No. 04-1225

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LISA WATSON, *et. al.*,

Plaintiffs/Appellants,

v.

PHILIP MORRIS COMPANIES, INC., *et al.*,

Defendants/Appellees.

On Appeal by Permission Under 28 U.S.C. § 1292(b) from an Order
of the United States District Court for the Eastern District of Arkansas
Denying Remand to State Court
No. 4:03-cv-519 (GTE)
Hon. G. Thomas Eisele, United States District Judge

BRIEF FOR AMICI CURIAE PUBLIC CITIZEN, INC., AND AARP IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae Public Citizen, Inc., and AARP state that they are nonprofit corporations that have no parent corporations and have issued no publicly held stock; hence, no publicly held company owns ten percent or more of their stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Other:

INTEREST OF AMICI CURIAE

Amici curiae Public Citizen, Inc., and AARP are nonprofit organizations with shared interests in promoting public health and protecting the public's access to effective judicial remedies for the redress of injuries. As a result, they are interested in both substantive and procedural aspects of litigation involving tobacco and other dangerous and deceptively marketed products.

Public Citizen is a membership organization that appears before Congress, agencies, and courts on a range of issues. Public Citizen is concerned with ensuring access to the courts to redress injuries and illnesses caused by dangerous products. Thus, Public Citizen seeks to counter the misuse of procedural devices, such as removal, which are invoked by defendants in a range of litigation involving public health and safety to burden plaintiffs and escape liability under state law.

AARP is a non-profit, nonpartisan organization with more than 35 million members. As the largest membership organization representing interests of Americans aged 50 and older, AARP is greatly concerned about widespread fraudulent and deceptive practices in a broad range of marketplace transactions because older Americans are disproportionately victimized by such practices. AARP supports laws and public policies designed to protect its members' rights and to preserve availability of legal redress when they are harmed in the marketplace. AARP, through its affiliated AARP Foundation, also engages in legal advocacy, which

focuses on filing amicus curiae briefs and representing clients in federal and state courts nationwide in impact and class action cases involving health and long-term care, consumer protection including predatory lending, age and disability discrimination in employment, pensions and other retiree benefits, and low-income issues.

Amici curiae submit this brief because the panel's opinion places an unwarranted 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 giving them the same right to remove a case to federal court as a federal officer sued for actions under color of his office. By treating a company that is merely subject to federal *regulation* as if it were a federal officer or agency, the panel's opinion will spawn many more removal attempts as other companies—many subject to much greater federal regulation than Philip Morris—seek to take advantage of the court's expansion of the removal statute by asserting that they, too, are being sued for actions under color of federal office.

SUMMARY OF ARGUMENT

The panel held that, in developing and marketing so-called "light" cigarettes—and manipulating their design so they would appear, when mechanically tested, to deliver less tar than they actually do to real smokers—Philip Morris was, in effect, acting as an agent of the federal government and therefore may avail itself of the removal statute applicable to "any officer (or any person acting under

that officer) of the United States or any agency thereof, sued … for any act under color of such office ….” 28 U.S.C. § 1442(a)(1). The incongruity of the panel’s decision to give Philip Morris a form of protection designed for federal officers and employees (and later extended to federal agencies) is best illustrated by the fact that the federal government is currently suing Philip Morris for exactly the same conduct, asserting that the activities the panel characterized as performed “under color of [federal] office” were a RICO conspiracy in which Philip Morris and its industry cohorts “did the exact opposite of what the Government and public health community called for” and “fraudulently exploited the FTC test method to target and benefit financially by deceiving smokers.” Post-Trial Brief of the United States of America 70-71, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Aug. 24, 2005) (available on PACER). The government’s position in its own action against Philip Morris throws into sharp relief the panel’s failure to differentiate private conduct from action under color of federal authority.

The panel’s opinion rests on a number of fundamental errors. First, by expansively reading the removal statute, the panel disregarded the basic requirement that removal is permitted only when a person acts under the direction of a federal officer in taking actions under color of federal office—that is, when he acts as an *agent of the federal government in performing an official function*. Philip Morris’s development and marketing of low-tar cigarettes cannot be equated with the per-

formance of an official function of the government of the United States. Second, the panel incorrectly permitted removal by a defendant who does not have even a colorable claim of an official-immunity defense, which the Supreme Court has read the statute to require. Third, the panel erred in allowing a corporation to take advantage of statutory language intended to benefit only natural persons—officers, employees, and other individual agents of the federal government.

The panel's misconstruction of 28 U.S.C. § 1442(a)(1), which effectively equates corporate conduct that is affected by federal regulation with official federal action, presents an issue of exceptional importance. If allowed to stand, the panel's opinion will encourage other regulated entities to claim the same entitlement not to be sued in state court that the panel afforded Philip Morris, disrupting the balance of state and federal judicial authority, needlessly impairing plaintiffs' access to state courts to assert state-created causes of action involving a broad array of products, and substantially burdening an already overtaxed federal judiciary.

ARGUMENT

I. Philip Morris Did Not Act Under Direction of a Federal Officer in the Performance of Actions Under Color of Federal Office.

The panel, citing *Willingham v. Morgan*, 395 U.S. 402 (1969), asserted that the federal officer removal statute should broadly interpreted. Slip op. 5-6. But *Willingham*, while rejecting an unduly narrow construction of the statute, held only that it must be interpreted broadly enough to serve its core purpose—that is, "it is

broad enough to cover all cases where *federal officers* can raise a colorable defense *arising out of their duty to enforce federal law*." *Id.* at 406-07 (emphasis added). Similarly, the Court emphasized in *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981), that "removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a *federal official* is entitled to raise a defense *arising out of his official duties*" (emphasis added).

By contrast, when the Court has faced attempts to stretch the statute beyond its intent, it has declined to construe it expansively. *See International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991); *Mesa v. California*, 489 U.S. 121 (1989). As the Court put it in *Mesa*, respect for state courts dictates that the "language of § 1442(a) cannot be broadened" beyond its "fair construction." *Id.* at 140 (quoting *Maryland v. Soper (No. 2)*, 270 U.S. 36, 43-44 (1926)). Section 1442 removal remains, as the Court characterized it in *Screws v. United States*, 325 U.S. 91 (1945), "an 'exceptional procedure' which wrests from state courts the power to try" cases under their own laws, and, therefore, "the requirements of the showing necessary for removal are strict." *Id.* at 111-12 (opinion of Douglas, J.) (citing *Soper (No. 2)*, 270 U.S. at 42).

A. Regulated Entities Are Not Federal Actors.

In particular, the statute requires that a removing defendant make a showing not only that he is an "officer of the United States" or a "person acting under that

officer," but also that the actions for which he is being sued were performed "under color of such office." 28 U.S.C. § 1442(a)(1). The statute thus requires that the defendant show that he acted under the direction of an officer of the United States in performing an official action, or, put another way, that he 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); *see also Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530, 533 (W.D. Ky. 1996) (holding that tobacco whistleblower Jeffrey Wigand could not remove an action brought against him for giving grand jury testimony because "he has not been directed to perform official functions as an officer or agent of the government"). The requirement that a removing defendant act under official direction in the performance of an official function excludes from the coverage of the statute entities that are merely conducting their own private business under federal regulation. *See Virden*, 304 F. Supp. 2d at 844-45 (citing cases).

The statutory language demanding that the defendant show he has been sued for conduct "under color of [federal] office" underscores the point. As the Supreme Court has explained, the "under color of office" language of the removal statute is *narrower* than the "under color of law" language used in federal civil rights statutes such as 42 U.S.C. § 1983. *Screws*, 325 U.S. at 111-12 (opinion of Douglas, J.). The Supreme Court has repeatedly emphasized 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); *Single Moms, Inc. v. Montana Power Co.*, 331 F.3d 743, 748 (9th Cir. 2003) ("That a private entity is regulated by government does not transform that private entity's conduct into state action."); *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826, 837-39 (9th Cir. 1999) (a private entity does not act "under color of law" merely because it acts under compulsion of government regulation); *Cobb v. Georgia Power Co.*, 757 F.2d 1248 (11th Cir. 1985) (heavy regulation of a private entity does not make its actions "under color of law").

A fortiori, if regulatory compulsion is not enough to make private action "under color of law," it also cannot bring private conduct within the narrower category of action "under color of [federal] office" within the meaning of 28 U.S.C. § 1442(a)(1). Philip Morris itself has successfully argued in other litigation that federal regulation of its marketing practices did not make its actions "under color of federal law" for purposes of a *Bivens* action. *See Brown v. Philip Morris Inc.*, 250 F.3d 789, 801 (3d Cir. 2001). The same reasoning compels the conclusion that regulation does not make Philip Morris a federal actor under § 1442(a)(1).

B. Philip Morris Did Not Act Under Federal Compulsion.

There is no defensible basis for concluding that in marketing its cigarettes as "light" and "low tar," and in designing them so that they would yield lower tar figures when mechanically tested that when actually smoked by real people, Philip Morris was acting under the direction or compulsion of federal officers and carrying out official functions of the federal government. The panel's reliance on the FTC's development of a method for mechanically testing tar and nicotine yields of cigarettes as support for its conclusion that Philip Morris was acting under federal direction is flawed in a number of respects.

Although the FTC developed the testing method, no federal statute or regulation requires any cigarette manufacturer to use it. *See Virden*, 304 F. Supp. 2d at 838-39, 841-42; *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 45 (D.C. Cir. 1985) (holding that tobacco manufacturers are not required to comply with FTC method). As the FTC itself has explained, it suspended any formal rulemaking with respect to the testing method "when five of the major cigarette manufacturers and three small companies agreed voluntarily among themselves to disclose clearly and prominently the ratings produced by the Commission's protocol in certain types of advertising." 62 Fed. Reg. 48158 (Sept. 12, 1997).

The most that can be said about the extent of FTC regulation in the area is that, since the voluntary agreement of several companies to use the testing method,

the FTC has published the test results and informally followed a policy of not pursuing false advertising claims against companies for accurately publishing the test results in their advertising. *See Virden*, 304 F Supp. at 842. But the FTC has not promulgated legally binding regulations concerning the use of such terms as "light" and "low tar" in cigarette packaging. *See* 62 Fed. Reg. 48158, 48163 (Sept. 12, 1997). Indeed, the evidence presented by the United States in its own action against Philip Morris and other cigarette companies demonstrates that "'the FTC has never taken an official position on the use of descriptors [such as 'light' and 'lowered tar'] and has never defined or recognized the descriptors used by cigarette manufacturers in their advertisements.'" Reply Memorandum in Support of the Post-Trial Brief of the United States of America 29, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Sept. 19, 2005) (available on PACER) (quoting testimony of FTC employee Joseph Mulholland).

More to the point, even if it has not brought enforcement actions against cigarette companies that describe their cigarettes as "light" or "low tar" based in part on the results of the FTC test method, the FTC has in no way *compelled* cigarette manufacturers to market their cigarettes as "light" or "low tar," let alone to take advantage of weaknesses in the FTC testing method to support their effort to market "light" and "low tar" cigarettes as a healthier alternative to "regular" cigarettes even though they knew that such cigarettes actually delivered harmful sub-

stances to real smokers in amounts much greater than measured by the FTC test method. Nor has the FTC required tar and nicotine measurements to be reported on the cigarette packaging where Philip Morris touted its cigarettes as "light" *without* reporting their tar levels. As the district court handling the United States's own action against Philip Morris has explained:

> Defendants advance the … claim that "the Court is literally being asked to impose liability for the companies' adherence to FTC mandates" regarding the disclosure of tar and nicotine yields. … In fact, what the Government claims is that the Defendants knowingly misled consumers with advertisements that suggested, for example, that "light" cigarettes were less hazardous. The specific advertisements which the Government claims were intentionally misleading … *were certainly not mandated by the FTC*.

United States v. Philip Morris, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) (emphasis added). Similarly, the panel here has pointed to nothing that suggests that in marketing its cigarettes as "light" and "low tar," Philip Morris was acting under any compulsion by the FTC, let alone that it was acting as an agent of the United States performing an official function in doing so.

C. The Panel Opinion Threatens to Inundate the Courts with Spurious Claims That Regulated Entities Are Federal Officers.

The extreme weakness of the claim that Philip Morris was acting under any federal compulsion when it marketed its "light" and "low tar" cigarettes makes the panel's application of the removal statute particularly disturbing. The panel characterized the FTC's activities as "comprehensive, detailed regulation," slip op. at 8,

and asserted that "[t]he FTC involved itself in the tobacco industry to an unprecedented extent." Slip op. at 13. Judge Gruender, concurring, acknowledged that "in most instances, a contract, principal-agent relationship, or near-employee relationship with the government will be necessary to show the degree of direction by a federal officer necessary to invoke removal under 28 U.S.C. § 1442(a)(1)," but asserted that "the FTC's direction and control of the testing and marketing practices at issue is extraordinary." Slip op. at 18 (Gruender, J., concurring).

These descriptions contrast sharply with the United States's description of the degree of FTC regulation of cigarettes in its own action against Philip Morris. There, the government has pointedly observed that a long-time FTC employee called as a witness *by the tobacco companies* "**rejected** Defendants' claim that the FTC has given special focus to cigarette advertising." Reply Memorandum in Support of the Post-Trial Brief of the United States of America 29, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Sept. 19, 2005) (emphasis in original). Quoting the FTC employee's testimony, the government describes FTC regulation of the industry as far from "extraordinary":

> The tobacco industry is simply one of the numerous types of commerce that the FTC has looked at over this period of time. To the best of my knowledge, the agency has never focused, nor at any given time have more than a handful of staff focused, on cigarette-related issues.

Id. Indeed, based in large part on its disagreement with the panel's view of the extent of FTC regulation of cigarettes, the United States has told the district court

in *United States v. Philip Morris* that the "[d]efendants' citation to [the panel's opinion in] *Watson* warrants no legal or evidentiary weight in this case." *Id.*

A comparison to other areas that involve significant federal regulation demonstrates that the FTC's intervention in the tobacco area is anything but "extraordinary." To be sure, the agency devised a test method and then informally adopted a policy of not bringing enforcement actions against companies that used it to report tar and nicotine levels, but it did not regulate the design or manufacture of the product, and it never required cigarette companies to market their products as "light" or "low tar." By contrast, the FDA's regulation of drugs and medical devices generally involves far more extensive and elaborate standards for testing, approval, and labeling of products. *See Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 343-46 (2001) (describing process for medical devices); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475-80 (1996) (same); *Brooks v. Howmedica, Inc.*, 273 F.3d 785, 788-90 (8th Cir. 2001) (en banc) (describing process for drugs and medical devices). Similarly, federal regulation of pesticides imposes detailed requirements for registration, packaging and labeling. *See Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788, 1794-96 (2005). And the regulation of automobiles by the National Highway Traffic Safety Administration involves safety standards that impose detailed minimum requirements for the design and performance of new motor vehicles as well as the manner in which their safety is to be tested. *See Geier*

v. American Honda Motor Co., 529 U.S. 861 (2000) (describing federal regulation of passive restraint systems); *Public Citizen v. NHTSA*, 374 F.3d 1251 (D.C. Cir. 2004) (describing federal regulation of vehicle crash tests).

In each of these areas, federal regulation is both more formal (embodied in statute and regulation) and more pervasive than the FTC's activities with respect to cigarettes. Companies operating in each of these areas can be expected to respond to the panel's ruling by claiming that they, too, are entitled to be treated as federal officers who may remove claims involving regulated activities to federal court. At a minimum, this court's decision will burden the federal courts with a host of meritless claims to the statute's protection.

It is no wonder, therefore, that, as the United States has informed the district court handling the *United States v. Philip Morris* case, "[e]very other court to consider Philip Morris's claim for removal under this provision has rejected it." Reply Memorandum in Support of the Post-Trial Brief of the United States of America 28 n.31, *United States v. Philip Morris USA Inc.*, No. 99-CV-02496 (D.D.C. filed Sept. 19, 2005). Because the statute's purpose is to protect federal interests, the United States's own apparent disagreement with the panel's extension of its protection to Philip Morris is very telling. This Court should grant rehearing en banc to correct the panel's ruling that federal regulation (and minimal regulation at that) suffices to make Philip Morris a government actor for removal purposes.

II. The Panel's Decision Also Permits Removal Based on Ineligible Defenses and Wrongly Treats Corporations as "Persons."

As the Supreme Court held in *Mesa*, *Willingham*, and *Manypenny*, the purpose of the removal statute is to permit removal 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). *Mesa* emphasized that the requirement of such a defense is integral to the statute and stems from the language requiring that the conduct for which the defendant is sued be "under color of such office." *Mesa*, 489 U.S. at 126. The requirement is directly connected to the statutory purpose of protecting the assertion of immunities arising from the performance of official federal duties. As the Fourth Circuit has put it, the removing defendant must "allege a 'colorable' federal defense to th[e] action 'arising out of [his] duty to enforce federal law.'" *Jamison v. Wiley*, 14 F.3d 222, 239 (4th Cir. 1994). Here, by contrast, Philip Morris has no immunity defense *arising out of a duty to enforce federal law*; its implied preemption defense, even if it were valid, does not qualify.

Nor, indeed, is Philip Morris a "person" qualified to invoke the statute. Although the panel followed the majority of courts in holding that a corporation is a person under the statute, that issue has never been authoritatively resolved, and there are substantial arguments that the statute only applies to natural persons. *See Krangel v. Crown*, 791 F. Supp. 1436, 1442 (S.D. Cal. 1992). In particular, the statutory language referring to an officer or a person acting under his direction

reflects a desire to protect federal *employees* who do not qualify as "officers of the United States," a term of art referring to officers who exercise significant authority. *Cf. Primate Protection*, 500 U.S. at 81. Moreover, the original reason for the statute was to protect vulnerable *individual* federal officers, employees and agents from being sued in state court. *Id.* at 85. Although the Supreme Court has never addressed a case involving the application of the statute to a corporation, in *Primate Protection* the Court demonstrated the limits of the statute in holding that it did not apply even to federal agencies.

Nor can Congress's later amendment of the statute to include agencies be interpreted to indicate an expansion to include corporations. Congress did not cover agencies by changing the definition of "person," which the Court had held did not encompass agencies; rather, Congress added agencies as a *separate* category of entities that could invoke the statute. Nothing in Congress' action reflects an intention to benefit other non-natural persons. Indeed, holding the statute applicable to corporations necessarily means they were already covered by the term "persons" before 1996, when actual agencies of the United States were prohibited from invoking the statute—an incongruous result, to say the least.

CONCLUSION

For the foregoing reasons, this Court should grant rehearing en banc, receive further briefing and argument, and reverse the district court's order.

Respectfully submitted,

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

Although the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) does not apply to this amicus curiae brief in support of a petition for rehearing en banc, I hereby certify that the foregoing Brief for Amici Curiae Public Citizen, Inc., and AARP in Support of Appellants' Petition for Rehearing En Banc 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 3,768 words.

/s/
Scott L. Nelson

CERTIFICATE OF COMPLIANCE
(CD-ROM—Eighth Circuit Rule 28A(d))

Pursuant to Rule 28A of the Rules of the United States Court of Appeals for the Eighth Circuit, I hereby certify that the digital version of this brief on the accompanying CD-ROM has been scanned for viruses and is virus-free.

/s/
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2005, two copies of the foregoing Brief for Amici Curiae Public Citizen, Inc., and AARP in Support of Appellants' Petition for Rehearing En Banc were served by UPS next-day delivery on the following:

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