrics and garments subject to the standard for compliance with the standard … [and] will consider any failing results from compliance testing as evidence of a violation of the standard and section 3 of the Flammable Fabrics Act (15 U.S.C. § 1192)." 16 C.F.R. § 1616.35(f).

As a final example, the Occupational Safety and Health Administration (OSHA), pursuant to the Occupational Safety and Health Act, 29 U.S.C. § 651 et seq., formally promulgates regulations requiring employers to limit the exposure of their workers to hazardous substances and conditions. Those standards, which have the force of law, typically specify not only precise exposure limits, but also means

of compliance and specific methods for exposure testing. For example, OSHA's recently promulgated rule on exposure to hexavalent chromium, 71 Fed. Reg. 10100 (Feb. 28, 2006), not only prescribes an exposure limit (5 micrograms of hexavalent chromium per cubic meter of air as an eight-hour time-weighted average), but also defines exactly the testing that employers must use to determine compliance: "the employer shall use a method of monitoring and analysis that can measure chromium (VI) to within an accuracy of plus or minus 25 percent (+/- 25%) and can produce accurate measurements to within a statistical confidence level of 95 percent for airborne concentrations at or above the action level." *Id.* at 10375. In addition to requiring employers to monitor their compliance using specified methods, OSHA itself periodically tests employer compliance, and violation of its regulations can result in administrative sanctions.

We could go on. The point is that federal regulation of business activity is ubiquitous, and regulations that impose detailed testing and compliance requirements are commonplace. Indeed, if anything is "unique" and "unusual" about the FTC's testing of cigarettes, it is that it has *not* been imposed by regulations with the force of law, that it does *not* involve enforcement of any design or performance standards regarding the regulated products, and that it involves *no* enforceable regulations concerning the use of test results in cigarette advertising or marketing. Even the most basic understanding of federal regulation makes it impossible to

credit the Eighth Circuit's view that the "regulation" of cigarette companies by the FTC is "uniquely," "extraordinarily," or even "unusually" extensive.

C. Whether Broadly or Narrowly Applied, the *Watson* Decision, If Adopted by This or Other Courts, Would Have Mischievous Consequences.

Precisely because the federal "regulation" of cigarette testing and marketing has been so feeble compared to other federal regulatory regimes that impose enforceable legal requirements on their subjects, a ruling permitting removal by Philip Morris would lead other regulated businesses sued by consumers to claim that they, too, "acted under" a federal officer. Indeed, medical device manufacturers have already done so, *see Parks v. Guidant Corp.*, 402 F. Supp. 2d 964 (N.D. Ind. 2005), as have banks claiming to be acting under federal officers by virtue of federal regulation of their lending practices. *See King v. Provident Bank*, _ F. Supp. 2d _, 2006 WL 902271 (M.D. Ala. April 6, 2006).

Thus, if this Court adopts *Watson*'s reasoning and holding, a number of undesirable consequences are likely. District courts that undertake a serious comparison of the degree of regulation faced by defendants in other industries with that faced by cigarette companies may allow a broad range of defendants to remove cases under § 1442(a)(1), dramatically expanding the scope of federal removal jurisdiction. Such an expansion might render largely irrelevant the much-litigated distinction between normal preemption, which does not support federal question jurisdic-

tion (or removal), and so-called "complete" preemption, which does. *See Lehmann v. Brown*, 230 F.3d 916, 919-20 (7th Cir. 2000). In a great number of express and implied preemption cases, defendants would have a colorable claim that their conduct was "directed" by a federal officer and could thus attempt removal under the *Watson* rationale. Similarly, *Watson* suggests that the removal wars that have raged around class actions were pointless to the extent the defendants were heavily regulated industries. Rather than seeking the enactment of the Class Action Fairness Act or the overruling of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), which was finally achieved last year in *Exxon Mobil Corp. v. Allapattah Services, Inc*., 125 S. Ct. 2611 (2005), such defendants, like Dorothy in *The Wizard of Oz*, could have gotten where they wanted to be all along, just by tapping their heels together three times and saying "I'm a federal officer."

On the other hand, courts may grasp at the lifeline offered by *Watson*'s characterization of the Philip Morris case as "unique," "unusual," "extraordinary," and "unprecedented" and reject removal by defendants outside the cigarette industry even though, in reality, they face much more extensive regulations than do cigarette companies. The district court's decision in *Parks v. Guidant* reflects this approach (as well as open skepticism about *Watson*'s correctness). *Parks* provides a telling illustration of the mental gymnastics that courts must go through to distin-

guish removal attempts by businesses in other regulated industries from the result in *Watson*.

Parks involved a claim that defects in an implanted cardiac defibrillator—a Class III medical device—had severely injured the plaintiff. The device's manufacturers invoked § 1442(a)(1) to remove the case to federal court, claiming that they had acted under the direction of a federal officer because of FDA regulation of their activities. The district court acknowledged that "the FDA has comprehensive regulatory authority over the production of medical devices." 402 F. Supp. 2d at 968. Specifically, the defendants were required to obtain FDA approval of the safety and efficacy of the device before they were permitted to market it, and "FDA regulations prohibit [them] from making any changes to a device that impact its safety and effectiveness without first obtaining FDA consent." *Id.* "Obviously," the court observed, "the FDA does not want medical device manufacturers altering an already-approved device without first running the changes by the FDA," but that "does not mean that the manufacturers are 'acting under' the direction of the FDA, as that phrase is used in the federal officer removal statute." *Id.* If it did, the court warned, every medical device and drug manufacturer could remove any "garden-variety" products liability action against it, resulting in "an unprecedented expansion of federal jurisdiction." *Id.*

So far, so good. But when it confronted *Watson*, the district court's logic began to falter. The court asserted that "the tobacco companies have a better case for federal officer removal," *id.* at 969, but its support for that conclusion was thin, to say the least. The court cited the supposed "forty year history" of FTC "regulation" of cigarette testing and advertising (*id.*), but the FDA's history of regulating drugs and medical devices is far more lengthy, and even the specific premarket approval requirements of the Medical Device Act Amendments of 1976 are of comparable vintage to the voluntary agreement of the cigarette companies, which dates only to 1970. The court further stated that the FTC "requires disclosure of tar and nicotine ratings in cigarette advertisements and permits manufacturers to advertise their cigarettes as 'light' or 'low tar' if the cigarettes meet the FTC's standard." *Id.* But, of course, the FTC has *never* imposed binding legal requirements with respect to disclosure of tar and nicotine ratings, nor has it promulgated any formal "standard" under which manufacturers are "permitted" to market their products as "light" or "low tar" cigarettes. And even if the FTC did *permit* manufacturers to call cigarettes "light" or "low tar," that would not mean the manufacturers were acting under federal *compulsion* in doing so, any more than a medical device manufacturer is *directed* to market a device it has received regulatory *permission* to sell.

The *Parks* court also referred to the "extraordinary" and "unprecedented" fact that, for a time, the FTC itself tested cigarettes. *Id.* at 969-70. As explained above,

government testing of products is by no means extraordinary or unprecedented, but even if it were, the FTC's *testing of cigarettes* does not make the cigarette companies' *marketing of cigarettes* a federally mandated act, any more than the FDA's *approval* of a medical device makes the manufacturers' *design and marketing* of the device an action carried out at the direction of a federal officer. *Parks* also failed to confront the critical fact that the FTC's testing of cigarettes did not have significant regulatory consequences, because cigarette makers were not legally required to do anything as a result of the tests, and even their voluntary agreement required nothing more than disclosure of the results in their ads. The *Parks* court went on to observe that the plaintiffs had "not alleged the same 'unprecedented' involvement of the FDA in the manufacture, design, or sale of medical devices." *Id.* at 970. But the FTC has never regulated the manufacture or design of cigarettes *at all*, and its regulation even of their sale is very limited.

Finally, *Parks* stated that the FDA's regulation of medical devices did not "'cut to the heart of Plaintiffs' claims' to the same degree that the FTC's regulation of low-tar cigarettes did in *Watson*." *Id.* But if the FDA's express approval of the marketing of a medical device does not "cut to the heart" of a claim that the manufacturer defectively designed or made it, it is hard to see how the FTC's mere use of a particular test to measure tar and nicotine in cigarette smoke (and the cigarette manufacturers' voluntary agreement among themselves to use that same test and

advertise the results) "cuts to the heart" of the claim in *Watson* (and here) that marketing cigarettes as "light" and "lowered tar" is fraudulent and misleading.

Our point is not that the result in *Parks* was wrong. Quite the contrary. Nor would we urge district courts to give a broad reading to any decision allowing removal by Philip Morris. Indeed, we hope that, whatever the outcome here, district courts would react skeptically to efforts to extend removal to other industries. But as much as we agree with the result in *Parks*, we must acknowledge that the distinctions drawn by that decision do not hold water. Their weakness illustrates the difficulty of limiting any decision that permits removal by cigarette companies based on the supposedly "extraordinary" regulation to which they have been subject. A ruling premised on the false notion that the cigarette industry has been heavily regulated will force courts either to accept removal by other industries that are *genuinely* subject to heavy regulation (expanding federal officer removal far beyond its proper bounds) or to strain credulity, as *Parks* did, by trying to portray those industries as less heavily regulated than the cigarette industry.

We recognize that precedents do not always flow one to another based on the demands of pure logic, and that courts sometimes find traction on a slippery slope through a simple, if not logically coherent, command to halt in the name of common sense. If one reads between the lines, that appears to be the thinking of the court in *Parks* (and, more recently, of a district court in the Eighth Circuit that

similarly rejected a medical device manufacturer's invocation of federal officer removal, *see In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, _ F. Supp. 2d _, 2006 WL 1134766 (D. Minn. April 27, 2006)). Moreover, district courts that seek to limit the impact of *Watson* may take comfort in the unappealability of jurisdictional remands (*see* 28 U.S.C. § 1447(d)), which ensures that the logic of their distinctions may not be tested by appellate review.

But even if, at the end of the day, removal is limited to the cigarette industry, much time and effort will be expended litigating meritless removals by other regulated businesses encouraged by the result in *Watson*. Indeed, even as it distinguished *Watson*, the district court in *Parks* acknowledged that *Watson* had given the defendants a "colorable" enough basis for removal to avoid sanctions for improper removal. 402 F. Supp. 2d at 971. Just as importantly, if federal officer removal is confined to the tobacco industry, the cigarette companies will be left with a special benefit not available to other more heavily regulated (and less culpable) industries. This Court should not countenance the creation of an unprincipled exception to ordinary jurisdictional rules for the benefit of a single industry, any more than it should expand federal officer removal to virtually all regulated industries, which would vastly exceed anything Congress had remotely in mind in enacting § 1442.

CONCLUSION

Most people, including most lawyers, would probably be surprised if not shocked to learn that Philip Morris had availed itself of a removal provision designed to protect federal officers, employees, and agents. Their incredulity would only be heightened when they realized that the federal government is itself suing Philip Morris for the very actions the company claims were done under federal direction, and that the government has shown no sign of supporting Philip Morris's entitlement to removal (unlike most of the federal officer removal cases decided by the Supreme Court, where the United States *represented* the removing party). And the assertion that cigarette companies are entitled to removal because they have faced more extensive regulation than other industries would seem merely laughable—if it had not been accepted by a United States Court of Appeals. This Court should not join the Eighth Circuit in reaching such a baseless decision.

For the reasons stated above, and by the plaintiffs-appellants, this Court should reverse the decision of the district court and remand the case to the district court with the direction that the district court, in turn, remand it to the state court in which it was filed.

Respectfully submitted,

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Date: May 2006

RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Brief for Amicus Curiae Public Citizen, Inc., in Support of Plaintiffs-Appellants Seeking Reversal is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2002) the Brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure) contains 6,446 words.

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2006, two copies of the foregoing Brief for Amicus Curiae Public Citizen, Inc., in Support of Plaintiffs-Appellants Seeking Reversal were served by United Parcel Service next-business-day delivery on the following:

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