No. 05-1284

IN THE

Supreme Court of the United States

LISA WATSON, ET AL.,

Petitioners,

v.

PHILIP MORRIS COMPANIES, INC., ET AL.,

Respondents.

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

BRIEF OF PUBLIC CITIZEN, INC., AARP, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, U.S. PIRG, CONSUMER FEDERATION OF CALIFORNIA, CONGRESS OF CALIFORNIA SENIORS, AND PUBLIC HEALTH ADVOCACY INSTITUTE, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a private corporation engaged in marketing cigarettes is a "person acting under [a federal] officer" and is acting "under color of such office" for purposes of 28 U.S.C. § 1442(a)(1), entitling the corporation to remove to federal court a civil action brought in state court under state law, solely because the corporation's actions were influenced by federal regulatory authorities.

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INTEREST OF *AMICI CURIAE*

Public Citizen, Inc., AARP, the National Association of Consumer Advocates, U.S. PIRG, the Consumer Federation of California, the Congress of California Seniors, and the Public Health Advocacy Institute, Inc., submit this brief in support of the petitioners because the decision below directly implicates *amici*'s interests in defending the role of state courts in providing consumer remedies under state law.[1]

Public Citizen, Inc., is a consumer advocacy organization founded in 1971. On behalf of its approximately 100,000 members nationwide, Public Citizen appears before Congress, administrative agencies, and the courts on a wide range of issues and works toward enactment and effective enforcement of laws protecting consumers, workers, and the general public. Public Citizen is concerned with improving public health laws and regulations and ensuring access to the court system for the redress of injuries caused by unsafe and defective products. Public Citizen thus has an interest in litigation involving tobacco products, which have caused grievous illness and injury to so many people. Public Citizen also seeks to counter the misuse of removal and the defense of preemption, which defendants increasingly invoke to burden plaintiffs and escape liability.

AARP is a non-profit, nonpartisan organization with more than 36 million members. As the largest membership organization representing interests of Americans aged 50 and older, 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 is concerned that if allowed to stand, the Eighth Circuit's

[1] Letters of consent to the filing of this brief from all parties are on file with the Clerk. The brief was not authored in whole or part by counsel for a party. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

opinion will encourage other regulated products and entities (e.g., prescription drugs, long term care services, nursing homes, etc.) to claim the same entitlement not to be sued in state court that the court afforded Philip Morris, thereby 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 services, and substantially burdening an already overtaxed federal judiciary.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices.

U.S. PIRG, the federation of state PIRGs, is a national non-profit advocacy group. Its mission is to protect consumers, ordinary citizens, and our natural environment. It seeks to uncover threats to public health and well-being and fight to end them, using the tools of investigative research, media exposés, grassroots organizing, advocacy and litigation.

The Consumer Federation of California is non-profit consumer advocacy organization, established in 1960, for the purpose of enacting consumer protection laws and regulations, ensuring their enforcement and conducting education and research on consumer matters. CFC has filed amicus briefs in both state and federal courts in matters, such as this one, that relate to the protection of consumers.

The Congress of California Seniors (CCS) is a membership non-profit organization dedicated to protection of California's senior population through education and advocacy.

The Public Health Advocacy Institute, a 501(c)(3) non-profit organization founded in 1979 and located at Northeastern University School of Law in Boston, is devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law. Its primary area of research and scholarship focuses on legal strategies to reduce the adverse public health impact of tobacco industry products.

This case implicates *amici*'s concerns in several ways. The decision below places a roadblock 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 granting them the removal rights of federal officers sued for actions under color of government office. By treating a company subject to federal *regulation* as if it were a federal officer or agency, the Eighth Circuit's opinion will give rise to many more removal attempts as other companies—many subject to much greater federal regulation than the tobacco industry—seek to take advantage of this broad, judicially created expansion of the federal officer removal statute.

Amici believe a brief reflecting their perspective may assist the Court in reviewing the Eighth Circuit's novel ruling. In particular, it may be useful to the Court to consider arguments, not addressed by the court below, about the statutory requirement that the removing party be a "person" who is being sued for action "under color of [federal] office," and 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 regulation of other products and businesses by other federal agencies. Far from justifying a special status for cigarette companies as federal agents, the FTC's actions provide no basis for singling them out for special protections unavailable to other industries that are, in fact, 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. www.tngenweb.org/monroe/news3.txt.

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), this Court affirmed 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 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, the Philip Morris Companies, Inc., a corporation engaged in a purely private enterprise, has been sued for fraudulently misrepresenting the hazardous nature of one of its products—so-called "light" cigarettes. The statute's history provides no support for the notion that it was intended to protect private corporations, as opposed to natural persons acting on behalf of the federal government (or, under a recent amendment to the statute, federal agencies themselves).

In addition, there is no claim that, in promoting and selling its cigarettes, Philip Morris was exercising any government authority or carrying out any official function of the United States. Rather, the company's claim to removal, which was accepted by the Eighth Circuit, 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.

Finally, the Eighth Circuit's decision 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 in any way performed for the benefit of the federal government. The justification offered by the Eighth Circuit and parroted by Philip Morris—that the FTC's regulation of cigarette companies is so "unusual" 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. And any attempt to limit the effect of the ruling to Philip Morris and other cigarette companies (based on the supposed "uniqueness" of federal regulation of the industry) would result in an equally significant distortion of federal law: A special dispensation would be granted to the very industry whose claim to such indulgence is weakest.

ARGUMENT

I. The Corporate Defendants Are Not "Persons" Entitled To Invoke Federal Officer Removal.

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." As the *Davis* case illustrates, and as this Court held in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), the principal purpose of the removal statute was to protect *individual* federal officers, employees, and agents from prosecutions and lawsuits in unsympathetic state courts arising out of performance of their official duties. Philip Morris, as a corporation, falls well outside of the universe of intended beneficiaries of the statute and does not qualify as a "person" who may invoke removal under it. Although the Eighth Circuit followed the majority of courts in assuming that a corporation is a person under the statute, that issue has never been resolved by this Court, and several federal courts have concluded that the statute only applies to natural persons. *See Krangel v. Crown*, 791 F. Supp. 1436, 1442 (S.D. Cal. 1992); *C.H. v. American Red Cross*, 684 F. Supp. 1018, 1023-24 (E.D. Mo. 1987) ("person" in 1442(a)(1) refers to natural person); *Roche v. American Red Cross*, 680 F. Supp. 449, 455 (D. Mass.1988) (same); *Gensplit Fin. Corp. v. Foreign Credit Ins. Ass'n*, 616 F. Supp. 1504, 1508-10 (E.D. Wis. 1985) (same).

We emphasize that the Court need not reach this issue to reverse the Eighth Circuit here, because, as explained below, it is so clear that even if the Philip Morris Company qualifies as a "person," it is not here being sued for actions taken "under" a federal officer and "under color of [federal] office." However, the Court could not *affirm* the exercise of subject matter jurisdiction over this action without addressing this as-yet unresolved issue and deciding that the Philip Morris Company is a "person" under this statute.

The history of the removal statute, which was canvassed extensively by this Court in *Willingham,* 395 U.S. at 405-06, *Mesa*, 489 U.S. at 125-28, and *Primate Protection*, 500 U.S. at 85-86, shows an overwhelming concern for the protection of vulnerable individual officers and employees of the federal government against arrest or other interference by state authorities in the performance of their duties. *See also Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 941-44 (E.D.N.Y. 1992) (describing history of statute). As this Court put it in *Primate Protection*, addressing the statutory predecessors to § 1442(a)(1), "Congress expressly limited whatever removal power it conferred upon federal defendants to *individual officers*," and the Congress that enacted the current version of the statute in 1948 similarly determined "that *individual officers* … needed the protection of a federal forum in which to raise their federal defenses." 500 U.S. at 85, 86 (emphasis added). In the words of one federal district court:

> The series of enactments culminating in Section 1442(a) were initially designed to protect Federal revenue officers from prosecution or civil suit in State Court for violation of State law. … Subsequent amendments have, from time to time, enlarged the class of Federal officers and employees who might claim protection, but these additions left unchanged the basic theory and purpose of this removal privilege: that the officer was entitled to—and the interest of national supremacy required—his protection in actions brought against him which attacked and threatened him with personal liabilities or penalties.

New Jersey v. Moriarity, 268 F. Supp. 546, 555 (D.N.J. 1967) (footnote omitted).

Moreover, when read in context, the statutory language granting removal rights not only to an "officer," but also to a "person acting under his direction" does not reflect an intent to grant protection to corporations and other artificial entities.[2] Rather, it was apparently intended to protect federal employees and other individual agents who would not otherwise qualify as "officers of the United States," a term of art referring to officers who exercise significant authority. *See Primate Prot.*, 500 U.S. at 81 (noting limited scope of term "officers of the United States");[3] *see also Ryan*, 781 F. Supp. at 941 (noting that the need to protect "[s]ubordinate [customs] inspectors" was among the reasons for enactment of the first federal officer removal statute). Thus, the committee report accompanying the 1948 legislation that created § 1442(a)(1) in its current form explained that "[t]he revised subsection … is extended to apply to all officers and employees of the United States and any agency thereof." H.R. Rep. No. 80-308, at A134 (1947) (quoted in *Primate Protection*, 500 U.S. at 84). Nothing in the history of the statute as canvassed in the relevant judicial decisions suggests that Congress intended generally to benefit corporations, much less

[2] The Dictionary Act, codified in its current form at 1 U.S.C. § 1, provides that "unless the context indicates otherwise," the word person includes corporations and other impersonal private entities. Here, as explained below, the context does indicate otherwise. *Cf. Adams v. United States*, 420 F.3d 1049 (9th Cir. 2005) (context of Federal Tort Claims Act indicates that "persons acting on behalf of a federal agency in an official capacity" in 28 U.S.C. § 2671 includes only natural persons). In addition, the use of the term "person" in the federal officer removal statute long predates the first enactment of the Dictionary Act in 1871 and could not possibly have been informed by the Act. *See Lippoldt v. Cole*, 468 F.3d 1204, 1215 (10th Cir. 2006) (holding that Dictionary Act does not assist in determining congressional intent in statutes predating its enactment).

[3] Indeed, *Primate Protection* suggests that the 1948 enacting Congress may have even had a more limited definition of "officer of the United States" in mind, *see* 500 U.S. at 81, because at that time it was not clear that the phrase encompassed officers of certain independent agencies. Thus, it was all the more essential to add the word "person" to ensure coverage of employees and agents of independent agencies.

those whose only qualification for "officer" status is that they are regulated by (or doing business with) the government.

Although this 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 the term "officer … or person acting under him" did not apply even to federal agencies. 500 U.S. at 82-84. In so holding, the Court emphasized that Congress had limited the statute to "individual federal officers" (as opposed to agencies) because it was individual federal officers and employers who were being prosecuted and sued in state courts, and whom Congress wanted to protect from such actions. *Id.* at 85. The Court further reasoned that "individual federal officers" had a greater need for "the protection of a federal forum in which to raise their federal defenses." *Id.* at 86. The Court's reasoning strongly suggests that corporations, like agencies, fall outside the concerns that led Congress to provide protection for vulnerable individuals against potentially hostile state courts.[4]

Following *Primate Protection*, Congress amended § 1442(a)(1) to permit the United States and federal agencies, in addition to federal officers and persons acting under them, to invoke removal. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850. Although one court has suggested that "Congress's amendment of the statute to emphasize its broad scope supports the conclusion that 'person' encompasses more than mere individuals," *In re "Agent Orange," Product Liability Litigation*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004), the way Congress amended the statute in fact supports exactly the opposite in-

[4] *Cf. Mignona v. Sair Aviation, Inc.*, 937 F.2d 37, 41 (2d Cir. 1991) (holding, in the aftermath of *Primate Protection*, that a nonappropriated fund instrumentality of the federal government was not entitled to remove cases against it, because, as "an impersonal entity, [it] is not an 'officer' of the United States").

ference. Congress did *not* bring agencies within the ambit of the statute by changing the definition of "person," which the Court in *Primate Protection* had held did not encompass them. Rather, Congress left in place the statutory protection for officers and persons acting under them, and added the United States and federal agencies as a *separate category* of entities that could invoke the statute. Nothing in Congress's changes to the statute reflects a broader intent to alter, let alone expand, the definition of "person" or to benefit non-human entities other than the United States and its agencies.

Thus, if the statute applies to corporations because they are "persons," it must also have done so before 1996, when actual agencies of the United States were held by this Court to be prohibited from invoking the statute—an incongruous result, to say the least. In short, the history of the statute contains no suggestion that Congress intended to grant to corporations and other non-human entities an entitlement that, until 1996, was not even available to the government's own agencies; and the 1996 amendment of the statute in no way indicates that in extending that entitlement to agencies, Congress also gave it to corporations.

II. A Private Business, Even If Subject to Federal Regulation, Does Not Act "Under" a Federal Officer or Perform "Any Act Under Color of Such Office" When It Is Not Enforcing or Executing Federal Law.

On its face, the federal officer removal statute requires not only that the *actor* who is sued be a government officer or person acting directly under an officer, but also that the *action* for which the defendant is sued be an official one—that is, an act "under color of such office." The under-color-of-office requirement is a critical limitation of the statute, integral to 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); *see* *also Arizona v. Manypenny*, 451 U.S. at 241 ("[R]emoval 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).

The Court emphasized this critical limitation in two of its leading decisions applying the statute, *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), and *Maryland v. Soper (No. 2)*, 270 U.S. 36 (1926). The *Soper* cases, like *Davis*, arose from the efforts of federal revenue agents to break up an illegal still, this one near the hamlet of Madonna, Maryland. After a futile pursuit of a group of moonshiners, the agents destroyed the still and, as they left the site, found a mortally wounded man lying beside a path. Although they claimed not to know how the man had been killed, the agents (and their chauffeur) were arrested by the local sheriff and indicted for murder and conspiracy to obstruct justice by falsely denying any knowledge of the circumstances leading to the victim's death. The officers invoked the predecessor to § 1442(a)(1) to remove the prosecutions to the U.S. District Court for the District of Maryland, which denied a motion to remand. This Court reversed as to both the murder and conspiracy prosecutions.

In *Soper (No. 1)*, addressing the murder prosecution, the Court held that the defendants' removal petition was deficient because it failed to explain in any manner how the alleged murder constituted an action "under color of … office" other than that the death occurred during a time when the agents were engaged in performing their duty of enforcing the prohibition laws. 270 U.S. at 35. The Court emphasized that the statute required more:

> The [action] to be removed under the section must have been instituted "on account of" acts done by the defendant *as a federal officer under color of his office* …. There must be causal connection between *what the officer has done under asserted federal authority* and the state prosecution. It must appear that the prosecution of

> him for whatever offense has arisen out of the acts done by him *under color of federal authority and in enforcement of federal law* ….

Id. at 33 (emphasis added). Because the defendants' petition did not state that "whatever was done by them leading to the prosecution was done under color of their federal official duty," and thus left open the possibility that they were being prosecuted for a murder *not* committed under color of federal authority, *id.* at 35, the Court found that, unless the petition could be amended to rectify this deficiency, the case must be remanded.

Having so held with respect to the murder charges, the Court in *Soper (No. 2)* made even shorter shrift of the claim that the prosecution for conspiracy to obstruct justice was removable. The Court held that the defendants' responses to the criminal investigation by state authorities were not "acts under federal authority" because they were not "closely connected with, and included in, the attempted enforcement of the federal law," nor were the officers acting "in performance of their duty as officers of the United States" when they gave the allegedly false evidence. 270 U.S. at 43. Because the prosecution was not for "acts done by these defendants solely in pursuance of their federal authority," the Court held that a "fair construction" of the statute did not permit removal. *Id.* at 44.[5]

Similarly, in *Gay v. Ruff*, 292 U.S. 25 (1934), the Court enforced the limit placed on removal by the statute's requirement that an action be based on acts "under color of office." *Gay* concerned a 1916 amendment to the statute that provided that any "officer of the courts of the United States" could remove an action brought against him "for or on ac-

[5] In a third case, *Maryland v. Soper (No. 3)*, 270 U.S. 44 (1926), the Court also applied *Soper (No. 2)* to require remand of a perjury prosecution against one of the defendants.

count of any act done under color of his office or in the performance of his duties as such officer." *Id.* at 27.[6] The removed action was a lawsuit brought against the receiver of a railroad (who had been appointed by and was an officer of a federal court) alleging that the railroad's negligence had resulted in the death of the plaintiff's son. Emphasizing that the statute's purpose was to protect officers engaged in the enforcement of federal law and not to produce a wholesale expansion of federal jurisdiction over otherwise non-federal claims, *see id.* at 31-35, Justice Brandeis' opinion held that the claim must be remanded to state court, and rested its holding squarely on the "under color of office" requirement: "A suit for damages for an injury resulting from negligent operation of a train is not, within the meaning of [the federal officer removal statute], a suit 'for or on account of any act done under color of his (the receiver's) office.'" *Id.* at 39.

For precisely the same reason, a suit predicated on injuries resulting from Philip Morris's design, marketing and sale of so-called "light" cigarettes is not brought "for any act under color of [federal] office" within the meaning of § 1442(a)(1). As Philip Morris itself has successfully argued elsewhere, whatever selling cigarettes may be, it is not an activity performed *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 its actions "under color of federal law" for purposes of a *Bivens* action). And *Soper (No. 2)* leaves no doubt that misleading the public as to the health risks associated with "light" cigarettes falls well outside the furthest possible bounds of action under color of federal office.

Nor can Philip Morris's purely self-interested private conduct be brought within the realm of action "under color of

[6] The provision is now codified at 28 U.S.C. § 1442(a)(3).

office" by the federal regulation to which it was (supposedly) subject. This 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); *see also 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").[7]

Indeed, this Court's precedents suggest that, if anything, the phrase "under color of such office" in the removal statute is even more limited than the "under color of law," which is used in 42 U.S.C. § 1983 and elsewhere to describe conduct that qualifies as government action for constitutional purposes. Thus, under § 1983, action "under color of law" includes action "under pretense of law," but, as the *Soper* holdings illustrate, the under color of office requirement in the removal statute requires an exercise of authority actually conferred by office. *See Screws v. United States*, 325 U.S. 91, 111-12 (1945) (opinion of Douglas, J.). A fortiori, if regula-

[7] Similarly, that a business is operating under government contracts whose specifications it must meet does not transform its conduct into government action. As this Court has stated, "many private corporations['] … business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982).

tory 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). There is all the difference in the world between merely *complying* with federal regulations and stepping into the shoes of a federal regulator acting under color of his office. As one early decision under the removal statute put it:

> The purpose of the statute is to protect the revenue officers of the government in the line of their official duties, and those who are employed to act under them in the performance of such duties; but, further than providing this necessary protection to the administration of its revenues, the federal government has no interest in the business affairs of the people incidentally brought within the range of the tariff system.

Johnson v. Wells Fargo & Co., 98 F. 3, 8 (C.C. Cal. 1899).[8]

Rather, removal of suits based on actions taken by federal officers or their subordinates under color of office must be limited to cases where the removing 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); *see also Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (a defendant invoking the removal statute must be so "intimately involved with government functions as to occupy essentially the position of an employee");

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[8] In *Johnson*, the plaintiff sued Wells Fargo, a common carrier, for refusing to deliver a package for which the plaintiff had refused to purchase a one-cent stamp that federal law required Wells Fargo to affix to each item shipped. Wells Fargo removed the case to federal court, arguing that in requiring the purchase of the stamp, it was acting under the direction of a federal revenue officer. The federal court rejected Wells Fargo's argument that its mere compliance with the federal regulatory requirement made its action one under color of federal office.

Brown & Williamson Tobacco Corp. v. Wigand, 913 F. Supp. 530, 533 (W.D. Ky. 1996) (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 thus excludes from the coverage of the statute entities that are merely conducting their own private business under regulatory or other requirements imposed by the federal government. *See Virden*, 304 F. Supp. 2d at 844-45 (citing cases). Philip Morris's conduct in marketing "light" cigarettes was not in any way performed on behalf of the federal government or as an exercise of its authority; hence it was not action "under color of [federal] office."

The intrinsically private nature of Philip Morris's conduct no doubt explains why Philip Morris discovered that it was "acting under" a federal officer so late in the game (particularly in light of the company's assertion that there is a long and unique history of federal regulation of its activities). The first reported decision in a case where a cigarette company claimed federal officer removal 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 some of Philip Morris's attempted removals on this ground have recently been held untimely. *Craft v. Philip Morris Companies, Inc.*, 2006 WL 744415 (E.D. Mo. Mar. 17, 2006). And as noted above, when it suited Philip Morris's interests in other litigation, the company steadfastly denied that its actions could be equated to those of a government officer acting under color of law. *See*

Brown v. Philip Morris, 250 F.3d at 801. Philip Morris was right then; it is wrong now.[9]

III. The FTC's "Regulation" of Cigarettes Has Never Been Uniquely or Even Unusually Extensive.

Recognizing that "mere participation in a regulated industry is insufficient" to support removal, Br. in Opp. 14, Philip Morris has attempted to defend the Eighth Circuit's decision on the ground that the regulation to which it was subject was so "unusual" and even "unique" as to differentiate Philip Morris from other regulated businesses and justify a special removal rule for tobacco cases. Br. in Opp. 10. But if regulation is not enough to transform a private enterprise's conduct of its business into action "under color of federal office," it does not matter whether that regulation is more or less extensive. And in any event, the Eighth Circuit's characterization of the regulation of cigarette companies as "unprecedented," on which Philip Morris relies, Br. in Opp. 18, is baseless. Left standing, the decision below 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 an unprincipled special rule benefiting only the tobacco industry.

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

Philip Morris, echoing the Eighth Circuit's opinion, is long on adjectives characterizing the supposedly extensive regulation to which it was subjected by the FTC. *See* Br. in

[9] Indeed, accepting the company's belated characterization of regulated business activity as action "under color of office" would, especially if extended to other industries, render legal battles that have raged in recent years over other grounds for removal such as "complete preemption" largely beside the point as regulated industries rushed to invoke this new basis for federal jurisdiction. *See infra* pp. 19-27.

Opp. 3-6. The undisputed, public-record facts, however, fall far short of justifying those characterizations. The critical points are:

- First, and 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, or compelled it to call its cigarettes "lights," 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.
- The United States is currently 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*, 263 F. Supp. 2d 72, 81 (D.D.C. 2003) (emphasis added).
- 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 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. 48,158 (Sept. 12, 1997).

- 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 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 Philip Morris, following the Eighth Circuit's lead, insists that the FTC "'formally defined' 'low tar' cigarettes as those measuring 15 milligrams or less in tar according to the FTC Method," Br. in Opp. 5, neither Philip Morris nor the court below can cite any FTC regulation or other "formal" action of the Commission embodying such a definition. As the Commission 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 industry to reflect ranges of FTC tar ratings." FTC, *Cigarette Testing: Request for Public Comment*, 62 Fed. Reg. at 48,163 (emphasis added).
- The most that can be said is that the FTC at one point followed an *informal* enforcement policy of not taking action against cigarette companies that advertised cigarettes as "light" or "low tar" based on test results using the Cambridge method; but as Philip Morris itself acknowledges, the Commission has more recently begun

an investigation, as yet unresolved, of whether such advertising is deceptive. Br. in Opp. 6.

B. Other Industries Face Much More Extensive, Specific, and Formal Regulation than Do Cigarette Manufacturers Such as Philip Morris.

The "regulation" of cigarette testing and advertising by the FTC—which, as explained above, is virtually non-existent—is by no means "unique," "extraordinary" or "unusual" in its intrusiveness. 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 as it did with cigarettes (Br. in Opp. 18), 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 Food and Drug Administration's regulation of drugs and medical devices demonstrates the fallacy of the argument that the FTC's actions concerning cigarettes constituted an unusually extensive regulatory scheme. Unlike cigarette makers, drug and medical device manufacturers must comply with detailed, legally enforceable federal standards governing the approval and marketing of new drugs and medical devices. Once approved, drugs and devices are subject to formal regulations that incorporate the formulation and design originally developed by the manufacturer, as well as the precise contents of their labels; other regulations address manufacturing practices to which their makers must conform. *See generally Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). The FDA's manufacturing standards specify how drug and device manufacturers must audit and inspect their manufacturing facilities (*see, e.g.*, 21 C.F.R. Part 820), and the agency itself conducts inspections of manufacturing facilities pursuant to its statutory authority under 21 U.S.C. § 374(a). 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 directly regulates product design and production.

In some cases, FDA regulations 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 unique. 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, 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.

Foods, in sharp contrast to cigarettes, are subject to significant, mandatory federal regulation. Food additives (unlike cigarette ingredients) are subject to detailed federal regulations, which require formal FDA approval of the use of any additive not generally recognized as safe. *See* 21 C.F.R. Parts 170, 171. Manufacturers seeking approval of a food additive must provide detailed scientific information supporting the claim that it is safe for human consumption. *See* 21 C.F.R. 171.1. Food packages (unlike cigarette packages) must list their ingredients, provide nutritional information and comply with other mandatory labeling requirements. *See* 21 C.F.R. Part 101. And federal agencies, including the FDA and the Agriculture Department's Food Safety and Inspection Service, conduct mandatory, not voluntary, inspection and testing programs to determine the safety of meat, poultry, eggs, seafood, and other food products. And unlike cigarettes, foods are subject to seizure by federal authorities if testing or inspection reveals them to be adulterated. *See generally* www.fsis.usda.gov/Fact_Sheets/FSIS_Food_Recalls/index.asp.

Such detailed and compulsory federal regulatory schemes are by no means confined to the food, drug, and medical device industries. 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 far more extensive than the FTC's, are carried out under a specific statutory mandate, 49 U.S.C. § 30168, not pursuant to voluntary agreements or informally adopted policies.

Moreover, unlike the FTC, NHTSA does more than 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. Typically, FMVSSs not only define what safety features manufacturers are required to install in vehicles and what standards of protection they must provide, but they also specify 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 automobile industry is *required by law* to meet.[10]

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.

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[10] By contrast, although the FTC opened a cigarette testing laboratory using the Cambridge Filter Method in 1967, *see* FTC, *Cigarettes: Testing for Tar and Nicotine Content*, 32 Fed. Reg. 11,178 (1967), that laboratory was closed in 1987 when most testing of tar and nicotine levels was turned over to a private laboratory funded by the tobacco companies themselves. *See* 62 Fed. Reg. 48,158 n.5.

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 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 the testing must be conducted (including eight pages of engineering drawings describing the test chamber), what records the manufacturer must keep, the Commission's enforcement policy, the role of the Commission itself 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).

Financial institutions also operate under detailed federal regulatory regimes. Agencies such as the Federal Reserve, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision extensively supervise the activities of banks and savings associations.[11] Federal regulation of these institutions involves not only the promulgation of mandatory standards governing their soundness and the types of activities they may undertake, but also examination of banks by federal officers. Unlike cigarette testing, bank examination is carried out directly by the responsible federal agencies, and it is mandatory, not voluntary. And findings made by bank examiners may lead to consequences far more drastic than anything associated with the FTC's limited tar and nicotine testing regime, including removal of the financial institution's management, placement into federal receivership, and liquidation.

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. 10,100 (Feb. 28, 2006), not only prescribes a precise 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 10,375. In addition to requiring employers to monitor their compliance

[11] An overview of federal financial institution regulation and the roles of the various agencies involved may be found at www.federalreserve.gov/pf/pdf/pf_5.pdf.

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. No one who understood federal regulation could possibly credit Philip Morris's (and the Eighth Circuit's) view that the "regulation" of cigarette companies by the FTC is "uniquely," "extraordinarily," or even "unusually" extensive. When compared to most other modern regulatory regimes, just the opposite is true.

C. Whether Broadly or Narrowly Applied, the Eighth Circuit's Ruling Will 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, affirmance of the Eighth Circuit's ruling would likely lead other regulated businesses who are sued by consumers injured by their products 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*, 428 F. Supp. 2d 1226 (M.D. Ala. 2006).

The range of state-law tort actions potentially subject to claims of removal is virtually unlimited, but the regulations described above provide a number of illustrations, including:

- Actions against manufacturers of drugs and medical devices alleging design or manufacturing defects or failure to disclose risks associated with use of the products;
- Actions against automobile manufacturers alleging defective design, manufacture or testing of safety equipment;
- Consumer fraud actions involving improper disclosure of energy consumption figures for vehicles and other consumer products;
- Personal injury actions against manufacturers or sellers of virtually any product subject to regulation by the CPSC;
- Actions by consumers sickened or injured by contaminated or unsafe foods or food additivies;
- Consumer fraud actions based on misleading labeling of the contents or nutritional qualities of foods;
- Consumer or commercial fraud actions involving bank transactions.

Thus, if this Court were to leave the Eighth Circuit's decision intact, a number of undesirable consequences would be likely. Courts that conscientiously applied the principle that regulation, if extensive enough, can justify removal, and that undertook a serious comparison of the degree of regulation faced by defendants in other industries with that faced by cigarette companies, might allow a broad range of defendants to remove cases under § 1442(a)(1), dramatically expanding the scope of federal removal jurisdiction in a manner having nothing to do with the statute's purpose of protecting federal officers in the performance of their official duties.

Alternatively, it is possible that this Court, or lower courts, might grasp at the lifeline offered by the Eighth Circuit's characterization of the Philip Morris case as "unique," "unusual," "extraordinary," and "unprecedented," and use it to reject removal by defendants outside the cigarette industry even though, in reality, they face regulations much more extensive than cigarette companies. But even if courts declined to extend removal to other industries, much time and effort would be expended litigating meritless removals. And, at the end of the day, the cigarette companies would be left with a special benefit not available to other more heavily regulated industries. A decision resulting in an unprincipled exception to ordinary jurisdictional rules for the benefit of a single industry should not be allowed to stand by this Court.

CONCLUSION

For the reasons stated above, and by the petitioner, the Eighth Circuit's decision should be reversed, and the case remanded with directions that it be remanded to the state court in which it was filed.

Respectfully submitted,

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