NO. 19-1158

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

BRIEF IN OPPOSITION

Gary C. Robb
Anita Porte Robb
Andrew C. Robb
Brittany Sanders Robb
ROBB & ROBB LLC
One Kansas City Place
1200 Main Street
Suite 3900
Kansas City, MO 64105
(816) 474-8080

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
455 Massachusetts Ave., NW
Suite 152
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Counsel for Respondents

QUESTION PRESENTED

Whether the aircraft design choices made by a manufacturer of private aircraft, formally delegated self-certification authority by the Federal Aviation Administration, can claim to be "acting under" a federal officer for removal to federal court under 28 U.S.C. § 1442(a)(1), when a design defect solely attributable to that choice caused a passenger injury?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Mary Riggs, as Personal Representative of the Estate of Jonathan Neil Udall, and Philip and Marlene Udall, as Next of Kin and Natural Parents of Jonathan Neil Udall, deceased, respectfully request that this Court deny the petition for a writ of certiorari that seeks review of the decision of the United States Court of Appeals for the Ninth Circuit in this case.

INTRODUCTION

The federal officer removal statute allows a private party "acting under" a federal officer to permit their federal defense to be heard in federal court. 28 U.S.C. § 1442(a)(1). This Court, adopting the dictionary meaning of the critical "acting under" requirement at issue here, described the relationship between private person and government actor as "typically involv[ing] 'subjection, guidance, or control.'" *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151 (2007) (quoting Webster's New International Dictionary 2765 (2d ed.1953)). That relationship, as both the district court and the Ninth Circuit held, was absent in this tragic case involving an allegedly defective design.

Petitioner Airbus Helicopters, Inc. (AHI) had sole responsibility for the aircraft's design. It did not, for example, stand in the same boots as a military contractor tasked with building a helicopter to the government's specifications. That manufacturer acts "under the direct supervision, control, order, and directive of federal government officers acting under

the color of federal office." *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805, 813 (3d Cir. 2016). In those instances, it is the federal government, not the manufacturer, who is responsible for the design, and any lawsuit of that kind claiming a design defect against that manufacturer is properly subject to federal-officer removal.

AHI can make no similar claim. The tour helicopter that crashed here was not designed or built under the "subjection, guidance, or control" of federal government officers, but entirely as a function of AHI's own design preferences. To be sure, the helicopters must conform to Federal Aviation Regulations (FARs), through which the Administrator of the Federal Aviation Administration (FAA) prescribes "minimum standards required in the interest of safety … for the design, material, construction, quality of work, and performance of aircraft, aircraft engines, and propellers." 49 U.S.C. § 44701(a).

Yet, the institution of those standards and compliance with them no more makes a manufacturer a federal officer than does a pharmaceutical company's compliance with Food & Drug Administration (FDA) regulatory requirements to conduct clinical trials, monitor adverse events, and propose labeling changes. *See Wyeth v. Levine*, 555 U.S. 555, 571 (2009) (citing 21 CFR § 201.80(e); 21 CFR § 314.80(b); and, 73 Fed. Reg. 49605)). Both the Ninth and Seventh Circuits noted that other industries have compliance certification responsibilities that do not transform them into federal officers. *See* Pet. App. 6a-7a n.6 (finding no

dispositive difference between a delegation of authority to certify compliance and ordinary compliance).

Before the Ninth Circuit, AHI conceded that "it cannot make design changes without approval from the FAA." Pet. App. 14a. That concession confirms that the design defect alleged in the complaint, *see* Pet. App. 2a, was a function of AHI acting as a private company, and not as the designee of the FAA. The FAA has no responsibility for the allegedly defective design, regardless of AHI's compliance with then-existing FARs. Given the lack of federal involvement in AHI's helicopter design choices, AHI is not entitled to federal-officer removal.

STATEMENT OF THE CASE

A. Factual Background.

Jonathan Neil Udall, while on vacation from the United Kingdom, embarked on a sightseeing tour of the Grand Canyon on February 10, 2018 in a helicopter assembled, distributed, and sold by AHI. Pet. App. 2a, 31a. The helicopter was operated and maintained by Co-Respondent Papillon Airways, Inc. The helicopter departed that morning from Papillon's base of operations, Boulder City Municipal Airport in Nevada.

As the helicopter approached a landing area at the Grand Canyon, the pilot lost control, forcing the aircraft to make a hard landing in the canyon. It immediately burst into flames. Udall was extensively burned, but still had to endure a painful eight-hour

wait for helicopter emergency transport to a medical center.

Once the helicopter emergency transport arrived, Udall was taken to University Medical Center where he remained in critical condition with burns over 98 percent of his body. On February 22, 2018, Udall died as a result of his catastrophic burn injuries.

B. Procedural History

On March 2, 2018, Udall's parents and estate filed this action in the Eighth Judicial District Court for Clark County, Nevada, alleging claims of negligence and strict liability against several defendants including the manufacturer, operator, owner, and pilot. In their claims against AHI (and its parent company, Airbus Helicopters, S.A.S.), Plaintiffs allege that the subject helicopter was defectively designed in that the fuel system was not crash-resistant and could not withstand a minimal or moderate impact without bursting into flames and engulfing the passenger compartment. Pet. App. 2a. No claim raised a federal question.

On March 9, 2018, Plaintiffs filed their First Amended Complaint, adding two defendants. On May 18, 2018, thirty days after being served with the FAC, AHI filed a notice of removal asserting federal officer status under 28 U.S.C. § 1442(a)(1). Plaintiffs timely filed a motion to remand on June 8, 2018. The non-AHI defendants, Co-Respondents here, filed a separate remand motion on June 15, 2018. On July 16, 2018, the District Court granted the motions to remand. Pet. App. 29a-40a.

AHI appealed as of right and asked for expedited review by the Ninth Circuit. It contended, as it does here, that its holding of an Organization Designation Authorization (ODA) from the FAA makes it a federal officer. The Ninth Circuit disagreed, holding that the ODA designation merely permits AHI to certify "compliance and . . . mere compliance with federal directives does not satisfy the 'acting under' requirement of § 1442(a)(1), even if the actions are 'highly supervised and monitored.'" Pet. App. 14a (quoting *Watson*, 551 U.S. at 153).

More critically, the court recognized that the case was about a defectively designed helicopter, not about negligent certification. Pet. App. 2a. The dissent took the view that the designated "authority to issue 'certificates' on the agency's behalf" rendered AHI a federal officer, Pet. App. 17a, a basis for federal-officer designation the majority found too flimsy and unconnected to the cause of action. Pet. App. 6a-7a n.6, 13a, 14a. AHI's petition for rehearing en banc was denied with no judge requesting a vote. Pet. App. 41a-42a.

C. Statutory and Regulatory Background.

The Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1), permits removal of a state-filed case to a federal forum in any action 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). Its purpose is "to ensure

a federal forum in any case where a federal official is entitled to raise a defense arising out of his duties." *Arizona v. Manypenny*, 451 U.S. 232, 241 (1981).

Removal is appropriate only when some "federal interest in the matter" exists to protect "the enforcement of federal law through federal officials." *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). The otherwise broad scope of removal authority authorized by Section 1442(a)(1) is limited by reference to the statute's "language, context, history, and purposes." *Watson*, 551 U.S. at 147. Federal officer removal was brought into being in 1815 as a "congressional response to New England's opposition to the War of 1812, [and] its expansion in response to South Carolina's 1833 threats of nullification." *Mesa v. California*, 489 U.S. 121, 125-26 (1989). It seeks to avoid state-court hostility to federal authority. *Willingham*, 395 U.S. at 405.

The FAA sets "minimum standards for aircraft design, materials, workmanship, construction, and performance" and "prescribe[s] reasonable rules and regulations governing the inspection of aircraft." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 804 & n.5 (1984).

Since "at least 1927, the federal government has used private persons to examine, test and inspect aircraft as part of the system for managing aviation safety" to make up for "limited resources." Pet. App. 69a, 70a. The Eighth Circuit has described this delegation approach as a means of "reduc[ing]

governmental costs [and] eas[ing] the burden of regulation on the aviation community by expediting the issuance of requested certifications." *Charlima, Inc. v. United States*, 873 F.2d 1078, 1081 (8th Cir. 1989). The designated private persons are authorized to undertake certification and airworthiness approvals for the products manufactured by the authorization holder. *Id. See also Varig Airlines*, 467 U.S. at 807.

The ODA program, 14 CFR § 183.49, utilizes qualified private parties to conduct "the examination, testing, and inspection" and issue a certificate of compliance. 49 U.S.C. §§ 44710, *et seq*., 44702(d)(1)(A) & (B). When performing one of the specified delegated functions, an ODA designee is "legally distinct from and act[s] independent of the organizations that employ them." Pet. App. 71a; Establishment of Organization Designation Authorization Program, 70 Fed. Reg. 59,932, 59,933 (Oct. 13, 2005) (codified at 14 C.F.R. pts. 21, 121, 135, 145, 183). There is no direct or sustained supervision of ODA functions. In support of that separation of function, an ODA holder must ensure that no conflicting responsibilities affect the performance of authorized functions. 14 CFR § 183.57(c).

Regulations give the FAA Administrator authority, "at any time and for any reason," to inspect an ODA Holder's products, components, parts, appliances, procedures, operations, and records associated with the authorized or requested functions. 14 CFR § 183.59. When that spot-checking function is not utilized, a "person affected by an action of a private

person under this subsection may apply for reconsideration of the action by the Administrator," who can "change, modify, or reverse" any "unreasonable or unwarranted" action by the private person. 49 U.S.C. § 44702(d)(3).

REASONS FOR DENYING THE PETITION

The Seventh and Ninth Circuits, the only appellate decisions to address the Question Presented since this Court's decision in *Watson*, held that a private aircraft manufacturer does not qualify for federal-officer removal based on either regulatory compliance activities or its own design choices. Contrary to AHI's assertions, there is no confusion in the lower courts on this issue. Since this Court's decision in *Watson*, the "vast majority of those courts [that have confronted arguments for removal in the aviation context] have remanded the cases to state court." *Dietz v. Avco Corp.*, 168 F. Supp. 3d 747, 753 (E.D. Pa. 2016).

AHI attempts to manufacture a circuit conflict by pointing to an Eleventh Circuit decision that predated *Watson* and therefore applied different legal principles. AHI fails to recognize that since the seminal decision in *Watson,* courts have read and applied the rules articulated in *Watson* consistently. *Id.*

Critically, this case presents a poor vehicle for review because it is a design-defect case. In *Watson*, this Court suggested that that critical fact made a difference, but put it aside to address how compliance with highly specific regulatory authority was

insufficient. *Watson*, 551 U.S. at 154 ("For argument's sake we shall overlook the fact that the petitioners appear to challenge the way in which Philip Morris 'designed' its cigarettes, not the way in which it (or the industry laboratory) conducted cigarette testing."). There is no reason to answer the same question one more time "[f]or argument's sake."

Here, the causal nexus needed for federal-officer removal is missing because there is no connection between AHI's unilateral choice not to incorporate a crash-resistant fuel system into its helicopter and, in turn, its OHA certification responsibility to comply with FARs. AHI made its design choices as a private manufacturer, not by any stretch as a representative of the FAA.

I. The Decision Below Faithfully Applies this Court's Decision in *Watson*.

The Ninth Circuit has distilled this Court's decisions into three elements for private-party removal under the Federal Officer Removal Statute, 28 U.S.C. § 1442(a)(1): (a) the party seeking removal must be a "person" within the meaning of the statute; (b) there must be "a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims;" and (c) the officer must "assert a 'colorable federal defense.'" *Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (citing *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999); *Mesa v. California*, 489 U.S. 121, 129 (1989)). The other circuits, though they differ on the number

of elements in the test, ask the same essential questions.[1]

The Ninth Circuit applied that test in a manner faithful to this Court's decision in *Watson*. AHI does not suggest a different test, only a different result.

A. The Decision Below Does Not Conflict with *Watson*.

Still, AHI asserts that the decision below conflicts with *Watson* and, for that reason, merits this Court's review. However, the Ninth Circuit carefully and faithfully applied the guidance supplied by this Court in *Watson*, and there is no conflict. Instead, AHI asks this Court to accept that its private duties as a manufacturer merged with its public duties because of its ODA holder status and, consequently, AHI's helicopter design choices should become attributable to the FAA.[2] The Ninth Circuit rejected that merger

---

[1] *See Cuomo v. Crane Co.*, 771 F.3d 113, 115 (2d Cir. 2014); *Golden v. New Jersey Inst. of Tech.*, 934 F.3d 302, 309 (3d Cir. 2019); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2017); *St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co.*, 935 F.3d 352, 355 (5th Cir. 2019); *Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017); *Betzner v. Boeing Co.*, 910 F.3d 1010, 1015 (7th Cir. 2018); *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1230 (8th Cir. 2012); *Greene v. Citigroup, Inc.*, 215 F.3d 1336 (10th Cir. 2000); *Caver v. Cent. Ala. Elec. Coop.*, 845 F.3d 1135, 1142 (11th Cir. 2017); *K&D LLC v. Trump Old Post Office LLC*, 951 F.3d 503, 506 (D.C. Cir. 2020).

[2] AHI writes, "the *ODA holder* is the entity that carries out *the FAA's duties* under section 21.33(a), such that an ODA designee's [self-]certification conveys *the FAA's* formal approval of the aircraft." Pet. App. 12 (emphasis in orig.). It takes comfort in the

hypothesis. Pet. App. 13a-14a. AHI's arguments, in fact, cannot be reconciled with the applicable regulations, which emphasize the separation of the private and federal functions and demand that ODA holders avoid conflicts of interest. *See* Pet. App. 71a ("When performing a delegated function, designees are legally distinct from and act independent of the organizations that employ them."); 14 CFR § 183.57(c) ("The ODA Holder must … (c) [e]nsure that no conflicting non-ODA Unit duties or other interference affects the performance of authorized functions.").

If AHI's argument were valid, "every repair or maintenance inspection on an airplane engine is eventually followed by issuance of a certificate of airworthiness, [and] then every airplane engine [] mechanic could remove to federal court even the simplest of negligence claims." *Britton v. Rolls Royce Engine Servs.*, 2005 WL 1562855, at *4 n.3 (N.D. Cal. June 30, 2005). *Accord, O'Brien v. Cessna Aircraft Co.*, No. 8:09CV40, 2010 WL 4721189, at *13 (D. Neb. July 21, 2010), report and recommendation adopted, No. 8:09CV40, 2010 WL 4720333 (D. Neb. Nov. 12, 2010).

1. Watson's *reasoning supports the decision below.*

Watson provides no basis for AHI's novel and illogical proposition that its failure to correct a design

---

dissent's agreement with that proposition, *see* Pet. App. 26a ("an ODA Holder's 'certification' conveys the *agency's* formal approval to the aircraft."). However, both AHI and the dissent mistakenly make this a case about negligent certification approval when the defective design was entirely AHI's doing in its private capacity.

defect is government action. Before the Court of Appeals, as here, AHI conflates its ODA role with its separate private status by claiming that the plaintiff's death was connected to its responsibility to the FAA in "inspecting major design changes and issuing supplemental type certificates for aircraft." Br. of Deft.-Appellant Airbus Helicopters, Inc., *Riggs v. Airbus Helicopters, Inc.*, No. 18-16396, Dkt. No. 12-1, at 2 (Aug. 27, 2018). Because 14 CFR § 183.63(c) requires an ODA holder to "[i]nvestigate any suspected unsafe condition or finding of noncompliance with the airworthiness requirements …, and report to the Administrator the results of the investigation and any action taken or proposed," AHI seeks to turn this design-defect case into one about its failure to discharge its ODA duties to identify and report the unsafe condition of its design – *to itself as the Administrator's designee*.

In other words, AHI claims that its failure to apply *to itself* to self-certify any failure is attributable to its federal role and not its decisions as a private company. AHI's argument is precisely the type of "expansion" of federal-officer removal that *Watson* held to be at odds with the removal statute's language, history, and purpose. 551 U.S. at 153. It certainly does not implicate "a significant risk of state-court 'prejudice'" that the federal-officer removal statute was meant to prevent. *Watson*, 551 U.S. at 152 (2007).

In *Watson,* Philip Morris claimed the federal government insisted it use a government-developed methodology, the Cambridge Filter Method, to test cigarette tar and nicotine content to enable consumers

to compare different cigarettes. *Id.* at 155. In 1967, the FTC took over testing by that method in its own laboratory. Through an agreement between leading cigarette companies and the FTC, the companies disclosed in their advertising the tar and nicotine ratings from the FTC's testing. *Watson v. Philip Morris Cos., Inc.,* 420 F.3d 852 (8th Cir. 2005), *rev'd*, 551 U.S. 142 (2007).

After 20 years of conducting that testing, "the FTC decided to terminate its cigarette laboratory, and instead *require* the cigarette industry to self-test, using the Cambridge Filter Method, and to submit results that would continue to be published in the Federal Register." *Id.* (emphasis added). Under this new plan, the "FTC retained the right to conduct unannounced inspections of the industry testing facilities and the right to confirm the test results through a government lab." *Id.* The FTC also continued to publish the results and report them to Congress, just as it did when its own laboratory did the testing. 551 U.S. at 155.

The *Watson* state-court complaint charged that the Cambridge Filter Method, as implemented by Philip Morris, inaccurately assessed tar and nicotine content. *Id.* at 146. The Eighth Circuit nonetheless sustained removal on federal-officer grounds because the FTC "exercise[d] the same type of comprehensive, detailed regulation and does the same kind of ongoing monitoring as in [government contractor cases, where removal is upheld]." 420 F.3d at 858.

This Court unanimously reversed and held:

> A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase "acting under" a federal "official." And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored. *A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries.*

551 U.S. at 153 (emphasis added). The Court further held that "[n]either language, nor history, nor purpose lead us to believe that Congress intended any such expansion." *Id.*

After reviewing the history of the statute to guide its interpretation, this Court held the "removal statute's 'basic' purpose is to protect the Federal Government from the interference with its 'operations' that would ensue were a State able, for example, to 'arres[t]' and bring 'to trial in a State cour[t] for an alleged offense against the law of the State,' 'officers and agents' of the Federal Government 'acting ... within the scope of their authority.'" *Id.* at 150 (alterations in original) (quoting *Willingham*, 395 U.S. at 406). Additionally, the statute changes venue from state to federal to prevent "'local prejudice' against

unpopular federal laws or federal officials" or state acts that "impede through delay federal revenue collection or the enforcement of other federal law." *Id.* (citations omitted). The Court added that "some of these same considerations may apply" when a private person lawfully assists the federal officer "in the performance of his official duty." *Id.* at 151 (citations omitted).

AHI recognizes that *Watson* requires an "acting under" basis for federal officer removal to "go[] beyond simple compliance with the law" and "the usual regulator/regulated relationship," and typically involves "'subjection, guidance, or control.'" Pet. 10 (quoting *Watson*, 551 U.S. at 151, 153, 157). AHI also asserts that "[i]t is sufficient" (AHI's words) that the 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." Pet. 10 (quoting at *Watson*, 551 U.S. at 153–54). It therefore suggests that its issuance of an airworthiness certificate in its ODA holder status renders it a federal officer.

However, as the Ninth Circuit held, AHI improperly interprets these phrases and ignores the plain meaning of the statutory regime. Pet App. 10-12a. For example, Boeing helped the FAA by issuing airworthiness certificates for its Boeing 737 Max jets, which demonstrated a propensity to nosedive, overriding a pilot's attempt to correct the computer-generated trajectory. Under AHI's distorted view of *Watson*, that certification of compliance delegated to

Boeing rendered the company a federal officer for all disputes concerning its sensor system until the FAA decided to take the delegation away last year. *See* Statement of FAA Administrator Stephen M. Dickson before the Committee on Transportation and Infrastructure, United States House of Representatives (Dec. 11, 2019), available at https://www.faa.gov/news/speeches/news_story.cfm?newsId=24474 (informing the committee that the delegation was rescinded). Yet, the FAA did not design or implement the sensor system that caused the 737 Max's failures, and Boeing did not design or implement it as an FAA designee. Boeing merely self-certified compliance with all general safety regulations applicable to all planes and not specific to the system in question. AHI's misreading of *Watson*, then, would make the ODA holder the FAA regardless of the designation's limited and specific purposes.

After all, aircraft obtain "type certificates" from the FAA after the agency reviews manufacturer's submissions and finds the "design, test reports, and computations … show that the product to be certificated meets the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements" of the FARs and that "no feature or characteristic makes it unsafe for the category in which certification is requested." 14 CFR § 21.21(b). *See also* 49 U.S.C. § 44704(a)(1). The review is quite similar to that undertaken for new drug approval by the FDA. *See Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1672-73 (2019). *See also Wyeth*, 555 U.S. at 570–71 ("a central premise of federal drug

regulation that the manufacturer bears responsibility for the content of its label at all times.").

Once a type certificate is issued, each aircraft must obtain an airworthiness certification, which indicates that the specific "aircraft conforms to its type certificate and, after inspection, is in condition for safe operation." 49 U.S.C. § 44704(d)(1). The issuance of airworthiness certificates is typically delegated to an ODA pursuant to 49 U.S.C. § 44702(d)(1).

In this case, the Ninth Circuit acknowledged this legal framework and framed the question before it as "whether AHI was assisting the FAA to carry out the FAA's duties or whether AHI was 'simply complying with the law,' which would not bring it within the scope of § 1442(a)(1)." Pet. App. 6a. The Ninth Circuit derived the question from *Watson*, thereby demonstrating its adherence to the decision's teachings. *Cf. Watson*, 551 U.S. at 157 (following the "FTC's detailed rules … for testing, requirements about reporting results, and the like … sounds to us like regulation, not delegation.").

Watson also explicitly distinguishes filling out required forms and obeying federal regulations or requirements—which may help or assist federal officials—from acting under a federal agent. *Id.* at 152. Thus, it added that "[w]hen a company subject to a regulatory order (even a highly complex order) complies with the order, it does not ordinarily create a significant risk of state-court 'prejudice,'" and "a state-court lawsuit brought against such a company" will not "disable federal officials from taking necessary

action designed to enforce federal law" or "deny a federal forum to an individual entitled to assert a federal claim of immunity." *Id*. The Ninth Circuit faithfully applied *Watson*'s teachings.

2. Watson's *"Fatal Flaw" Discussion Related to an Analogy to Government Contractors, Not to Authority to Certify Compliance with the Law*.

AHI contends that the Ninth Circuit's analysis erred because it did not give weight to the formal designation it received from the FAA to self-certify and that the legal designation of AHI as an ODA holder transformed *everything* it did into actions attributable to the FAA. To AHI, this constituted a deviation from *Watson,* which recognized that a formal delegation of legal authority would constitute evidence of "acting under" and its absence in *Watson* was a "fatal flaw" in Philip Morris's argument. Pet. 11 (citing Watson, 551 U.S. at 156). AHI's assertion misapprehends *Watson*'s discussion.

In *Watson*, the Eighth Circuit likened Philip Morris's situation to that of a government contractor.[3] *Watson*, 420 F.3d at 858 ("[T]he FTC exercises the

[3] The government contractor defense involves the "'uniquely federal interest[ ]' of 'getting the Government's work done' [and] requires that, under some circumstances, independent contractors be protected from tort liability associated with their performance of government procurement contracts." *In re Agent Orange Prod. Liab. Litig.*, 517 F.3d 76, 87 (2d Cir. 2008) (quoting *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504-05 (1988)).

same type of comprehensive, detailed regulation and does the same kind of ongoing monitoring as in [government contractor cases where removal is permitted]"). *See also Watson*, 551 U.S. at 157. Yet, it was the absence of documents that could attest to that special relationship between a government and its contractor that was the "fatal flaw" in that argument, *Id*. at 156, not the absence of a formal delegation of compliance authority, as AHI claims. Recall that the underlying tort claim against Philip Morris was that the Cambridge Testing Method, as implemented by the company, gave falsely favorable tar and nicotine ratings to its cigarettes. Thus, the dispute centered upon the testing methodology. Philip Morris defended against the charge by claiming that it was using a methodology developed by the federal government and mandated by the FTC, so its function was essentially ministerial.

Rather than consider the design-defect claim underlying the case "[f]or argument's sake," in order to reach the broader issue of what removal for a status akin to a government contractor required, this Court noted that there was no evidence of "any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." *Id*. That same kind of close working relationship does not exist through ODA status. *See Charlima,* 873 F.2d at 1081 ("the FAA does not control the day-to-day operations of designated airworthiness representatives. … it does not manage the details of a designated representative's work or supervise him in his daily investigative duties.").

Watson contrasted the facts before the Court with government-contractor cases, where a private company produces an item the government needs, rather than certifies compliance with the law. 551 U.S. at 153. It was only in this context that the lack of evidence of a formal relationship constituted a "fatal flaw." Compliance with federal regulations remains compliance, not delegation, even with a formal designation, *see* Pet. App. 6a-7a n.6, unless negligence in the carrying out of the delegation is alleged. Yet, that is not at issue in this case.

As an example of removal based on the type of relationship required, this Court, *Watson*, 551 U.S. at 153-54, pointed to *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387 (5th Cir. 1998), *cert. denied*, 526 U.S. 1034 (1999) (holding federal officer removal appropriate because of the direct control the "government exercised over the composition and production of Agent Orange," the product in question, was supplied by a vender to the government "under threat of criminal sanctions."). There, removal was warranted because any state lawsuit in that case would focus on the legitimacy of the federal decision, rather than the actions of the private manufacturers—precisely the risk federal officer removal was intended to address. Here, in contrast, it is AHI's design decisions, not any federal one, that is at issue.

Because Philip Morris was not a government contractor (and neither is AHI), *Watson* went no further in its analysis, other than to point out that not every contract with the government will "enable

private contractors to invoke the statute." *Watson*, 551 U.S. at 154.[4] Ignoring that statement is one of the fatal flaws in AHI's argument. Moreover, *Watson* further recognized that there is a distinction in a case where plaintiffs challenge the "design" of a product where the government does not specify the design, and one where the company or industry conducts testing for compliance purposes. *Id*. That distinction exists here, and the Ninth Circuit's decision conforms to that recognition in *Watson*.

Watson teaches that AHI's status as an ODA holder that can issue "FAA certifications" on its own aircraft is not sufficient to qualify as acting under the authority of the FAA. AHI's status as an ODA holder does not confer upon AHI the close working

---

[4] AHI invokes the Solicitor General's responses in oral argument in *Watson* for what it asserts was a sympathetic position on ODA status. Pet. 13-15. Yet, *Watson* denies that every contract enables removal, which is what AHI suggests in extensively quoting the oral argument. And nothing in *Watson* indicates that this Court adopted the SG's position, which did not necessarily reflect the FAA's own views or that of Congress, but can instead be premised on other considerations unique to that office. *See* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. L. Rev. 255, 263 (1994).

The Solicitor General's position is owed no deference. As the litigation position of the United States in interpreting a statute addressing federal jurisdiction, it is no more authoritative than that of counsel for any other party. Courts defer to a federal agency in interpreting a statute only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). Federal-officer status is not such a delegation.

relationship with the federal government required to be acting under the authority of the federal government. *See Charlima,* 873 F.2d at 1081. And, its ODA status has nothing to do with the design choices AHI made in its private capacity.

AHI was not carrying out government functions in which the decisions could be imputed to the government. The FAA did not specify the design or implementation of requirements with significant government oversight. *Cf. Getz v. Boeing Co.*, 654 F.3d 852, 861 (9th Cir. 2011). *Watson* distinguished between that type of nondiscretionary assistance from private contractors who simply comply with the law, *Watson*, 551 U.S. at 153, and the Ninth Circuit's decision took that distinction to heart. There is no conflict between the two decisions that warrants the exercise of this Court's discretion.

II. AHI Conjures Up a Circuit Conflict that Does Not Exist.

AHI attempts to fabricate a circuit conflict by pitting the Ninth and Seventh Circuits' decisions—both issued post-*Watson*—against a pre-*Watson* decision from the Eleventh Circuit. *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424 (11th Cir. 1996). AHI's alleged circuit conflict does not exist.

Before noting the critical factual distinctions between *Magnin* and the case at bar, *Magnin* does not create a circuit conflict because it was decided before *Watson.* The Seventh Circuit's post-*Watson* decision in *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 813 (7th Cir. 2015), considered *Magnin* and found the decision both

"inconsistent with *Watson*" and not "authoritative" because it was decided before *Watson*. *Id.* at 810. The Sixth Circuit, too, criticized reliance on *Magnin* as pre-*Watson* case law. *See Ohio State Chiropractic Ass'n v. Humana Health Plan Inc.*, 647 F. App'x 619, 622 (6th Cir. 2016). This Court's decision in *Watson* has unified the lower courts' interpretation of the federal-officer removal statue, and—contrary to AHI's assertions—there is no need for this Court to intervene to clarify *Watson*'s proper application. *Dietz*, 168 F. Supp. 3d at 754 ("Since *Watson* . . . the vast majority of those [lower] courts [that have confronted arguments for removal in the aviation context] have remanded the cases to state court.").

Further, in *Magnin*, the plaintiff "specifically named Smith [a Teledyne employee] as a DMIR [Designated Manufacturing Inspection Representative] . . . and "authorized agent of the FAA]." *Id.* at 1428. Plaintiff accused him of "proximately caus[ing] the fatal crash" by "sign[ing] the export certificate only in his capacity as an agent of the FAA, *i.e.*, as a DMIR, and the complaint itself pleads that connection." *Id.* Thus, the cause of action was explicitly against an agent of the FAA, operating in that capacity, for negligently performing those federal duties.

As several courts have observed, because of the unusual way the case was framed, *Magnin* is entirely distinguishable from cases where the complaint does not specifically name an authorized agent of the FAA and implicate that agent's actions "only in his capacity as an agent of the FAA." *See id. See also Swanstrom v.*

Teledyne Continental Motors, Inc., 531 F. Supp. 2d 1325, 1332 (S.D. Ala. 2008); *Britton*, 2005 WL 1562855, at *4. The complaint at bar makes no such claims.

Like this case, *Lu Junhong*—a case AHI invokes as conflicting with *Magnin*—involved a defective-design claim in an aircraft crash. 792 F.3d at 806-07. Boeing contended, as does AHI here, that "the FAA has granted Boeing authority to use FAA-approved procedures to conduct analysis and testing required for the issuance of type, production, and airworthiness certifications for aircraft under Federal Aviation Regulations." *Id*. at 808. The company further asserted that "[i]n carrying out those functions, Boeing is subject to FAA control, and it acts as a representative of the FAA Administrator." *Id*.

The Seventh Circuit squarely rejected the notion that a company's acts of self-certification could support a form of "acting under a federal officer." Judge Easterbrook, writing for the unanimous court, explained, "we know from *Watson v. Philip Morris Cos*. that being regulated, even when a federal agency 'directs, supervises, and monitors a company's activities in considerable detail,' is not enough to make a private firm a person 'acting under' a federal agency." *Id*. at 809 (internal citations omitted).

Lu Junhong recognized it was "linguistically possible to call self-certification a form of 'acting under' the FAA," but held that "certifications just demonstrate a person's awareness of the governing requirements and evince a belief in compliance." *Id*. at

808. The court said the "right question is whether being subject to governmental requirements is enough to make a person one 'acting under' the authority of those regulations, for the purpose of § 1442," when we know from *Watson* "that being regulated, even when a federal agency 'directs, supervises, and monitors a company's activities in considerable detail' is not enough to make a private firm a person 'acting under' a federal agency." *Id.* at 809 (quoting *Watson*, 551 U.S. at 145).

Boeing argued before the Seventh Circuit, as AHI does here, that the Philip Morris-FTC relationship in *Watson* was a "*faux* delegation, while its relation with the FAA is real delegation." *Id.* at 809. Boeing pointed, as AHI does, to 49 U.S.C. § 44702(d)(1), which "permits the FAA to conserve its resources by transferring some checking and certification functions to manufacturers." *Id.* at 810. But, the court said that the regime outlined in § 44702(d)(1):

> is still a power to certify compliance, not a power to design the rules for airworthiness. The FAA permits Boeing to make changes to its gear after finding that the equipment as modified meets the FAA's standards; it does not permit Boeing to use gear that meets Boeing's self-adopted criteria.

Id.

While AHI treats the court's rulemaking discussion as the sole rationale behind the decision (one that the Ninth Circuit did not follow), the Seventh

Circuit used rulemaking as a touchstone to distinguish the inspection and certification functions Boeing claimed it did for the FAA from those that might actually generate "acting under" status. The distinction did not appear out of whole cloth. *Watson* too distinguished the delegation of legal authority, such as that used in rulemaking, from mere rule compliance. *Id.* (*Watson* "used rulemaking rather than rule compliance as the key ingredient") (citing 551 U.S. at 157). Rather than demonstrate discord with *Watson*, the rulemaking discussion demonstrates an understanding of its fine distinctions.

More critically and consistently with the Ninth Circuit's ruling below, the Seventh Circuit stated: "If the FAA gave Boeing a power to issue a conclusive certification of compliance, even though not to establish substantive standards, the situation would come closer to what *Watson* suggested might suffice." *Id.* Instead, the certification is not conclusive, and "a court must treat its self-certification as establishing that its flight-control systems do meet all federal rules." *Id.*

Based on *Watson*, *Lu Junhong* concluded that "neither the language nor the history of § 1442 justified reading it to cover the activities of regulated businesses." *Id.* at 809. A qualifying person "acting under" a federal agent, for example, would be "a local police officer who accompanies a federal agent on a drug raid and acts under the federal agent's direction." *Id.*

The Ninth Circuit similarly held that AHI did nothing more than certify compliance with federal regulations and, under *Watson*, that "did not satisfy the 'acting under' requirement of § 1442(a)(1)." Pet. App. 16a.

All three circuit decisions—the pre-*Watson* Eleventh Circuit decision in *Magnin*, along with the more recent Seventh and Ninth Circuit rulings—have a consistent holding: self-certification, even under a formal designation, is compliance with FARs and not acting under a federal officer. In contrast, a lawsuit that asserts negligence in the discharge of unquestionably federal duties can be acting under a federal officer.

Still, the question raised by the Petition in this case is a theoretical one. The Plaintiffs sued AHI because it decided against incorporating a crash-resistant fuel system into the helicopter, which would have prevented a hard landing from causing the aircraft to burst into flames. AHI made that choice as a private company, not as a designee of the FAA or in the course of its ODA responsibilities. The FAA does not design helicopters, which is why helicopters can both have unique designs and still comply with the FAA regulations.

III. The Petition Does Not Present a Recurring Issue of Exceptional Importance, and the Case Comprises a Poor Vehicle for Review.

AHI further asserts that the Petition raises a recurring issue of exceptional importance, apparently because aircraft manufacturers continue to make the

federal-officer removal argument and continue to be rebuffed by the courts. That broad consensus against AHI's position does not transform settled law into a recurring issue of great national importance no matter how vehemently aircraft manufacturers assert otherwise.

Courts applying *Watson* to aviation-related causes of action and claims of FAA "delegated authority" routinely hold that removal is improper. *See Dietz*, 168 F. Supp. 3d at 753 ("Since *Watson*, several district courts have confronted similar arguments for removal in the aviation context. The vast majority of those courts have remanded the cases to state court."). The frequency with which these cases occur, often in unpublished decisions and without an appeal, demonstrate that the issue does not qualify as a recurring issue of exceptional importance.

The cases uniformly hold that "Congress never intended to afford [aircraft engine manufacturers] federal officer status through their compliance with federal laws." *Id.* at 755. No court has signaled disagreement with or even questioned the Seventh Circuit's *Lu Junhong's* result on federal officer removal, which the Ninth Circuit has now joined. Instead, virtually all have followed that result. *See Swanstrom*, 531 F. Supp. 2d at 1333 ("Cirrus [aircraft manufacturer] can not claim removal under 28 U.S.C. § 1442(a)(1) simply because they have employees who are designated FAA authorized agents."); *Sesay v. Raytheon Aircraft Co.*, 2012 WL 847240, at *2 (C.D. Cal. Jan. 5, 2012) ("CMI [aircraft engine manufacturer] has presented no evidence of any

contract, any payment, any employer/employee relationship, or any principal/agent arrangement that would support an inference that CMI and the Federal Government had any special relationship beyond the usual regulator/regulated relationship."); *West v. A & S Helicopters*, 751 F. Supp. 2d 1104, 1110 (W.D. Mo. 2010) ("[E]ven though an employee 'acts under' the Federal Aviation Administrator when carrying out designee duties, MD Helicopters is not considered to have acted under a federal officer or agency via this employee."); *O'Brien v. Cessna Aircraft Co.*, 2010 WL 4721189, at *13 (D. Neb. Jul. 21, 2010) ("[T]he court finds Cessna's argument unpersuasive it was 'acting under' the direction of a federal officer by issuing an airworthiness certificate for the Cessna 208B."); *Vandeventer v. Guimond*, 494 F. Supp. 2d 1255, 1267 (D. Kan. 2007) ("The law is clear that Guimond may not remove" where he conducted the airworthiness inspection and certification); *Carter v. Cent. Reg'l W. Virginia Airport Auth.,* 2016 WL 4005932, at *11 (S.D. W.Va. Jul. 25, 2016) ("Courts have allowed removal under §1442 for aviation-related work after *Watson* only when the federal government directly hires a contractor to perform particular types of functions on its behalf."); *Andera v. Precision Fuel Components, LLC*, 2012 WL 12509225, at *3 (W.D. Wash. Aug. 1, 2012) ("Based on Precision's [aircraft parts manufacturer] description of FAA certification procedures and how they apply to Precision, it is clear that Precision employees are not carrying out directions from the FAA. Instead, they are merely complying with federal regulations and using their own discretion to perform and certify their repairs.").

The court in *Andera* further observed that "Precision proposes a vast expansion of the federal courts' jurisdiction, making virtually any case in which a defendant carries a federal certification removable. Precision cites no controlling authority in support of this argument, which the Court rejects." *Id.* at 4.

The issue of certification as an ODA holder cannot be removed from the causal nexus requirement that adheres to federal-officer analysis. *See Mesa*, 489 U.S. at 131. Here, the Ninth Circuit did not reach that question as it was unnecessary to the result.

Still, courts have made a useful distinction between the private and public obligations of an FAA-designee for federal-officer removal analysis. In *O'Brien*, surveying decisions of other courts, the court made plain that airplane manufacturer "Cessna cannot claim removal is appropriate under 28 U.S.C. § 1442(a)(1) simply because Cessna is a DOA holder as designated by the FAA," because "'removal is appropriate only where the FAA representative has been specifically named and the allegations relate to conduct of the FAA representative while acting in the capacity of an FAA representative.'" 2010 WL 4721189, at *13 (quoting *Swanstrom*, 531 F.Supp.2d at 1333). The allegations had no relationship to Cessna's obligations as an FAA designee under federal law.

Here as well, Plaintiffs have brought an action based solely on state law negligence and products liability and have not averred that AHI's discharge of

its ODA obligations gave rise to liability. There is no causal connection between AHI's ODA status and its alleged liability in this action. AHI has failed to carry this second required element for removal as well, which the Ninth Circuit found unnecessary to discuss. The existence of this and issues about AHI's asserted federal defense, both of which are elements of federal-officer removal, further make this case a poor vehicle for considering the scope of removal when an aircraft manufacturer asserts ODA status.

IV. The Decision Below is Correct.

The Ninth Circuit was correct to affirm the District Court's remand order. AHI designed and manufactured the helicopter, not the FAA. If FAA regulations specified the helicopter design, all helicopters, regardless of brand, would be the same. But the FAA does not mandate a particular design. Nothing about the complaint implicates federal responsibilities.

In contrast to mere legal compliance, even as an ODA, decisions that permit removal require the private defendant to undertake a task directed by the federal agency. For example, where "mold remediation firms hired by" the FAA to remove contamination at Detroit's airport were sued by air traffic controllers in state court for injuries sustained from the project, the Sixth Circuit upheld removal. *See Bennett v. MIS Corp.*, 607 F.3d 1076, 1082 (6th Cir. 2010). It relied upon facts that the remediation was carried out under detailed FAA instructions about the materials and methods utilized in addressing the mold, with an on-

site federal officer directly supervising each remediation. *Id.* at 1087. The circumstances constituted "assistance [that] went beyond 'simple compliance with the law,'" *id.* at 1088 (quoting *Watson*, 551 U.S. at 153), and satisfied the acting under a federal officer standard.

Other courts also have followed this clear-cut distinction by limiting § 1442 removal to factual circumstances not found in this case. *See Boyd v. Boeing Co.*, No. 15-0025, 2015 WL 4371928 (E.D. La. July 14, 2015) (allowing Boeing to remove where mechanic contracted mesothelioma while working on U.S. military plane made by Boeing to federal specifications); *Scrogin v. Rolls-Royce Corp.*, No. 3:10-cv-442 WWE, 2010 WL 3547706 (D. Conn. Aug. 16, 2010) (allowing Rolls-Royce to remove because helicopter was built for the U.S. military under federally generated military contractor specifications). As *Watson* explained, where a "private contractor ... is helping the Government to produce an item that it needs," removal under § 1442 may be appropriate. 551 U.S. at 153.

AHI, however, did not design or build this helicopter according to government specifications, as a military contractor might. Like Boeing in *Lu Junhong,* AHI created its own designs and then certified those designs and their manufacture to the FAA as compliant with minimal federal safety regulations. As the Seventh Circuit found in *Lu Junhong* and the Ninth Circuit found in this case, that certification does not constitute "acting under" a federal officer pursuant to § 1442, but mere

compliance with the law. *See* 792 F.3d at 809. *See also* Pet. App. 15a. AHI's delegated FAA acceptance of certification authority is separate from and, in the words of the law, "distinct" from its private status when it certifies compliance. *See* Pet. App. 71a.

Critically, this lawsuit is not about the way AHI conducted its FAA certifications, but about the way it designed and manufactured the subject helicopter. *Cf. Watson*, 551 U.S. at 154 ("petitioners appear to challenge the way in which Philip Morris 'designed' its cigarettes, not the way in which it (or the industry laboratory) conducted cigarette testing"). Both *Lu Junhong* and the Ninth Circuit in this case found that fact salient. *Lu Junhong*, 792 F.3d at 810; Pet. App. 39a.

AHI's argument in favor of federal-officer removal is little more than window-dressing to a preemption defense that is not a basis for removal to federal court. *See Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Calif.*, 463 U.S. 1, 14 (1983) ("[A] case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."). Federal-officer removal cannot, and should not, serve as an end-around this Court's longstanding precedent that a federal affirmative defense cannot serve as a basis for removal to federal court.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

May 21, 2020

Robert S. Peck
Counsel of Record
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
455 Massachusetts Ave., NW
Suite 152
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

Gary C. Robb
Anita Porte Robb
Andrew C. Robb
Brittany Sanders Robb
ROBB & ROBB LLC
One Kansas City Place
1200 Main Street
Suite 3900
Kansas City, MO 64105
(816) 474-8080

Counsel for Respondents