No. 19-

IN THE

Supreme Court of the United States

AIRBUS HELICOPTERS, INC.,

Petitioner,

v.

MARY RIGGS, et al.,

Respondents,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 20, 2020

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QUESTION PRESENTED

Whether a private party is "acting under" a federal officer and may remove under 28 U.S.C. § 1442(a)(1), where it is carrying out duties formally and expressly delegated by the Federal Aviation Administration.

PARTIES TO THE PROCEEDING

Petitioner is Defendant-Appellant Airbus Helicopters, Inc.

Respondents are Plaintiffs-Appellees Mary Riggs, in her capacity as Personal Representative of the Estate of Jonathan Neal Udall, Philip Udall, and Marlene Udall (together, "Plaintiffs"), as well as Defendants-Appellees Matthew Hecker, Daniel Friedman, Brenda Halvorson, Geoffrey Edlund, Elling B. Halvorson, John Becker, Elling Kent Halvorson, Lon A. Halvorson, Papillon Airways, Inc. d/b/a Papillon Grand Canyon Helicopters, Xebec LLC, and Scott Booth (together, the "Operator Defendants").

RULE 29.6 STATEMENT

Petitioner is a non-governmental corporation. No publicly held corporation owns 10% or more of petitioner's stock. Petitioner is wholly owned by Airbus Group, Inc., which in turn is wholly owned by Airbus SE, a publicly held company.

RELATED PROCEEDINGS

Counsel are aware of no directly related proceedings.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT	ii
RELATED PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
A. Statutory and Regulatory Background	1
B. Factual and Procedural Background	6
REASONS FOR GRANTING THE PETITION	9
A. The Decision Below Conflicts With *Watson* By Ignoring The Formal Delegation Of Authority That *Watson* Found Evidences That A Private Person Is "Acting Under" A Federal Officer For Purposes Of Removal	10
B. The Ninth Circuit's Decision Exacerbates A Split And Confusion Among The Circuit Courts As To When A Private Party Who Has Been Formally Delegated Federal Authority Is "Acting Under" A Federal Officer	15
C. The Proper Application Of The Federal Officer Removal Statute Is A Recurring Issue Of National Importance And This Case Is An Ideal Vehicle To Resolve The Confusion Among Federal Courts	19
CONCLUSION	25

TABLE OF CONTENTS—continued

Page

APPENDICES

APPENDIX A: Opinion, *Riggs* v. *Airbus Helicopters, Inc.*, No. 18-16396 (9th Cir. Sept. 20, 2019), ECF No. 60 (reported at 939 F.3d 981 (9th Cir. 2019)) 1a

APPENDIX B: Order Granting Motions to Remand, *Riggs* v. *Hecker*, No. 2:18-cv-912 JCM (GWF) (D. Nev. July 16, 2018), ECF No. 45 (reported at 325 F. Supp. 3d 1110 (D. Nev. 2018)) 29a

APPENDIX C: Order Denying Rehearing En Banc, *Riggs* v. *Airbus Helicopters, Inc.*, No. 18-16396 (9th Cir. Nov. 21, 2019), ECF No. 64 ..... 41a

APPENDIX D: Statutory and Regulatory Provisions Involved 43a

TABLE OF AUTHORITIES

CASES Page

Arizona v. *Manypenny*, 451 U.S. 232 (1981) 1

Bell v. *Thornburg*, 743 F.3d 84 (5th Cir. 2014) 18

Riggs v. *Airbus Helicopters, Inc.*, 939 F.3d 981 (9th Cir. 2019) 22

Butler v. *Coast Elec. Power Ass'n*, 926 F.3d 190 (5th Cir. 2019) 24

Caver v. *Cent. Ala. Elec. Coop.*, 845 F.3d 1135 (11th Cir. 2017) 18, 24

City of Burbank v. *Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973) 20

Colorado v. *Symes*, 286 U.S. 510 (1932) 20, 22

In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila., 790 F.3d 457 (3d Cir. 2015) 18, 24

Estate of Hecker v. *Robinson Helicopter Co.*, No. 13-CV-0306-TOR, 2013 WL 5674982 (E.D. Wash. Oct. 17, 2013)........................ 22

Goncalves v. *Rady Children's Hosp. San Diego*, 865 F.3d 1237 (9th Cir. 2017)......... 23

Isaacson v. *Dow Chem. Co.*, 517 F.3d 129 (2d Cir. 2008)... 18

Jacks v. *Meridian Res. Co.*, 701 F.3d 1224 (8th Cir. 2012) 18, 24

Jefferson Cty. v. *Acker*, 527 U.S. 423 (1999) 2, 3

Lu Junhong v. *Boeing Co.*, 792 F.3d 805 (7th Cir. 2015).. 16, 17, 22

Magnin v. *Teledyne Cont'l Motors*, 91 F.3d 1424 (11th Cir. 1996) 16, 22, 23

Mesa v. *California*, 489 U.S. 121 (1989)....... 2, 3

Nat'l Meat Ass'n v. *Harris*, 565 U.S. 452 (2012) 24

TABLE OF AUTHORITIES—continued

Page

Nw. Airlines, Inc. v. *Minnesota*, 322 U.S. 292 (1944) 21

O'Brien v. *Cessna Aircraft Co.*, No. 8:09CV40, 2010 WL 4721189 (D. Neb. July 21, 2010) 22

Ohio State Chiropractic Ass'n v. *Humana Health Plan Inc.*, 647 F. App'x 619 (6th Cir. 2016) 19

Sawyer v. *Foster Wheeler LLC*, 860 F.3d 249 (4th Cir. 2017) 18

Scrogin v. *Rolls-Royce Corp.*, No. 3:10cv442 (WWE), 2010 WL 3547706 (D. Conn. Aug. 16, 2010) 22

Sikkelee v. *Precision Airmotive Corp.*, 907 F.3d 701 (3d Cir. 2018), *cert. denied sub nom. Avco Corp.* v. *Sikkelee*, 140 S. Ct. 860 (2020) 7

United States v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) 4

Watson v. *Philip Morris Cos.*, 551 U.S. 142 (2007) .... *passim*

Weidler v. *Prof'l Aircraft Maint.*, No. CV 10-09376 SJO (CWx), 2011 WL 2020654 (C.D. Cal. May 13, 2011) 22

Willingham v. *Morgan*, 395 U.S. 402 (1969) 2, 20, 22

STATUTES AND REGULATIONS

Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 2

Federal Aviation Act, 49 U.S.C. § 40101 *et seq.* 1

28 U.S.C. § 1442 1

TABLE OF AUTHORITIES—continued

Page

49 U.S.C. § 44701 21
§ 44702 .... 4, 13, 21
§ 44704 .... 4, 7
14 C.F.R. pts. 1–147, 170–71 3
14 C.F.R. § 21.11 *et seq.* 4
§ 21.21 4
§ 21.93 4
§ 21.97 4
§ 21.113 .... 4, 7
§§ 21.113–.117 4
§ 183.41 5
§§ 183.41–.67 4
Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300 (Oct. 1, 2019) (to be codified at 9 C.F.R. pts. 301, 309, 310) 24
Modernization of Poultry Slaughter Inspection, 79 Fed. Reg. 49,566 (Aug. 21, 2014) (to be codified at 9 C.F.R. pts. 381, 500) ... 24
Establishment of Organization Designation Authorization Program, 70 Fed. Reg. 59,932 (Oct. 13, 2005) 4, 5, 11, 21
Fed. Aviation Admin., Order No. 8100.15, *Organization Designation Authorization Procedures* (2006), https://www.faa.gov/documentLibrary/media/Order/Order%208100.15%20CHG%201%20Incorporated.pdf 4, 5, 6, 13

LEGISLATIVE MATERIALS

H.R. Rep. No. 112-17, pt. 1 (2011), *reprinted in* 2011 U.S.C.C.A.N. 420 2
H.R. Rep. No. 103-525, pt. 2 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1644 20

TABLE OF AUTHORITIES—continued

SCHOLARLY AUTHORITY Page

Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 Yale J. on Reg. 535 (1996) 24

OPINIONS BELOW

The court of appeals' opinion is published at 939 F.3d 981 (9th Cir. 2019), and reproduced at Pet. App. 1a–28a. The district court's decision is published at 325 F. Supp. 3d 1110 (D. Nev. 2018), and reproduced at Pet. App. 29a–40a.

JURISDICTION

The court of appeals entered judgment on September 20, 2019, and denied a timely petition for rehearing or rehearing en banc by order dated November 21, 2019. See Pet. App. 41a–42a. On February 7, 2020, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including March 20, 2020. No. 19A883. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal officer removal statute, 28 U.S.C. § 1442, and relevant portions of the Federal Aviation Act, 49 U.S.C. § 40101 *et seq.*, are set forth at Pet. App. 43a–59a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The federal officer removal statute authorizes removal to federal court of any civil action or criminal prosecution filed in state court against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). This removal right is "absolute for conduct performed under color of federal office." *Arizona* v. *Manypenny*, 451 U.S. 232, 242 (1981).

The federal officer removal statute has a long history dating back to the early nineteenth century. *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 147–49 (2007). It was originally enacted to protect federal customs operations against state-court interference, and Congress has repeatedly expanded the statute's scope to include other federal agencies and officers, as well as those private persons that assist them. *Id.* Indeed, in its last revision to the statute, Congress "broaden[ed] the universe of acts" that enable removal under section 1442(a)(1) by adding the words "or relating to" to the nexus requirement. Removal Clarification Act of 2011, Pub. L. No. 112-51, sec. 2(b)(1), § 1442(a)(1), 125 Stat. 545, 545; H.R. Rep. No. 112-17, pt. 1, at 6 (2011), *reprinted in* 2011 U.S.C.C.A.N. 420, 425.

Consistent with this history, "[t]he words 'acting under' are broad, and this Court has made clear that the statute must be 'liberally construed.'" *Watson*, 551 U.S. at 147 (quoting *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932)); see also *Willingham* v. *Morgan*, 395 U.S. 402, 406–07 (1969) (rejecting notion that removal under section 1442(a)(1) is "narrow" or "limited"). Removal by a private party is proper when (1) the defendant is "acting under" a federal agency or officer; (2) there is a "nexus" between the claims and the defendant's conduct under federal authority; and (3) the defendant has alleged a "colorable federal defense." *Jefferson Cty.* v. *Acker*, 527 U.S. 423, 431 (1999); see also *Mesa* v. *California*, 489 U.S. 121, 129 (1989); *Willingham*, 395 U.S. at 406–07 (explaining that "[o]ne of the

primary purposes of the removal statute" was to provide "a federal forum" for federal defenses).[1]

This case concerns the first requirement for removal: that a private person is "acting under" a federal agency or officer. As this Court has explained, "acting under" a federal agency "involve[s] an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. In *Watson*, the Court held that "simply *complying* with the law" is not enough. *Id.* at 152; see also *id.* at 153 ("[A] highly regulated firm cannot find a statutory basis for removal in the fact of federal regulation alone."). But removal is proper if there is "evidence of some . . . special relationship"—such as a government contract or a "formal delegation" of legal authority—that distinguishes the situation "from the usual regulator/regulated relationship." *Id.* at 156–57.

2. This case implicates a regulatory scheme involving a formal delegation that distinguishes the situation from the usual regulator/regulated relationship. Specifically, it involves the pervasive scheme of regulations for enforcing national aviation safety standards, known as the Federal Aviation Regulations ("FARs"). See 14 C.F.R. pts. 1–147, 170–71.

To enforce the FARs, Congress and the FAA have instituted a multistep certification process, beginning

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[1] "[I]t is the raising of a federal question in the officer's removal petition that constitutes the federal law under which the action against the federal officer arises for Art. III purposes." *Mesa*, 489 U.S. at 136. As such, section 1442(a)(1) cannot be avoided by artful pleading—the statute is a well-recognized exception to the well-pleaded complaint rule. *See Jefferson Cty.*, 527 U.S. at 431 ("Under the federal officer removal statute, suits against federal officers may be removed despite the nonfederal cast of the complaint . . . .").

with a "type certificate" approving the aircraft's design. The manufacturer must establish conformity with the FARs in its application for a type certificate, but the FAA retains the responsibility of determining compliance and will only issue a certificate after a thorough examination. See 14 C.F.R. § 21.21; see generally 14 C.F.R. § 21.11 *et seq.*; *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 816–17 (1984).

The FAA also must approve any "major" design change to a type-certificated aircraft, 14 C.F.R. §§ 21.93(a), 21.97, and it requires a supplemental type certificate ("STC") for someone other than the type-certificate holder to make major design changes, see 49 U.S.C. § 44704(b); 14 C.F.R. § 21.113. Major design changes therefore are subject to the FAA's inspection, testing, and ultimate approval. See 14 C.F.R. §§ 21.113–.117.

If the regulatory process stopped there, aviation manufacturers would be heavily regulated, but under settled law would not be directly assisting the FAA in carrying out its congressionally mandated duties. The Federal Aviation Act, however, goes much further and provides that the FAA "may delegate to a qualified private person . . . a matter related to—(A) the examination, testing, and inspection necessary to issue a certificate under this chapter; and (B) issuing the certificate." 49 U.S.C. § 44702(d)(1).

As relevant here, the FAA has instituted the Organization Designation Authorization ("ODA") program, which delegates FAA certification authority to organizations such as petitioner. See 14 C.F.R. §§ 183.41–.67; *Establishment of Organization Designation Authorization Program*, 70 Fed. Reg. 59,932 (Oct. 13, 2005) ("ODA Program Rule"); Fed. Aviation Admin.,

Order No. 8100.15, *Organization Designation Authorization Procedures* ¶ 1-1 (2006) ("ODA Order").[2] An ODA "allows an organization to perform specified functions *on behalf of* the Administrator related to engineering, manufacturing, operations, airworthiness, or maintenance." 14 C.F.R. § 183.41(a) (emphasis added). The ODA program was established to "improve[] the FAA's ability to respond to our steadily increasing workload," while also "allow[ing] the FAA to focus our limited resources on more critical areas." ODA Program Rule, 70 Fed. Reg. at 59,933.

The ODA program is not a self-certification scheme. *Id.* ("The ODA program does not introduce any type of self-certification.") ODA designees "have a unique status" as "representatives of the Administrator" whose "authority . . . to act comes from an FAA delegation," and "[w]hen performing a delegated function, designees are *legally distinct from* and act independent of the organizations that employ them." *Id.* (emphasis added). To become an ODA designee, an organization must execute a memorandum of understanding with the FAA, in which the designee "agrees to use the same care, diligence, judgment, and responsibility when performing the authorized functions *as the FAA would use* in performing the function." ODA Order ¶ 3-7(a) (emphasis added). Thus, while manufacturers must perform tests and inspections as part of their *application*

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[2] The ODA Order is available at https://www.faa.gov/documentLibrary/media/Order/Order%208100.15%20CHG%201%20Incorporated.pdf. The FAA has since amended Order 8100.15. Petitioner cites to Order 8100.15 herein because it was the operative ODA procedures order at the time of the manufacture and sale of the aircraft that is at issue in this case.

for certification, an ODA holder has the delegated legal authority to *issue* the certificate, including conducting inspections, testing, and examinations *on behalf of the FAA*. See *id.* ¶¶ 11-3, 11-7(i), 11-7(k) (specifying that an ODA holder determines conformity "for the FAA"). Indeed, an ODA may authorize the ODA holder to issue certificates "to an applicant other than the ODA Holder." *Id.* ¶ 11-7(a)(1).[3]

B. Factual and Procedural Background

1. Respondents are the personal representative and next of kin of a passenger who died as a result of the crash of an Airbus helicopter. See Pet. App. 2a. In 2018, they brought this action asserting state-law tort claims against petitioner, as well as other defendants, including those responsible for operating the helicopter that crashed. See *id.*

Respondents alleged, in pertinent part, that the aircraft's fuel system did not meet certain crash-resistance standards. See Pet. App. 2a. But it is undisputed that the aircraft's fuel system was certified by the FAA in accordance with agency-imposed standards, which were less strict than the ones respondents

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[3] *Amicus curiae* General Aviation Manufacturers Association, Inc. ("GAMA") moved for leave to file a brief in support of petitioner before the court of appeals, which the court granted. Order, *Riggs* v. *Airbus Helicopters, Inc.*, No. 18-16396 (9th Cir. Feb. 7, 2019), ECF No. 49. GAMA's brief explains in further detail the FAA's comprehensive regulatory regime and the role FAA designees play in carrying out the FAA's federal mandate. *See* Brief of *Amicus Curiae* General Aviation Manufacturers Association in Support of Defendant-Appellant at 4–10, *Riggs* v. *Airbus Helicopters, Inc.*, 939 F.3d 981 (9th Cir. 2019) (No. 18-16396), 2018 WL 4561171, at *4–10.

assert should apply. (See ER026 ¶ 9.)[4] Respondents nonetheless contend that petitioner's failure to change the fuel-system design was unreasonable and caused the injuries. (See ER042–43 ¶ 446, ER049 ¶ 487.)

Petitioner became an FAA-certified ODA holder for the issuance of STCs in 2009, before the manufacture and sale of the subject helicopter. (ER026 ¶ 8.) This delegated authority empowers petitioner to issue STCs on the FAA's behalf. (ER026 ¶ 9.) It is undisputed that (1) the design changes respondents demand would require "major" changes in the aircraft's design, and (2) petitioner was the seller, but not the type-certificate holder, of the helicopter. (ER026 ¶ 9.) Thus, for petitioner to comply with respondents' design demands on its own, each major design change would have required inspection and the issuance of an STC. See 49 U.S.C. § 44704(b); 14 C.F.R. § 21.113.

2. Petitioner removed this case under 28 U.S.C. § 1442(a)(1) because the claims necessarily relate to petitioner's actions while it was "acting under" the FAA as an ODA holder. (ER025–27 ¶¶ 5–10.) For its federal defense, petitioner contends that respondents' state-law design-defect claims are preempted by federal law, given that the design was compliant with federal aviation standards. (ER026–27 ¶ 10.)[5]

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[4] All "ER" citations refer to Airbus Helicopters, Inc.'s Excerpts of Record, *Riggs* v. *Airbus Helicopters, Inc.*, No. 18-16396 (9th Cir. Aug. 27, 2018), ECF No. 13.

[5] This preemption issue was recently the subject of a divided opinion by the Third Circuit in *Sikkelee* v. *Precision Airmotive Corp.*, 907 F.3d 701 (3d Cir. 2018) (reversing dismissal on preemption grounds), *cert. denied sub nom. Avco Corp.* v. *Sikkelee*, 140 S. Ct. 860 (2020) (mem.). The Solicitor General took the position that the state-law claims *were* preempted, although

Plaintiffs in the district court and the other defendants moved to remand, and the district court granted the motions. Pet. App. 40a. The district court acknowledged that the Ninth Circuit had not addressed the scope of section 1442(a)(1) with respect to FAA designees and that the issue is currently the subject of a square conflict among the United States Courts of Appeals. See *id.* at 34a–35a, 39a–40a. But the district court adopted the Seventh Circuit's view that "acting under" status requires that the private party be engaged in "'rule making rather than rule compliance,'" and it found that the FAA's delegation to petitioner "does not allow AHI to create or change substantive rules" and "does not allow AHI to manufacture gear that meets its own self-adopted criteria." *Id.* at 38a–39a (quoting *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 809–10 (7th Cir. 2015)).

A divided panel of the Ninth Circuit affirmed.[6] The majority found that petitioner's certification activities represent "simple compliance with the law" and do not meet the removal statute's "acting under" standard as articulated by this Court in *Watson*. Pet. App. 14a–16a. The majority stated that petitioner is bound to follow prescriptive rules promulgated by the FAA, which "fit[s] squarely within the precept of mere compliance with regulatory standards and outside the 'acting under' provision of 1442(a)(1)." *Id.* at 14a. In reaching this conclusion, the majority cited the Seventh Circuit's decision in *Lu Junhong*—which likewise

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it recommended denying review in that specific case so as to allow the issue to percolate. *See* Brief for the United States as Amicus Curiae, *Avco Corp.* v. *Sikkelee*, 140 S. Ct. 860 (2020) (No. 18-1140), 2019 WL 6726852 [hereinafter "U.S. *Sikkelee* Br."].

[6] Like the district court, the panel did not reach the other requirements for removal under section 1442(a)(1). *See* Pet. App. 9a, 16a n.9.

rejected removal based on an FAA delegation—but the majority specifically "decline[d] to adopt the rule-making-rule-compliance distinction articulated by the Seventh Circuit and relied on by the district court." *Id.* at 15a.

Judge O'Scannlain dissented, explaining that the majority opinion "misunderstands the FAA's regulatory regime and misapplies the Supreme Court's decision in *Watson*." Pet. App. 17a. He explained that, unlike in *Watson*—where the defendant had no evidence of any delegation of legal authority from a federal agency—in this case, there was "clear evidence of delegation." *Id.* at 24a–27a. He further observed that allowing removal based on an FAA delegation was consistent with a decision by the Eleventh Circuit, as well as the position taken by the Solicitor General, who in *Watson* explicitly described the FAA's delegation scheme as one that *would* support "acting under" status. *Id.* at 24a (citing *Magnin* v. *Teledyne Cont'l Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996); Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *Watson*, 551 U.S. 142 (No. 05-1284), 2007 WL 621847, at *26 [hereinafter "U.S. *Watson* Br."]).

REASONS FOR GRANTING THE PETITION

This case cleanly presents a substantial and recurring question relating to the proper interpretation of the federal officer removal statute as interpreted by this Court in *Watson* in cases where there is a formal and explicit delegation of authority under FAA's regulatory regime. Review is warranted because the majority decision conflicts with *Watson* and deepens both a clear conflict and surrounding confusion among the Circuit Courts. Indeed, the Ninth, Seventh, and Eleventh Circuits have now all addressed whether an FAA delegation confers "acting under" status, and they

have reached conflicting results based on *three separate* rationales. Moreover, these recurring issues are of exceptional importance both in the FAA context and beyond.

A. The Decision Below Conflicts With *Watson* By Ignoring The Formal Delegation Of Authority That *Watson* Found Evidences That A Private Person Is "Acting Under" A Federal Officer For Purposes Of Removal.

The petition should be granted because the Ninth Circuit's decision conflicts with *Watson* by diminishing and misapprehending the FAA's formal delegation of authority to petitioner. See Pet. App. 17a, 24a–27a (O'Scannlain, J., dissenting).

1. This Court held in *Watson* that, for removal to be proper under section 1442(a)(1), "the private person's 'acting under' must involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 152. The "relationship typically involves 'subjection, guidance, or control,'" but it also must "go[] beyond simple compliance with the law" and "the usual regulator/regulated relationship." *Id.* at 151, 153, 157. It is sufficient for the purposes of the "acting under" requirement that a private party "help[] officers fulfill . . . basic governmental tasks" or "perform[] a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Id.* at 153–54. This special relationship between private party and federal officer may be evidenced by a contract or other formal delegation of legal authority. See *id.* at 156–57.

The Court in *Watson* addressed whether Philip Morris's compliance with the FTC's regulation of Philip Morris's testing processes satisfied section 1442(a)(1)'s "acting under" requirement. *Id.* at 145, 147. The

Court disagreed with Philip Morris's premise that mere compliance with federal law provides a basis for removal under section 1442(a)(1), "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 152–53. Instead, something more was required: "evidence of some . . . special relationship" between the private party and a federal officer that is "distinct from the usual regulator/regulated relationship." *Id.* at 157.

The *Watson* Court held that the "fatal flaw" in Philip Morris's assertion of delegated authority from the FTC was one of "omission": there was "no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf." *Id.* at 156. As the Court noted, Congress and federal agencies do not idly delegate authority to private entities without some kind of express grant. See *id.* at 157. Because "none of the[] documents [proffered by Philip Morris] establish[ed] the type of formal delegation that might authorize Philip Morris to remove the case," the company was not "acting under" a federal officer. *Id.* at 156–57.

2. As Judge O'Scannlain recognized in his dissent below, there is "clear evidence" in this case of a formal delegation, which is embodied in the statute, regulation, ODA Order, and memorandum of understanding executed between the FAA and ODA holders (like petitioner). See Pet. App. 22a–23a; see also, *e.g.*, ODA Program Rule, 70 Fed. Reg. at 59,933 (describing ODA designees as "representatives of the Administrator . . . performing a delegated function"). The Ninth Circuit's decision, however, relegated its discussion of the FAA's express delegation to a single footnote and treated it as somehow irrelevant under *Watson*. See Pet. App. 6a n.6. Instead, the majority labeled petitioner's ODA

to be equivalent to "self-certification" and mere compliance with generally applicable regulations. See *id.*

The dissent correctly identified the Ninth Circuit's "critical error" on this issue: the court conflated petitioner's separate roles as a manufacturer and as an FAA designee. See Pet. App. 24a–27a. Any manufacturer or seller applying for an STC—whether it is an ODA holder or not—must affirm (self-certify) that it completed its duty under the regulations as part of its application, and it is then subject to FAA review, inspection, and certification under 14 C.F.R. § 21.33(a). What the majority failed to recognize is that the *ODA holder* is the entity that carries out *the FAA's duties* under section 21.33(a), such that an ODA designee's certification conveys *the FAA's* formal approval of the aircraft.[7] As Judge O'Scannlain observed, the majority's conflation of these distinct duties led it to misread *Watson* and improperly compare petitioner to Philip Morris. See Pet. App. 26a–27a.

The Ninth Circuit further erred when it found that the ODA/FAA relationship is "a relationship based on compliance rather than assistance to federal officers" because ODA holders must perform delegated functions "in accordance with" detailed "FAA-approved" procedures. Pet. App. 13a–14a. As this Court in *Watson* explained, the very concept of a private party "acting under" a federal officer is that the federal officer

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[7] *See supra* at 3–6. The Solicitor General recently confirmed the distinction between a manufacturer's self-certification that its design meets applicable regulatory requirements and an FAA designee's certification that conveys the FAA's formal approval of the design. *See* U.S. *Sikkelee* Br., 2019 WL 6726852, at *3–4, *6 & n.1 ("'In determining whether an aircraft complies with FAA regulations,' these designees 'are guided by the same requirements, instructions, and procedures as FAA employees.'" (quoting *Varig Airlines*, 467 U.S. at 807)).

retains supervisory authority over the entity: the relationship "*typically* involves 'subjection, guidance, or control.'" 551 U.S. at 151 (emphasis added).

If the Ninth Circuit were correct that federal supervision negated the ability to remove, then that would read the phrase "acting under" out of section 1442(a)(1). The federal government does not typically delegate authority to private entities and then set those entities loose to carry out federal functions however they see fit. The key is that an ODA holder must follow *special* procedures—beyond those applicable to manufacturers and sellers—because *it is carrying out duties on FAA's behalf* and must exercise the same diligence "*as the FAA would use* in performing the function." ODA Order ¶ 3-7(a) (emphasis added); see also *supra* at 5.[8]

3. Notably, the Solicitor General in *Watson*—in arguing that Philip Morris was not entitled to remove—specifically contrasted Philip Morris's situation to the express delegation of authority under FAA regulations, which would support removal. See Pet. App. 24a (O'Scannlain, J., dissenting) (citing U.S. *Watson* Br., 2007 WL 621847, at *26). Under the heading "a proper understanding of the scope of the federal officer removal statute leaves ample room for removal by private parties in appropriate cases," U.S. *Watson* Br., 2007 WL 621847, at *24 (capitalization altered), the Solicitor General gave the following example:

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[8] Contrary to what the majority believed, the FAA Administrator's authority to review and reconsider ODA certification decisions (*see* 49 U.S.C. § 44702(d)(3)), simply reflects a process for administrative review, which would exist even if the certification decisions were made by a front-line FAA field officer. It does not change the fact that ODA certifications are done on behalf of FAA and, absent reconsideration, have the force of law.

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

Id. at *26 (emphasis added).[9]

The United States reiterated this point at oral argument during a back-and-forth with the Chief Justice regarding the line between delegation and regulation:

> MR. GORNSTEIN: You can have different situations . . . and the FAA is one, where the FAA has a statute which says you can delegate to third parties inspecting aircrafts, and the Agency certifies through regulation that this person is inspecting as a representative of the FAA. Now that's a varied situation. In that kind of situation the person would [be] acting under. But if the person is simply complying with Federal requirements about how to test, that is private behavior, acting on their

[9] The Ninth Circuit majority suggested that the Supreme Court in *Watson* "rejected" the Solicitor General's argument, but that is plainly not so. *Compare* Pet. App. 11a, *with Watson*, 551 U.S. 142. The Solicitor General's position was consistent with *Watson*'s holding, in explaining that Philip Morris was not entitled to removal, but that a party acting pursuant to a formal FAA delegation would be. *Compare* U.S. *Watson* Br., 2007 WL 621847, at *26–30, *with Watson*, 551 U.S. at 153–57. This Court simply did not address the FAA situation because it was not before it.

own behalf, in order to further the marketing of their products.

CHIEF JUSTICE ROBERTS: So if you are a federally certified inspector you are acting under—

MR. GORNSTEIN: Certified as a representative of the FAA, yes, you are.[10]

As reflected above, the fundamental distinction between the formal delegation under the FAA scheme here, and the lack of actual delegation under the FTC regime in *Watson*, is why removal is appropriate here but was not appropriate in *Watson*. By disregarding the relevance of that formal delegation, the Ninth Circuit's decision conflicts with the proper interpretation of *Watson* and warrants review because only this Court can resolve the meaning of that decision.

B. The Ninth Circuit's Decision Exacerbates A Split And Confusion Among The Circuit Courts As To When A Private Party Who Has Been Formally Delegated Federal Authority Is "Acting Under" A Federal Officer.

Review is equally warranted to resolve a split and confusion among the lower-court decisions in interpreting 28 U.S.C. § 1442(a)(1) and *Watson*, both in the FAA context and beyond.

1. The Ninth, Seventh, and Eleventh Circuits have all squarely addressed whether an FAA delegation supports "acting under" status, and they have reached conflicting results on divergent rationales.

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[10] Transcript of Oral Argument at 21–22, *Watson*, 551 U.S. 142 (No. 05-1284), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2006/05-1284.pdf.

In *Magnin* v. *Teledyne Continental Motors*, the Eleventh Circuit held that the FAA's express delegation of authority to private individuals gives rise to "acting under" status. 91 F.3d at 1426–27, 1429 n.1. *Magnin* involved a suit against an FAA Designated Manufacturing Inspection Representative ("DMIR"). *Id.* at 1426–27. The Eleventh Circuit found that "[t]he statute and regulations make it clear that DMIRs act under the FAA administrator, and the removal notice stated that [the DMIR's] certificate of designation as a DMIR had been issued by direction of the FAA Administrator, who had delegated inspection and certification authority to [the DMIR]." *Id.* at 1429 n.1 (citations omitted) (citing 49 U.S.C. § 1355 (current version at 49 U.S.C. § 44702); *Designated Airworthiness Representatives*, 48 Fed. Reg. 16,176, 16,176 (Apr. 14, 1983) (to be codified at 14 C.F.R. pt. 183)). The Eleventh Circuit thus rejected the plaintiff's argument in that case that the DMIR did not satisfy section 1442(a)(1)'s "acting under" requirement. See *id.* The Solicitor General in *Watson* subsequently cited *Magnin* approvingly as an example where removal based on a formal delegation was proper. U.S. *Watson* Br., 2007 WL 621847, at *26; see also Pet. App. 24a (O'Scannlain, J., dissenting) (citing *Magnin* as consistent with *Watson*).

The Seventh Circuit in *Lu Junhong*, 792 F.3d 805, reached the opposite conclusion, and in doing so invented a novel test for "acting under" status. There, the defendant was an FAA designee under FAA Order 8100.9A for issuing certificates for the autopilot and autothrottle systems being challenged—a scheme that the Seventh Circuit characterized as mere "self-certification," equivalent to a lawyer certifying compliance with the word limits of a brief. *Id.* at 808. Citing *Wat-*

son, the Seventh Circuit inferred that "the key ingredient" for "acting under" status is that the party be engaged in "rule making rather than rule compliance," and it found that FAA designees do not qualify because FAA Orders do not allow them "to change substantive rules." *Id.* at 810.

Here, the Ninth Circuit majority discounted *Magnin* while agreeing with the outcome of *Lu Junhong* that the formal delegation of authority under the FAA did not confer "acting under" status. The majority, however, specifically "decline[d] to adopt the rule-making-rule-compliance distinction articulated by the Seventh Circuit." Pet. App. 15a. At the same time, the majority adopted its own gloss that a delegation is insufficient if the delegate must comply with detailed policies in carrying out its duties. See *id.*

This disagreement among the courts of appeals as to both the outcome and underlying legal test for "acting under" status creates uncertainty for companies and individuals formally delegated federal duties and tasks by the FAA. It also encourages forum-shopping. A Florida-based manufacturer whose plane took off from California but crashed in Indiana may not be afforded its right to a federal forum depending on where the plaintiff decides to bring suit. This is precisely the kind of situation in which this Court should intervene. The Court accordingly should grant certiorari to resolve the conflict.

2. The case law reflects confusion in the application of *Watson* outside the FAA context as well.

In contrast to the Ninth Circuit's and Seventh Circuit's approaches, other circuits in a wide variety of contexts have applied *Watson* to find "acting under" status based on express delegations of authority to assist in carrying out federal functions, even when the

private party must strictly comply with federal requirements. See, *e.g.*, *Sawyer* v. *Foster Wheeler LLC*, 860 F.3d 249, 255, 257 (4th Cir. 2017) (holding manufacturer's production of boilers under contract with the U.S. Navy "readily satisfies" the "acting under" requirement, notwithstanding that the manufacturer hewed to the Navy's detailed specifications); *Caver* v. *Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1142–46 (11th Cir. 2017) (finding private electric cooperative entitled to remove where it "fulfill[ed] the congressional objective of bringing electricity to rural areas that would otherwise go unserved"); *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 469–70 (3d Cir. 2015) (holding Federal Community Defender Organization was entitled to remove consolidated disqualification actions to federal court because the organization was delegated authority to carry out provisions of the Criminal Justice Act); *Bell* v. *Thornburg*, 743 F.3d 84, 88–89 (5th Cir. 2014) (per curiam) (holding Chapter 13 standing trustee was "acting under" the U.S. Trustee pursuant to a formal delegation and thus entitled to remove state-law employment discrimination claims); *Jacks* v. *Meridian Res. Co.*, 701 F.3d 1224, 1233–34 (8th Cir. 2012) (allowing removal for insurance company with express federal delegation to administer federal health care plan, regardless that company was subject to Office of Personnel Management oversight); *Isaacson* v. *Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008) (finding "delegated authority" when manufacturer contracted with the U.S. government to provide the government a product pursuant to government specifications—"a product that, in the absence of Defendants, the Government would have had to produce itself").

In contrast, the Sixth Circuit in a memorandum disposition has cited *Lu Junhong* for the proposition that "acting under" status requires that the private party has the "power to make rules, as opposed to interpret and apply them as best it can." *Ohio State Chiropractic Ass'n* v. *Humana Health Plan Inc.*, 647 F. App'x 619, 624 (6th Cir. 2016) (quoting *Lu Junhong*, 792 F.3d at 810). As federal agencies typically do not bestow rulemaking authority on their contractors or designees, it is quite doubtful that the kinds of private entities that have successfully removed in the Second, Third, Fifth, Eighth, and Eleventh Circuits could remove in the Sixth and Seventh Circuits. A federal right, such as the removal protection granted by section 1442(a)(1), should not depend on geography for its enforcement.

Review is warranted to clarify the relevance of a formal delegation of authority under *Watson*, so that lower courts can apply the federal officer removal statute consistently and refrain from making up new and divergent tests.

C. The Proper Application Of The Federal Officer Removal Statute Is A Recurring Issue Of National Importance And This Case Is An Ideal Vehicle To Resolve The Confusion Among Federal Courts.

As explained above, the question presented—involving the proper interpretation of the federal officer removal statute as interpreted in *Watson* in cases where there is a formal delegation of authority—is substantial. Moreover, it is of exceptional importance both for the FAA's regulatory scheme and other contexts involving the federal delegation of authority. The Court should accept review because this case is an excellent vehicle to resolve the confusion among the lower

courts, both as to the application of section 1442 to FAA designees and more generally.

1. This case presents a recurring issue for the FAA's regulatory scheme governing the safety of our national system of air travel—an area in which there is an overriding need for national uniformity. As this Court has long recognized, the federal officer removal statute was "enacted to maintain the supremacy of the laws of the United States by safeguarding officers and others acting under federal authority against peril of punishment for violation of state law or obstruction or embarrassment by reason of opposing policy on the part of those exerting or controlling state power." *Symes*, 286 U.S. at 517. The statute's primary purpose is to allow federal officers or those acting under them to have their federal defenses such as official immunity or preemption decided in federal court. See *Willingham*, 395 U.S. at 406–07. The removal statute thus operates "to protect the Federal Government from . . . interference with its 'operations.'" *Watson*, 551 U.S. at 150 (quoting *Willingham*, 395 U.S. at 406).

The enforcement of uniform national standards is of paramount importance to the safe and efficient development and operation of air travel in the United States. Congress enacted the Federal Aviation Act to establish "a uniform and exclusive system of federal regulation" for overseeing almost all facets of aviation safety, including aircraft design, manufacturing, operation, and accident investigation. *City of Burbank* v. *Lockheed Air Terminal Inc.*, 411 U.S. 624, 638–39 (1973). The result of this "'cradle to grave' Federal regulatory oversight . . . is an industry whose products are regulated to a degree not comparable to any other." H.R. Rep. No. 103-525, pt. 2, at 5–6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1644. Congress has delegated

this comprehensive oversight role to the FAA and further authorized the FAA to delegate certain aspects of its regulatory duties to private persons. See 49 U.S.C. §§ 44701, 44702(d).

While this statutory evidence of a formal delegation should be sufficient on its own to bring FAA designees within the ambit of the removal statute, the important federal interest in enforcing uniform national aviation standards confirms the need for a federal forum in cases like this. This Court has long recognized "the national responsibility for regulating air commerce"; indeed, "[f]ederal control [of air travel] is intensive and *exclusive*" because "[l]ocal exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time." *Nw. Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) (emphasis added). The United States accordingly has taken the position that "Congress's decision to have the FAA exercise pervasive regulation of aircraft . . . design impliedly preempts the States from using their law (whether common law or positive law) to impose their own standards of care." U.S. *Sikkelee* Br., 2019 WL 6726852, at *15. FAA designees "are required to perform in a manner consistent with the policies, guidelines, and directives of the Administrator" under that same pervasive federal regulatory scheme. ODA Program Rule, 70 Fed. Reg. at 59,933.

This is exactly the kind of scheme for which the federal officer removal statute was enacted. When a plaintiff seeks to hold an FAA designee liable under state law for safety judgments made in accordance with federal standards, removal is necessary to "protect the Federal Government from . . . interference with its 'operations'" by providing a uniform federal forum to determine whether state law may override the

FAA designee's—and by extension, the FAA's—exercise of its federally delegated duty to enforce uniform national aviation safety standards. *Watson*, 551 U.S. at 150. Removal is further justified to "safeguard[] [the designee] acting under federal authority against peril of punishment for violation of state law." *Symes*, 286 U.S. at 517. And finally, removal is necessary to "have the validity of the [designee's] defense . . . tried in a federal court." *Willingham*, 395 U.S. at 407.[11]

Because the federal officer removal statute applies nationwide, this question of whether FAA designees may remove under section 1442 arises frequently, as evidenced by the multiple court of appeals and district court decisions addressing this specific issue. See, *e.g.*, *Riggs*, 939 F.3d 981; *Lu Junhong*, 792 F.3d 805; *Magnin*, 91 F.3d 1424; *Estate of Hecker* v. *Robinson Helicopter Co.*, No. 13-CV-0306-TOR, 2013 WL 5674982 (E.D. Wash. Oct. 17, 2013); *Weidler* v. *Prof'l Aircraft Maint.*, No. CV 10-09376 SJO (CWx), 2011 WL 2020654 (C.D. Cal. May 13, 2011); *Scrogin* v. *Rolls-Royce Corp.*, No. 3:10cv442 (WWE), 2010 WL 3547706 (D. Conn. Aug. 16, 2010); *O'Brien* v. *Cessna Aircraft Co.*, No. 8:09CV40, 2010 WL 4721189 (D. Neb. July 21, 2010) (Thalken, Mag. J.). This Court's intervention

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[11] As noted *supra*, the Solicitor General recently advised this Court that it should refrain from reviewing the preemptive scope of the Federal Aviation Act at this time because only one court of appeals has incorrectly decided that state-law aviation design-defect claims are not impliedly preempted by federal aviation standards. *See* U.S. *Sikkelee* Br., 2019 WL 6726852, at *20. Confirming FAA designees' right to remove under section 1442 will further allow the FAA preemption issue to percolate among the lower federal courts and facilitate an ultimate resolution of this important question of federal law.

thus is warranted to ensure national uniformity on this exceptionally important question of federal law.

Moreover, this case is an ideal vehicle with which to resolve the question. The district court and court of appeals declined to reach the other requirements for removal under the statute, so this case tees up directly the issue of what evidence of a formal delegation gives rise to "acting under" status. See Pet. App. 9a, 16a n.9.[12] There is "clear evidence" of a formal delegation here embodied in statute, regulation, agency order, and memorandum of understanding executed between the FAA and ODA holders. See *id.* at 22a–23a (O'Scannlain, J., dissenting). Moreover, the facts concerning the statutory and regulatory framework are undisputed: the parties do not contest the factual allegations in petitioner's notice of removal; they only assert those allegations are facially insufficient to invoke federal jurisdiction. Therefore, the instant case includes all of the facts necessary to clarify *Watson*'s proper application.

2. Granting review and resolving the circuit split presented here not only will bring clarity to the "acting under" status of FAA designees—but also will provide

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[12] In any event, petitioner readily could establish the other elements for removal: Respondents' claims "relate to" (are causally connected to) petitioner's decisions not to develop and issue an STC for an alternative design, and petitioner has much more than a "colorable federal defense" (preemption). *See Goncalves* v. *Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1244 (9th Cir. 2017) (explaining that "the 'hurdle erected by [the causal-connection] requirement is quite low,'" and that federal preemption is a defense that can support removal) (alteration in original); *Magnin*, 91 F.3d at 1427 (explaining that the federal defense "need only be plausible; its ultimate validity is not to be determined at the time of removal").

guidance on the status of various other federal designees who assist the U.S. government with determining or enforcing compliance with U.S. law. As industry needs continue to expand at a rate exceeding that of federal resources, federal agencies increasingly are turning to private entities and their expertise and resources to assist in the enforcement and implementation of federal regulations or programs. See, *e.g.*, Douglas C. Michael, *Cooperative Implementation of Federal Regulations*, 13 Yale J. on Reg. 535, 538–39, 558–97 (1996) (collecting examples).

For instance, as cited above, circuit courts have addressed federal officer removal in a wide variety of cases, such as electrical cooperatives (*Butler* v. *Coast Elec. Power Ass'n*, 926 F.3d 190, 192 (5th Cir. 2019); *Caver*, 845 F.3d at 1142–46), a community federal defender organization (*Def. Ass'n of Phila.*, 790 F.3d at 469–70), and insurance carriers responsible for seeking subrogation for federally sponsored health plans (*Jacks*, 701 F.3d at 1233–34). As another example, in the last several years, the Department of Agriculture has finalized rules delegating parts of the poultry and swine inspection process to employees of slaughter establishments rather than government inspectors. See *Modernization of Swine Slaughter Inspection*, 84 Fed. Reg. 52,300, 52,300 (Oct. 1, 2019) (to be codified at 9 C.F.R. pts. 301, 309, 310); *Modernization of Poultry Slaughter Inspection*, 79 Fed. Reg. 49,566 (Aug. 21, 2014) (to be codified at 9 C.F.R. pts 381, 500). A decision here would provide clarity as to whether those entities and their employees would have a right to remove claims alleging that they failed to follow state-law standards that are contrary to federal law. See, *e.g.*, *Nat'l Meat Ass'n* v. *Harris*, 565 U.S. 452, 455 (2012) (holding Federal Meat Inspection Act expressly

preempted California law governing nonambulatory swine).

Because the questions presented in the petition are of exceptional importance and will continue to recur in the FAA context and beyond, the Court should grant certiorari.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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