NO. _____

IN THE

Supreme Court of the United States

STEPHEN BUSCH, ET AL., *Petitioners*,

v.

TAMARA NAPPIER, ET AL., *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

CHARLES E. BARBIERI
ALLISON M. COLLINS
FOSTER, SWIFT, COLLINS & SMITH
313 S. Washington Square
Lansing, MI 48933
(517) 371-8155
CBarbieri@fosterswift.com
Counsel for Petitioners Cook & Prysby

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley Avenue SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com
Counsel for Petitioners Cook, Busch, Prysby, Shekter Smith, Wurfel & Wyant

(Additional counsel on inside cover)

MICHAEL JOHN PATTWELL
JAY M. BERGER
CHRISTOPHER B. CLARE
CLARK HILL PLC
500 Woodward Ave.
Suite 3500
Detroit, MI 48226
(517) 318-3043
mpattwell@clarkhill.com
Counsel for Petitioners
Wurfel & Wyant

PHILIP A. GRASHOFF, JR.
DENNIS K. EGAN
KRISTA A. JACKSON
KOTZ SANGSTER WYSOCKI
36700 Woodward Ave.
Suite 300
Bloomfield Hills, MI 48304
(248) 646-2073
pgrashoff@kotzsangster.com
Counsel for Petitioner
Busch

THADDEUS E. MORGAN
FRASER TREBILCOCK
124 W. Allegan Street
Suite 1000
Lansing, MI 48933
(517) 377-0877
tmorgan@fraserlawfirm.com
Counsel for Petitioner
Shekter Smith

QUESTIONS PRESENTED

1. Whether, in the context of a facial challenge to a federal-officer removal, a court resolves all doubts against removal and in favor of remand, as the Sixth Circuit has held, or instead accepts the removal notice's allegations as true and resolves all doubts in favor of federal jurisdiction, as held by the Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits.

2. Whether federal-officer removal is appropriate when an individual has performed duties a federal agency or officer would otherwise have to perform absent a delegation of authority, as the Third, Fifth, Seventh, and Eleventh Circuits have held, or whether the performance of such duties is merely a factor in the jurisdictional analysis, as the Sixth Circuit has held.

PARTIES TO THE PROCEEDING

Petitioners are Defendants Patrick Cook, Michael Prysby, Stephen Busch, Liane Shekter Smith, Daniel Wyant, and Bradley Wurfel.[1]

Respondents are Plaintiff Tamara Nappier, as mother and next friend of Takarie Nappier, a minor child, on behalf of a class of all others similarly situated.

Additional Defendants (but not Petitioners) are Richard Snyder, Darnell Earley, Gerald Ambrose, Eden Wells, Nick Lyon, Nancy Peeler, and Robert Scott.

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[1] On April 19, 2018, Defendants Wyant, Wurfel, and Shekter Smith were voluntarily dismissed with prejudice from this matter. But these Defendants remain parties to this request for certiorari, as they will be subject to any law developed from this case in related cases bound by the Sixth Circuit's erroneous removal jurisprudence.

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The opinion of the United States Court of Appeals for the Sixth Circuit, App. 1a–8a, is not reported but is available at 2018 WL 1791909. The opinion of the United States District Court for the Western District of Michigan, App. 9a–24a, is not reported but is available at 2017 WL 1190549. The controlling Sixth Circuit decision in *Mays* v. *Cook* is available at 871 F.3d 437.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1442 states, in relevant part:

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending (1) The United States or any agency thereof or any officer (*or any person acting under that officer*) of the United States or of any agency thereof, in an official or individual capacity, *for or relating to any act under color of such office*. [Emphasis added.]

INTRODUCTION

This petition raises two questions of recurring importance related to the standard that applies when district courts evaluate a notice of removal based on federal-officer status under 28 U.S.C. § 1442. In rejecting Petitioners' removal here, the Sixth Circuit panel followed its precedent in *Mays* v. *Cook*, 871 F.3d 437 (6th Cir. 2017), and (1) did not accept as true the allegations stated in the notice of removal, and (2) resolved all doubts in favor of remand, rather than in favor of federal jurisdiction. As Judge McKeague's *Mays* dissent explained, the Sixth Circuit's rule conflicts with previous decisions of this Court and those of six (actually seven) other circuits. This Court's review is necessary to maintain consistency among the lower courts.

The Sixth Circuit panel majority's opinion also created a second conflict by holding that it is a necessary but insufficient basis for federal jurisdiction that the removing officers were performing duties that a federal agency or officer would otherwise have had to perform absent a delegation of authority. This holding misinterprets *Watson* v. *Philip Morris Co.*, 551 U.S. 142, 150–51 (2007), and itself conflicts with four other circuits.

The need for this Court's immediate intervention is stark. The Sixth Circuit's erroneous removal jurisprudence is being applied in numerous other cases where state personnel acted at the direction of federal agencies. And whereas the *Mays* case had a vehicle defect that likely prevented this Court's review (the district courts alternatively had jurisdiction under the Class Action Fairness Act), this petition does not. Accordingly, certiorari is warranted.

STATEMENT

A. Overview of the case and the Safe Drinking Water Act

This case arises from the City of Flint's decision to switch its drinking water source to the Flint River, a change that allegedly resulted in drinking water becoming inadvertently tainted with lead leached from City and homeowner pipes. Petitioners are current or former employees of the Michigan Department of Environmental Quality (MDEQ), a state agency that stands in the EPA's shoes for the purpose of enforcing the federal Safe Drinking Water Act (SDWA) in Michigan.

Congress passed the SDWA to establish comprehensive federal regulations governing drinking water. 42 U.S.C. §§ 300f *et seq*. The SDWA's legislative history shows Congress intended the Act to "(1) establish Federal standards for protection from all harmful contaminants, which standards would be applicable to all public water systems, and (2) establish a joint Federal-State system for assuring compliance with these standards." H.R. Report No. 93-1185, at 1 (1974); accord Pub. L. No. 93-266, 88 Stat. 1660 (1974). In sum, the EPA "provides guidance, assistance, and public information about drinking water, collects drinking water data, and *oversees state drinking water programs*."[2]

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[2] EPA, Understanding the Safe Drinking Water Act, p. 2, available at https://goo.gl/U9fcR5 (emphasis added).

The SDWA tasks the Administrator of the U.S. Environmental Protection Agency with establishing national drinking water regulations for public water systems, which govern the quantity of contaminants that may be present in public drinking water. 42 U.S.C. § 300g-1. Accordingly, the EPA has promulgated comprehensive SDWA regulations to govern safe drinking water, addressing various microorganisms, disinfectants or disinfection byproducts, inorganic chemicals (including lead), organic chemicals, and radionuclides.[3]

To accomplish this massive federal objective,[4] the SDWA allows the EPA to delegate enforcement and administrative authority to state agencies, provided the state agency demonstrates that it has: (i) adopted drinking water regulations no less stringent than the National Primary Drinking Water regulations promulgated by the EPA; (ii) implemented adequate provisions for enforcing SDWA regulations, including such monitoring and inspections required by the EPA; and (iii) developed a program to issue certain required reports and keep relevant records. See 42 U.S.C. § 300g-2; 40 C.F.R. §§ 142.10–.11. The EPA retains control over state programs for monitoring and enforcing drinking water quality, including lead-level standards; can audit state drinking water programs and issue orders directing specific actions, as necessary; and can withdraw a state's primacy

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[3] See https://goo.gl/DGAA9Z.

[4] The systems regulated by the EPA and delegated states and tribes provide drinking water to 90% of Americans. See https://goo.gl/U4V4Pc.

designation to enforce the federal regulatory scheme. 40 C.F.R. §§ 142.15, 142.17(a)(2), 142.19, 142.30.

The EPA granted Michigan primary enforcement authority following the enactment of the Michigan Safe Drinking Water Act, Act 399 of 1976 (Act 399). Under this delegation, Petitioners regulated, monitored, and enforced the federal SDWA and its Lead and Copper Rule in Flint, Michigan, which serve as the basis of Plaintiffs' claims. As the Sixth Circuit recognized in *Mays* v. *Cook*, 871 F.3d 437 (6th Cir. 2017), the EPA funds the MDEQ's activities in enforcing the SDWA, *id.* at 444, and if the MDEQ did not enforce the SDWA, then the EPA would have to step in and do so, *id.*

B. Proceedings and allegations in notice of removal

Plaintiffs filed a class-action lawsuit in the Michigan Court of Claims on March 23, 2016, asserting a single substantive count of gross negligence and/or negligence against all Defendants. App. 9a. On May 31, 2016, Petitioner Stephen Busch filed a Notice of Removal alleging that, among other things, removal was proper under 28 U.S.C. § 1442(a)(1), the federal-officer removal statute. *Id.* The other Petitioners consented and joined in Busch's removal, as the same bases for federal jurisdiction was applicable to each one of them.

Busch alleged that as an MDEQ employee, he was being sued for purported negligence or gross negligence in his alleged decision-making, public notifications, and oversight of the City of Flint's monitoring, testing, and treatment of Flint's drinking water under the SDWA and the EPA's Lead and

Copper Rule (LCR). Notice of Removal, RE 1, ¶ 4, PgID 2. More specifically, Busch alleged:

- That his authority to regulate Michigan's public drinking water systems derived from the SDWA, LCR, and other EPA regulations, and his actual regulation occurred under the EPA's direction, control, and close supervision. Notice of Removal, RE 1, ¶ 14, PgID 4.
- That he is being sued for allegedly failing to adhere to federal law, due to his lack of compliance with the SDWA and LCR's detailed monitoring, testing, sampling, and notification requirements in overseeing the Flint water system, as administered by the MDEQ under the EPA's direction and control. *Id.* ¶ 27, PgID 7–8.
- That Plaintiffs' Complaint contains allegations that Busch owed duties to Plaintiffs based on the SDWA and LCR standards, the breach of which gave rise to Plaintiffs' causes of action. *Id.* ¶ 38, PgID 10.
- That Plaintiffs' claims are inextricably intertwined with the construction, interpretation, and effect of the SDWA and the LCR. If Busch establishes that these federal laws and regulations were not violated, Plaintiffs' claims against him fail. *Id.* ¶ 39, PgID 11–12.
- That Busch is being sued for carrying out the EPA's duty, as delegated to the MDEQ, to enforce the SDWA and LCR and ensure that public water systems such as Flint's comply with the SDWA and LCR. *Id.* ¶ 40, PgID 11.

- That the SDWA reserves tremendous oversight authority to the EPA, including mandatory EPA intervention in the form of notifications, advice, technical assistance, and enforceable orders and inspections. *Id.* ¶ 20, PgID 5.
- That the MDEQ functions as an agent of the EPA to implement the SDWA and LCR. The MDEQ entered into an agreement with the EPA to assure compliance with the SDWA and LCR, has the authority to investigate whether federal law has been violated, and enforces the SDWA and LCR by issuing violations to public water systems. *Id.* ¶ 29, PgID 8.
- And that Busch was the EPA's agent, acting under the EPA's direction and control to assist with implementing and enforcing the federal SDWA and LCR. Furthermore, Busch's alleged actions and inactions in this case were not only taken pursuant to the EPA's LCR, guidance documents, training manuals, and quarterly and annual reviews, but they were also guided by repeated written and verbal dialogue with EPA officers who advised and oversaw the Defendants' regulation of the Flint water system. *Id.* ¶ 30, PgID 8.

If all of the allegations in the Notice of Removal are accepted as true, there is no real question that Busch and the other Petitioners who joined in his Notice of Removal have invoked federal jurisdiction as federal officers under § 1442.

C. The district court's decision

The district court received supplemental authority regarding a remand decision of the United States District Court for the Eastern District of Michigan in *Mays* v. *City of Flint*, No. 5:15-cv-11519-JCO-MKM, and based on that opinion questioned jurisdiction over this case. App. 3a. In *Mays* the District Court for the Eastern District of Michigan remanded a nearly identical case that had also been removed by MDEQ Defendants. *Id.* The district court believed that *Mays* was correctly decided, App. 19a, and it declined to accept the allegations in the Notice of Removal as true. The district court said that Busch and the other MDEQ Defendants "were not 'acting under' the EPA at all." App. 21a. "Such remains true notwithstanding that the MDEQ Defendants consulted and interacted extensively with the EPA when water quality issues arose after the switch to the Flint River." *Id.*

D. The Sixth Circuit's decision below and in *Mays* v. *Cook*

Petitioners appealed. While the case was pending, the Sixth Circuit affirmed the decision in *Mays* 2-1, with the majority and dissent reaching diametrically opposed conclusions about the legal standard to apply when evaluating the propriety of federal-officer removal. Because the reasoning and holding in *Mays* ultimately dictated the outcome for the Sixth Circuit panel in the present case, Petitioners will begin with a more detailed explanation of what transpired in *Mays*.

The *Mays* panel majority began with the rule that "removal statutes are to be strictly construed, and 'all doubts should be resolved against removal.'"

871 F.3d at 442 (quoting *Harnden* v. *Jayco, Inc.*, 496 F.3d 579, 581 (6th Cir. 2007), and citing *Eastman* v. *Marine Mech. Corp.*, 438 F.3d 544, 550 (6th Cir. 2006)). Reviewing this Court's analysis of the federal-officer removal statute in *Watson* v. *Philip Morris Cos.*, 551 U.S. 142 (2007), the panel majority acknowledged that a factor supporting removal jurisdiction was the reality that the "EPA would have to enforce the SDWA in Michigan if the MDEQ did not have primary enforcement authority to do so." 871 F.3d at 444. But the majority interpreted *Watson* "as requiring more." *Id.* Specifically, said the majority, Petitioners have to show that they were "in a relationship with the federal government where the government [wa]s functioning as [their] superior." *Id.*

Applying that test, the majority said that the EPA's funding of the MDEQ as primary SDWA enforcer is insufficient to establish a delegation of legal authority. *Id.* at 444–45. And, like the district court, the majority found dispositive the lack of any contract with the federal government. *Id.* at 445–46 (citing *Ohio State Chiropractic Ass'n* v. *Humana Health Plan Inc.*, 647 F. App'x 619, 623–24 (6th Cir. 2016), for the proposition that "the absence of language allowing a private entity to act on the federal government's behalf weighs against allowing federal-officer removal").

The *Mays* panel majority also opined that the policy underlying the federal-officer removal statute—protection from local prejudice against unpopular federal laws or federal officials—did not come into play in this instance. *Id.* at 448. The majority so concluded despite allegations that the

MDEQ Defendants' enforcement of the SDWA and LCR was the crux of the case, including that, per the EPA, the LCR was ambiguous as applied to Flint's primary water source switch. *Mays* Notice of Removal, RE 1, ¶¶ 32, 38, 40, 44.

Judge McKeague dissented sharply, criticizing the majority for having started with the wrong legal framework. "The majority relies on a general rule favoring resolution of doubts against removal. But in *this* context, our precedents require us to resolve doubts in favor of the party or parties invoking federal jurisdiction." 871 F.3d at 450 (McKeague, J., dissenting). For its starting point, said Judge McKeague, the majority relied on *Harnden* and *Eastman*, which both involved a traditional removal action under 28 U.S.C. § 1441. *Id.* at 454–55. "The federal officer removal statute, however, is a different animal. The fundamental basis for removal under this statute is the *status* of the defendant as a federal officer or one acting under a federal officer." *Id.* at 454. Unlike a traditional removal action, this "status would ordinarily be set forth in the defendant's notice of removal, not in the plaintiff's complaint. It is for this reason, ostensibly, that 'doubts' arising under a facial attack on federal officer removal are to be resolved *in favor of* removal." *Id.* (emphasis added).

The *Mays* MDEQ Defendants, Judge McKeague noted, contended they were acting under the direction or instruction or guidance or control of the EPA, and their notice of removal "is replete with detailed allegations tending to substantiate their position." *Id.* at 454. Thus, the court should assume jurisdiction unless the alleged basis for jurisdiction is

"clearly immaterial or insubstantial." *Id.* at 455 (quoting *Williamson* v. *Tucker*, 645 F.2d 404, 415–16 (5th Cir. 1981)). "The lengths to which the majority opinion goes to explain why defendants' allegations are colorable but not persuasive . . . belie any notion that defendants' allegations are 'clearly immaterial or insubstantial.'" *Id.*

In sum, said Judge McKeague, the "allegations of the notice of removal . . . , on their face, aver that plaintiffs' 'garden variety state law tort action' is premised on alleged violations of duties stemming from federal standards established by the SDWA and the LCR—standards the MDEQ defendants were charged with monitoring and enforcing by virtue of the EPA's delegation of authority to them." *Id.* at 453. Judge McKeague would have reversed the district court and remanded for proceedings on the merits in the district court. *Id.* at 455.

The Sixth Circuit's decision in the present case was dictated entirely by *Mays*. After quoting § 1442 and summarizing the MDEQ Defendants' removal arguments, the panel simply noted that *Mays* was controlling and "legally indistinguishable." App. 6a. Accordingly, the Sixth Circuit affirmed the district court's order remanding the case to state court. *Id.*

Notably, the defendants in *Mays* also filed a petition for certiorari, asking this Court to resolve the circuit split regarding the proper standard to apply when analyzing a federal-officer removal. *Cook* v. *Mays*, No. 17-1144. But this Court denied the petition, presumably because *Mays* was a bad vehicle: the case remained in federal court notwithstanding the federal-officer ruling because of removal under the Class Action Fairness Act.

E. Additional cases affected

This Court's decision on the petition will affect other pending cases. Bound by the Sixth Circuit's decision in *Mays*, Michigan federal district courts have applied (or will soon apply) the same upside-down officer-removal standards that *Mays* established in *Waid* v. *City of Flint*, E.D. Mich. No. 16-cv-13519 and *Brown* v. *Snyder*, E.D. Mich. No. 18-cv-10699. In sum, the panel's published opinion immediately impacts federal jurisdiction across a swath of cases and will have a deleterious effect on federal contractors, state agency personnel, and other agents of the federal government moving forward.

ARGUMENT

In rejecting the identical notice of removal in *Mays*, the Sixth Circuit articulated two rules in conflict with this Court's precedents and those of other circuits. The first is the proper legal standard to apply when evaluating a notice of federal-officer removal: a presumption against removal rather than in favor of it. The second is that it is insufficient for purposes of invoking federal-officer removal jurisdiction to allege that a non-federal defendant performed tasks that a federal agency would otherwise have had to perform. This Court should grant the petition and resolve both conflicts.

I. The Sixth Circuit's decision to apply a presumption against federal-officer removal conflicts with decisions of this Court and those of other circuits.

As explained at length in Judge McKeague's dissent in *Mays*, the Sixth Circuit starts with the wrong legal premise, i.e., that "removal statutes are to be strictly construed, and 'all doubts should be resolved against removal.'" *Mays*, 871 F.3d at 442 (quoting *Harnden* and citing *Eastman*). That is the standard for traditional removal under 28 U.S.C. § 1441. The Sixth Circuit's adoption of that standard in the context of federal-officer removal under 28 U.S.C. § 1442 conflicts with decisions of this Court and those of other circuits, all of which have consistently held that notices of removal under § 1442 must be interpreted broadly in *favor of* removal.

For example, in *Arizona* v. *Manypenny*, 451 U.S. 232 (1981), this Court noted that removal under § 1442(a)(1) ensures a federal official (or someone acting under such an official) a forum "free from local interests or prejudice." *Id.* at 241–42 (citing *Colorado* v. *Symes*, 286 U.S. 510, 517–18 (1932), *Maryland* v. *Soper*, 270 U.S. 9, 32 (1926), and *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969). To protect such individuals, "this Court has held that the right of removal is absolute for conduct performed under color of federal office, and has insisted that the policy favoring removal 'should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).'" *Id.* at 242 (quoting *Willingham*, 395 U.S. at 407). "It scarcely needs to be said that" federal-officer removal statutes "are to be liberally construed." *Symes*, 286 U.S. at 517.

Other circuits are likewise in direct conflict with the Sixth Circuit's rule. In *Durham* v. *Lockheed Martin Corp.*, 445 F.3d 1247 (9th Cir. 2006), an electronics technician for the U.S. Air Force filed a state-court action against Lockheed Martin, a government contractor, for alleged exposure to asbestos. Lockheed Martin removed under § 1442(a)(1). The federal district court remanded the matter to state court, applying the same legal standard for federal-officer removal that the Sixth Circuit adopted here, namely, that "[r]emoval statutes are to be strictly construed, and any doubts as to the right of removal must be resolved in favor of remanding to state court." *Id.* at 1252. The Ninth Circuit said that this standard was correct as to § 1441 removals, but wrong for federal-officer removal under § 1442. *Id.* Relying on *Manypenny* and *Willingham*, the Ninth Circuit held "that when federal officers and their agents are seeking a federal forum, we are to interpret section 1442 *broadly in favor of removal*." *Id.* (emphasis added).

That standard is applied "for good reason," said the Ninth Circuit. *Id.* Section 1442, "although dealing with individuals, vindicates also the interests of government itself; upon the principle that it embodies 'may depend the possibility of the general government's preserving its own existence.'" *Id.* at 1252–53 (quoting *Bradford* v. *Harding*, 284 F.2d 307, 310 (2d Cir. 1960), itself quoting *Tennessee* v. *Davis*, 100 U.S. 257, 262 (1879)). "If the federal government can't guarantee its agents access to a federal forum if they are sued or prosecuted, it may have difficulty finding anyone willing to act on its behalf." *Id.* at 1253.

"Because it's so important to the federal government to protect federal officers, removal rights under section 1442 are much broader than those under section 1441," the Ninth Circuit continued. *Id.* "Federal officers can remove both civil and criminal cases, while section 1441 provides only for civil removal." *Id.* "Unlike other defendants, a federal officer can remove a case even if the plaintiff couldn't have filed the case in federal court in the first instance." *Id.* "And removals under section 1441 are subject to the well-pleaded complaint rule, while those under section 1442 are not." *Id.* (comparing *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149, 152 (1908), and *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999)).

Moreover, "the command to interpret section 1442 liberally" comes not only from this Court, but also from Congress itself. *Id.* at 1252. When this Court "held that federal agencies didn't have any removal rights under a prior version of section 1442, Congress amended the statute to reverse the decision." *Id.* (citing *Int'l Primate Prot. League* v. *Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 76, 79 n.5 (1991), and Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850)).

The Third, Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits are all in accord with the Ninth and in conflict with the Sixth. *E.g.*, *Papp* v. *Fore-Kast Sales Co.*, 842 F.3d 805, 811–12 (3d Cir. 2016) ("Unlike the general removal statute, the federal officer removal statute is to be 'broadly construed' in favor of a federal forum.") (quoting *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Defender Ass'n of Phila.*, 790 F.3d 457, 466–67

(3d Cir. 2015)); *Sawyer* v. *Foster Wheeler LLC*, 860 F.3d 249, 255 (4th Cir. 2017) (phrase "acting under" is "broad" and is to be "liberally construed" in favor of the entity seeking removal) (quotation omitted); *Zeringue* v. *Crane Co.*, 846 F.3d 785, 789 (5th Cir. 2017) ("Although the principle of limited federal court jurisdiction ordinarily compels [district courts] to resolve any doubts about removal in favor of remand, . . . courts have not applied that tiebreaker when it comes to the federal officer removal statute in light of its broad reach."); *Ruppel* v. *CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012) ("We liberally construe" the phrase "'acted under' a federal officer.") (citation omitted); *Goncalves* v. *Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017) ("duty to 'interpret Section 1442 broadly in favor of removal.'") (citation omitted); *Pretlow* v. *Garrison*, 420 F. App'x 798, 800 (10th Cir. 2011) (following *Durham*); *Caver* v. *Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1142 (11th Cir. 2017) ("The phrase 'acting under' is broad and thus we 'liberally construe' this portion of § 1442(a)(1).") (citation omitted).

The Sixth Circuit's published decision in *Mays* is even more of an outlier when considering § 1442's broadened scope because of Congress's 2011 amendments to the statute. Before 2011, a defendant had to establish that a plaintiff's claim was "for a[n] act under color of office." Congress amended that provision in 2011 to cover any action "for or *relating to* any act under color of office." Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (emphasis added). "This new language 'broaden[ed] the universe of acts' that enable federal removal, H.R. Rep. 112-17, 6, 2011 U.S.C.C.A.N. 420, 425, such that there need be only 'a connection or associ-

ation between the act in question and the federal office.'" *Sawyer*, 860 F.3d at 258 (citations omitted). So the 2011 Amendments "expanded the breadth of acts sufficient to establish a causal nexus even further." *Zeringue*, 846 F.3d at 793.

As Judge McKeague explained in *Mays*, applying the correct standard was dispositive there. Even the panel "majority acknowledges that several of the allegations in the notice of removal facially support a finding that the MDEQ defendants 'acted under' the oversight or direction of the EPA." 871 F.3d at 453 (McKeague, J., dissenting). For instance:

> the majority recognizes (a) that the EPA delegated primary SDWA enforcement authority to the MDEQ; (b) that the MDEQ receives funds from the EPA to perform the required monitoring and enforcement; (c) that the EPA would have to enforce the SDWA in Michigan if the MDEQ did not have primary enforcement authority; (d) that the MDEQ was required to submit reports to the EPA detailing compliance with the standards established by the SDWA and the LCR; (e) that during the course of the MDEQ's monitoring of the Flint water system, the MDEQ defendants received numerous communications and recommendations from the EPA, culminating in the EPA's January 2016 Emergency Administrative Order attached to the notice of removal; and (f) that the Emergency Order, by establishing the EPA's own monitoring of the Flint water system and ordering the MDEQ defendants to take

> myriad actions to assist the EPA, evidences the EPA's supervision and control. [*Id.*]

In sum, Judge McKeague concluded, under "the regulatory scheme established by the SDWA, as described in the notice of removal, the MDEQ defendants have stated facts which, if proved, could support a finding that they were, in their enforcement of water quality standards, acting under the guidance and oversight and, ultimately, direction of the EPA." *Id.* at 454. That is enough to establish federal jurisdiction. *Id.*

Judge McKeague's reasoning in *Mays* applies equally in this case. Indeed, Busch's Notice of Removal here, which was joined by the other Petitioners, is essentially *identical* in all material respects to the one the MDEQ Defendants filed in *Mays*. Compare RE 1, Notice of Removal, *with Mays* v. *Cook*, E.D. Mich. No. 16-11519, RE 1, Notice of Removal. And all the regulatory truths that the *Mays* panel majority recognized about the EPA, the SDWA, and the MDEQ, are equally true here.

Accordingly, this Court should grant the petition and reverse. The Sixth Circuit's published opinion in *Mays*—which bound the panel below and dictated entirely the outcome—conflicts directly with decisions of this Court and leaves the Sixth Circuit on the short end of a 6-1 circuit split. It cannot be the case that a party invoking the federal-officer-removal statute receives the benefit of the doubt everywhere in the country except in Michigan, Ohio, Kentucky, and Tennessee.

II. The Sixth Circuit's decision is the cause of a second circuit conflict regarding the appropriateness of federal-officer removal when it is alleged that a state official performed duties that a federal agency would otherwise have to perform.

The Sixth Circuit's *Mays* decision also created a second conflict by misinterpreting *Watson* v. *Philip Morris*, 551 U.S. 142 (2007). In *Watson*, consumer plaintiffs filed a putative class action in state court against cigarette manufacturers arising out of the testing and advertising of tar and nicotine levels in cigarettes. The manufacturer removed under § 1442(a)(1), alleging it was acting under the federal government's dictates for testing cigarettes.

This Court began by summarizing the history and purpose of federal-officer removal, emphasizing that § 1442 must be "liberally construed." *Id.* at 147 (citing *Symes*, 286 U.S. at 517; *Manypenny*, 451 U.S. at 242, and *Willingham*, 395 U.S. at 406–07). But the Court cautioned that § 1442's broad scope does not extend to a private person acting simply to *comply* with federal law. *Id.* at 152. Taxpayers who fill out complex federal tax forms, for example, are not "acting under" a federal official for purposes of § 1442. *Id.* What § 1442 contemplates "goes beyond simple compliance with the law and helps officers fulfill other governmental tasks." *Id.* at 153. This Court favorably cited *Winters* v. *Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), as an example where federal jurisdiction was correctly invoked because "Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Id.*

Other circuits have correctly interpreted *Watson* to mean exactly what it said when explaining why federal jurisdiction existed in *Winters*. For example, the Third Circuit in *Papp* held that the defendant company did not have to show that its actions were the result of a direct order or prohibition from a federal officer or agency to be "acting under" them. When "'the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete,' that contractor is 'acting under' the authority of a federal officer." *Papp*, 842 F.3d at 812. The Third Circuit rejected the argument—accepted by the panel majority here—that a defendant can only be "acting under" a federal officer if the complained-of conduct was done at the specific behest of the federal officer or agency. *Id.* at 813.

Similarly, the Fifth Circuit in *Zeringue* held that the mere fact that the federal government would have had to carry out the tasks forming the basis of the complaint if the defendant had not done so is enough to satisfy the "acting under" requirement of federal-officer removal. *Zeringue*, 846 F.3d at 792. According to the Fifth Circuit, this Court in *Watson* clarified that "acting under" refers to a relationship that typically involves "'subjection, guidance, or control', but at a minimum it 'must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior.'" *Id.* (citation omitted). "Direct oversight of the specific acts that give rise to a plaintiff's complaint is not required to satisfy this part of Section 1442." *Id.*

The Seventh and Eleventh Circuits have held likewise. *Ruppel*, 701 F.3d at 1181 ("'Acting under' covers situations, like this one, where the federal government uses a private corporation [or a state agency] to achieve an end it would have otherwise used its own agents to complete."); *Caver*, 845 F.3d at 1143 (federal-officer removal appropriate where "the private person [or state agency] must help federal officers fulfill a basic governmental task that the government otherwise would have had to perform.").

The Sixth Circuit in *Mays* interpreted *Watson* very differently. Rather than apply *Watson*'s plain language, the Sixth Circuit said that "*Watson* did not formulate a clear test for when the acting-under requirement is satisfied." 871 F.3d at 444. In response to the *Mays* MDEQ Defendants pointing out that "the EPA would have to enforce the SDWA in Michigan if the MDEQ did not have primary enforcement authority to do so," the panel majority said this was merely a "factor supporting removal," but not dispositive. *Id.* The panel majority read *Watson* "as requiring more," namely evidence of a specific "delegation of legal authority" or a contract. *Id.*

Regardless whether the panel majority correctly interpreted *Watson* or whether the better view is that propounded by the Third, Fifth, Seventh, and Eleventh Circuits, this Court should intervene. Again, the proper analysis is dispositive, because it cannot be disputed that Petitioners performed tasks the EPA would otherwise have had to perform. Indeed, that is the entire purpose of the EPA granting primary enforcement authority to Michigan, acting through the MDEQ and its employees. Certiorari is warranted.

III. This case is an ideal vehicle to clear up the substantial confusion caused by the Sixth Circuit's published decision.

Federal-officer removal is a recurring issue of substantial significance. This truth is indicated by the significant number of circuit cases applying § 1442(a)(1), and it is undergirded by the important federal policies that motivated Congress's enactment of § 1442 in the first instance. Here, Petitioners are facing substantial local prejudice for their enforcement of federal regulation per the EPA's guidance, direction, and control, regulations which the EPA has admitted were ambiguous as applied to Flint's primary water switch. And the number of very recent cases in other circuits (four in 2017 alone) indicates a rise in federal contractors and others seeking a federal forum to determine local controversies stemming from tasks undertaken on behalf of the federal government that its agencies and personnel would otherwise have to perform.

This case is also a perfect vehicle to fix the rift in circuit authority that the panel majority's decision created. The two issues presented are clearly framed by the Sixth Circuit's precedent, and their resolution does not depend on any disputed facts. Given the well-pleaded allegations in Petitioners' notice of removal, the outcome turns entirely on the proper legal standard to apply under § 1442. Moreover, unlike *Mays*, where federal jurisdiction was eventually sustained under the Class Action Fairness Act, there is no alternative basis for federal jurisdiction in the

present case.[5] If the petition is denied, Petitioners lose their right to a federal forum and the Sixth Circuit's errors will be perpetuated.

As noted above, additional affected cases arising from Flint's water switch include *Waid* v. *City of Flint*, E.D. Mich. No. 16-cv-13519, and *Brown* v. *Snyder*, E.D. Mich. No. 18-cv-10699. These cases will, like the present case, be bound by the Sixth Circuit's published decision in *Mays*.

In sum, the Sixth Circuit's new federal-officer removal rules impact federal jurisdiction in other pending cases and have a drastic and deleterious effect on federal contractors, state agency personnel, and other agents of the federal government. As a result, the rule negatively impacts the federal government, too: "If the federal government can't guarantee its agents access to a federal forum if they are sued or prosecuted, it may have difficulty finding anyone willing to act on its behalf." *Durham*, 445 F.3d at 1253.

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[5] Petitioners also sought to remove by establishing federal jurisdiction under 28 U.S.C. § 1441(a). The Sixth Circuit rejected that argument on the merits, App. 7a–8a, and for lack of unanimity, App. 8a n.2. Petitioners do not seek this Court's review of the § 1441 ruling, and the lack of unanimity applies only to the § 1441 analysis, not to federal-officer removal under § 1442. E.g., *Akin* v. *Ashland Chem. Co.*, 156 F.3d 1030, 1034 (10th Cir. 1998); *Ely Valley Mines, Inc.* v. *Hartford Accident & Indem. Co.*, 644 F.2d 1310, 1315 (9th Cir. 1981); *Fowler* v. *Southern Bell Tel. & Tel. Co.*, 343 F.2d 150, 152 (5th Cir. 1965); *Bradford* v. *Harding*, 248 F.2d 307, 310 (2d Cir. 1960). Accord 28 U.S.C. § 1446(b)(2)(A) (rule of unanimity applies "solely under § 1441(a)").

All these factors counsel strongly in favor of a grant of the petition and resolution of the two circuit conflicts presented. Alternatively, the Court could summarily reverse, either with an opinion resolving the conflict or simply by vacating the decision below and adoption of Judge McKeague's dissent in *Mays*. Any of these options would once again align the Sixth Circuit with the rest of the country regarding the proper standards to employ when considering the propriety of § 1442 federal-officer removal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN J. BURSCH
Counsel of Record
BURSCH LAW PLLC
9339 Cherry Valley
Avenue SE, #78
Caledonia, MI 49316
(616) 450-4235
jbursch@burschlaw.com
Counsel for Petitioners Cook, Busch, Prysby, Shekter Smith, Wurfel & Wyant

CHARLES E. BARBIERI
ALLISON M. COLLINS
FOSTER, SWIFT, COLLINS
& SMITH
313 S. Washington Square
Lansing, MI 48933
(517) 371-8155
CBarbieri@fosterswift.com
Counsel for Petitioners Cook & Prysby

MICHAEL JOHN PATTWELL
JAY M. BERGER
CHRISTOPHER B. CLARE
CLARK HILL PLC
500 Woodward Ave.
Suite 3500
Detroit, MI 48226
(517) 318-3043
mpattwell@clarkhill.com
Counsel for Petitioner
Wurfel & Wyant

THADDEUS E. MORGAN
FRASER TREBILCOCK
124 W. Allegan Street
Suite 1000
Lansing, MI 48933
(517) 377-0877
tmorgan@fraserlawfirm.com
Counsel for Petitioner
Shekter Smith

PHILIP A. GRASHOFF, JR.
DENNIS K. EGAN
KRISTA A. JACKSON
KOTZ SANGSTER WYSOCKI
36700 Woodward Ave.
Suite 300
Bloomfield Hills, MI 48304
(248) 646-2073
pgrashoff@kotzsangster.com
Counsel for Petitioner
Busch

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