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 OF RESPONDENTS MATTHEW HECKER, *ET AL.* IN OPPOSITION

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QUESTION PRESENTED

Whether a private party, such as Airbus Helicopters, Inc., satisfies the "acting under" requirement for federal officer jurisdiction under 28 U.S.C. § 1442(a)(1), merely because it must comply with the federal laws, rules, and regulations as set forth by the Federal Aviation Administration, and has been provided the ability the self-certify its own compliance with these regulations.

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 Udall, Philip Udall, and Marlene Udall (together, "Plaintiffs-Respondents"), 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, and Xebec LLC (together, the "Defendants-Respondents"), and Scott Booth.

RULE 29.6 STATEMENT

Defendants-Respondents 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, and Xebec LLC, make the following disclosures:

- Matthew Hecker is an individual, not a corporation;
- Daniel Friedman is an individual, not a corporation;
- Brenda Halvorson is an individual, not a corporation;
- Geoffrey Edlund is an individual, not a corporation;
- Elling B. Halvorson is an individual, not a corporation;
- John Becker is an individual, not a corporation;
- Elling Kent Halvorson is an individual, not a corporation;
- Lon A. Halvorson is an individual, not a corporation;
- Papillon Airways, Inc., d/b/a Papillon Grand Canyon Helicopters ("Papillon") is a non-governmental corporation. No publically held corporation owns more than 10% or more stock of Papillon. There is no parent company for Papillon.

- Xebec, LLC ("Xebec") is a non-governmental corporation. No publicly held corporation owns more than 10% or more stock of Xebec. There is no parent company for Xebec.

RELATED PROCEEDINGS

- *Mary Riggs, et al. v. Matthew Hecker, et al.*, Case No. A-18-770467-C, District Court of Clark County, Nevada, removed May 18, 2018

- *Mary Riggs, et al. v. Matthew Hecker, et al.*, Case No. 2:18-cv-00912, United States District Court for the District of Nevada, remanded July 16, 2018

- *Mary Riggs v. Airbus Helicopters, et al.*, No. 18-16396, United States Court of Appeals for the Ninth Circuit, judgment September 20, 2019

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JURISDICTION

The court of appeals entered judgement 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 April 6, 2020, the Clerk of the Court granted an extension of time within which to file a response to the petition to and including May 22, 2020. 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 & Regulatory Background

1. Section 1442(a)(1), commonly known as the federal officer removal statute, permits a defendant in certain limited situations to remove to federal court a state court action brought against the "United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in

an official or individual capacity, for or relating to any act under color of such office…" 28 U.S.C. § 1442(a)(1). A party seeking removal under 28 U.S.C. § 1442(a)(1) must establish that: "(a) it is a 'person' within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and (c) it can assert a 'colorable federal defense.'" *See Durham v. Lockheed Martin Corp.*, 445 F.3d 1247, 1251 (9th Cir. 2006) (citation omitted).

The sole issue at hand in this case is whether Petitioner Airbus Helicopters, Inc., a private manufacturer, was serving as a person acting under the FAA pursuant to 28 U.S.C. § 1442(a)(1) when it was merely complying with federals laws, rules, and regulations. Both the District Court and the Ninth Circuit Court of Appeals concluded that Petitioner could not demonstrate it was acting under a federal officer and therefore, found removal improper. Neither the District Court, nor the Ninth Circuit reached the other requirements. This Court has held that "the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law." *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 152 (2007) (emphasis in original).

This history and purpose of the federal officer removal statute make clear that the statute does not apply to private regulated commercial actors. *See Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969). Section 1442(a)(1) was instead designed to protect federal officers from state court civil or criminal actions that, because of the costs and burdens of litigation in remote locations and the risk of anti-federal prejudice, could hinder the enforcement of unpopular federal laws. *See Willingham*, 395 U.S. at

406-07. Furthermore, "one of the most important reasons for [federal officer] removal is to have the validity of the defense of official immunity tried in a federal court." *Id.* at 407. Indeed, if a party seeking federal officer jurisdiction cannot articulate a colorable federal defense, remand is appropriate. *See Durham*, 445 F.3d at 1251. None of these principles for federal officer jurisdiction, however, are present in this case.

Decisions of this Court confirm that the "acting under" clause is limited to those who aid or assist federal officers in performing official functions. *See Davis v. South Carolina*, 107 U.S. 597, 599-600 (); *Maryland v. Soper*, 270 U.S. 9, 30-32 (1926); *City of Greenwood v. Peacock*, 384 U.S. 808, 821 n.1, 823 n.20 (1966). Under this standard, a private commercial actor, such as Petitioner, has no claim to federal officer jurisdiction.

2. This case involves the regulatory scheme for prescribing and enforcing national aviation safety standards—the Federal Aviation Regulations (FARs). *See* 14 C.F.R. Parts 1-147, 170-71. In the Federal Aviation Act (the Act), Congress directed the Secretary of Transportation to establish minimum standards for aircraft design. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 804-05 (1984). To accomplish this, the Federal Aviation Administration promulgated regulations specifying minimum safety standards that aircraft manufacturers must comply with before marketing their products. *Id.* The FAA polices compliance through the issue of a "type certificate" after determining that the product comports with the minimum safety standards. *Id.* at 805-06; *see also* 49 U.S.C. § 4470(a)(1). Pursuant to the Act, the

FAA can delegate certain inspection and certification responsibilities to private individuals. *Varig Airlines*, 467 U.S. at 807. Most often, the delegated representatives are employees of the manufacturer. *Id.* at 807. The *Varig Airlines* court stated:

> The FAA certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance. Thus, the manufacturer is required to develop the plans and specifications and perform the inspections and tests necessary to establish that an aircraft design comports with the applicable regulations; the FAA then reviews the date for conformity purposes by conducting a 'spot check' of the manufacturer's work.

Id. at 816-17. This FAA certification process, as outlined by this Court in *Varig Airlines*, remains controlling precedent.

B. Factual & Procedural Background

1. This case arises out of a February 2018 helicopter crash in the Grand Canyon. *See* Pet. App. 2a. John Udall, a resident of the United Kingdom, was fatally injured in the crash. *See id.* The subject helicopter was owned and operated by several of the Defendants-Respondents.[1] The

1. The named Defendants-Respondents are: Matthew Hecker, Daniel Friedman, Brenda Halvorson, Geoffrey Edlund,

subject helicopter was manufactured by Petitioner Airbus Helicopters, Inc. (AHI). *See id.*

Mary Riggs, as personal representative for Mr. Udall, filed the underlying action in Nevada state court against Petitioner and Defendants-Respondents, alleging that the subject helicopter was defectively designed. *See id.* Specifically, Plaintiffs-Respondents alleged that the aircraft's "fuel tank was not crash-resistant, and could not withstand an impact of a minimal or moderate nature" without causing a catastrophic fire. *See id.*

2. Petitioner removed this case to federal court asserting federal subject matter jurisdiction pursuant to 28 U.S.C. § 1442(a)(1). *See id.* Plaintiffs-Respondents and Defendants-Respondents separately moved to remand the case to Nevada state court, asserting that Petitioner did not meet any of the requirements of § 1442(a)(1). *See id.* at 3a. The district court disagreed with Petitioner's position and granted the motions to remand, concluding that:

> Here, the FAA delegation under 49 U.S.C. § 44702(d)(1) does not allow AHI to create or change substantive rules. *See* 49 U.S.C. § 44702(d)(1). Moreover, the delegation does not allow AHI to manufacture gear that meets its own self-adopted criteria. *See id.*; *see also Lu Junhong*, 792 F.3d at 810. Rather, the relevant regulation provides that "each applicant must

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Elling B. Halvorson, John Becker, Elling Kent Halvorson, Lon A. Halvorson, Scott Botth, Papillon Airways, Inc., DBA Papillon Grand Canyon Helicopters (Papillon) and Xebec LLC. *See* Pet. App. 2a.

> make all inspections and tests necessary to determine (1) compliance with the applicable airworthiness, aircraft noise, fuel venting, and exhaust emission requirements." 14 C.F.R. § 21.33.

See Pet. App. 38a-39a. Consequently, the district court concluded that Petitioner was merely complying with the detailed regulations, and that such compliance was insufficient to establish jurisdiction. *See id.* Accordingly, the district court remanded the case back to state court. *See id.* at 40a. The district court did not reach the remaining requirements for removal under § 1442(a)(1). *See id.* 29a-40a.

Petitioner appealed the district court's remand orders and the Ninth Circuit affirmed the district court's decision, again concluding that Airbus had not established it was "acting under" a federal officer and thus could not demonstrate that removal was appropriate. *See id.* at 15a-16a. In affirming, the Ninth Circuit relied upon this Court's decision in *Watson v. Philip Morris Companies, Inc.*; noting that it agreed with this Court's reasoning. *See id.* at 14a. Specifically, the majority concluded that Petitioner's certification actions constituted "simple compliance with the law" and, therefore, did not meet the "acting under" standard articulated in *Watson*. *See id.* In further support of this conclusion, the majority emphasized Petitioner's concession that it could not "make design changes without approval from the FAA" and that the "FAA has the authority to rescind any action taken by AHI in connection with the certification process." *See id.* These facts confirmed that Petitioner "was duty-bound to follow prescriptive rules set forth by the FAA, thus falling within the 'simple compliance with the law' circumstance

that does not meet the 'acting under' standard" articulated in *Watson*. *See id.*

Judge O'Scannlain dissented. *See id.* at 17a-28a. Relying primarily on an Eleventh Circuit case that predates *Watson*, as well as portions of the brief submitted by the Solicitor General on behalf of the unsuccessful party in the *Watson* case, the dissent concluded that the majority opinion misapplied this Court's decision in *Watson*. *See id.* at 17a. A petition for a rehearing and a petition for a rehearing *en banc* were denied. *See id.* at 41a-42a.

REASONS FOR DENYING THE PETITION

This case is not appropriate for review. The Ninth Circuit expressly acknowledged, relied upon, and applied this Court's interpretation of "acting under" as set forth in *Watson*. Indeed, the Ninth Circuit stated that this Court's decision in *Watson* "fully support[s] the proposition that [Petitioner's] mere compliance with federal regulations did not satisfy the 'acting under' requirement of § 1442(a)(1)." *See* Pet. App. 16a. Contrary to Petitioner's suggestion, the Ninth's Circuit's decision here does not deviate from this Court's precedent, but instead, faithfully applies it.

Additionally, the Ninth Circuit's decision here does not create a split of authority under the federal Circuits. To the contrary, the Ninth Circuit confirms that its decision brings it in line with Seventh Circuit, the only other Circuit Court to address this issue since the advent of the FAA's ODA program. The Eleventh Circuit's decision in *Magnin v. Teledyne Cont'l Motors*, 91 F.3d 1424 (11th Cir. 1996), heavily relied upon by both the Petitioner and Judge O'Scannlain in his dissent, pre-dates both this

Court's *Watson* decision, and the 2005 creation of the FAA's ODA program. The *Magnin* case, therefore, is of extremely limited value here. The Ninth Circuit expressly acknowledges that its decisional rule comports with not only *Watson*, but the Seventh Circuit as well and, thus, no split of Circuit authority exists.

Finally, since this Court's decision in *Watson* and the creation of the ODA program, this issue has only reached the Federal Circuit Courts of Appeal on two occasions, including the present case. The rarity of this occurrence controverts Petitioner's claim that review by this Court is necessary to resolve an important or common issue. In contrast, the issue is rare and the law is both established and unified. Moreover, because the record is factually and legally undeveloped, review at this time will not resolve issue of whether Petitioner is entitled to federal officer jurisdiction.

A. The Ninth Circuit's Decision Is In Line With This Court's Decision in *Watson* and Its Reasoning that Federal Officer Jurisdiction Is Not Appropriate When The Private Actor Is Merely Complying With The Law.

In the aviation industry, it is fundamentally accepted that the FAA sets the rules and minimum safety standards for aircraft design, and that manufacturers, whether ODA holders or not, are required to comply with those rules and standards. The petition should be denied because the Ninth Circuit's decision is in line with *Watson's* holding that mere compliance with federal directives does not satisfy the 'acting under' requirement of § 1442(a)(1), and it expressly applies *Watson's* rationale for denying federal officer jurisdiction.

1. In *Watson*, the plaintiffs Lisa Watson and Loretta, sued Philip Morris in Arkansas state court. *Watson*, 551 U.S. at 146. The plaintiffs' complaint focused on "advertisements and packaging that described certain Philip Morris brand cigarettes (Marlboro and Cambridge Lights) as 'light,' a term indicating lower tar and nicotine levels than those present in other cigarettes." *Id.* Specifically, the plaintiffs' allegations were related to "the design and performance of Philip Morris cigarettes that are tested in accordance with the Cambridge Filter Method, a method that 'the tobacco industry [uses] to measure tar and nicotine levels in cigarettes.'" *Id.* (citation and one set of quotations omitted; brackets in original). Plaintiffs further alleged that "Philip Morris cigarettes delivered 'greater amounts of tar and nicotine when smoked under actual conditions' than the adjective 'light' as used in the advertising indicated. *Id.* (citation and one set of quotations omitted).

Relying on the federal officer removal statute, Philip Morris removed the case. *Id.* The district court, in turn, concluded that removal was appropriate under the federal officer removal statute. *Id.* The district court concluded that "the complaint attacked Philip Morris' use of the *Government's* method of testing cigarettes" and, therefore, the plaintiffs had sued Philip Morris for "'act[s] taken 'under' the Federal Trade Commission." *Id.* (emphasis and brackets in original).

The Eighth Circuit affirmed, emphasizing the "FTC's detailed supervision of the cigarette testing process." *Id.* at 147. "The Eighth Circuit concluded that Philip Morris was 'acting under' federal 'officer[s],' namely, the FTC, with respect to the challenged conduct." *Id.* (citation omitted; brackets in original). This Court granted certiorari. *Id.*

Before this Court, Philip Morris argued that "its activities at issue here did not consist simply of compliance with regulatory laws, rules, and orders." *Id.* at 154. Philip Morris contended "that the FTC, after initially testing cigarettes for tar and nicotine, '*delegated authority*' for that task to an industry-financed testing laboratory." *Id.* (citation omitted; emphasis in original). Philip Morris asserted that it was acting under that delegation. *Id.* In sum, Philip Morris claimed that because of its delegated authority to certify compliance in the highly regulated tobacco industry, where its work was closely monitored and supervised by the Federal Trade Commission, Philip Morris was acting under a federal officer. *Id.* This Court, in a unanimous decision, disagreed, explaining:

> 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.

Id. at 153. This Court further noted in *Watson* that "[n]either language nor history, nor purpose lead us to believe that Congress intended such expansion." *Id.*

The Ninth Circuit explicitly followed this reasoning in its decision, stating that it fundamentally agreed with the holding from *Watson*, and that its decision was in

line with that holding. *See* Pet. App. 15a-16a. The Ninth Circuit explained that Petitioner, as an ODA holder, "must perform all delegated functions *in accordance with* a detailed, *FAA-approved* procedures manual to each [Designation] holder." *See id.* at 13a (emphasis in original; brackets in original; one set of quotations omitted). The Ninth Circuit found the language "in accordance with" and "FAA-approved" suggesting of a "relationship based on compliance rather than assistance to federal officers." *See id.* at 13a (one set of quotations omitted). The Ninth Circuit further noted that "one of the regulations circumscribing an FAA delegee's authority to certify provides that 'each applicant *must allow* the FAA to make any inspection and any flight and ground test necessary *to determine compliance* with the applicable requirements of this subchapter." *See id.* at 13a-14a (citing 14 C.F.R. § 21.22) (emphasis added by Ninth Circuit). The Ninth Circuit concluded that "[t]his language explicitly denotes compliance and, as discussed, 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.'" *See id.* at 14a (citing *Watson*, 551 U.S. at 153).

Perhaps most notably, the Ninth Circuit stated:

> AHI concedes that it cannot make design changes without approval from the FAA. At oral argument, AHI even acknowledged that the FAA has the authority to rescind any action taken by AHI in connection with the certification process. These facts demonstrate that AHI was duty-bound to follow prescriptive rules set forth by the FAA, thus falling

> within the "simple compliance with the law" circumstance that does not meet the "acting under" standard. *Gonclaves*, 865 F.3d at 1247; *see also Fidelitad*, 904 F.3d at 1100. In sum, AHI's actions as insurer of Supplemental Certificates fit squarely within the precept of mere compliance with regulatory standards and outside the "acting under" provision of 1442(a)(1). *Waston*, 551 U.S. at 153, 127 S. Ct. 2301.

See id. at 14a. Stated another way, Petitioner acknowledged the scope of their role and authority to act as an ODA holder was not only within the specific confines of the FAA's regulations, but explicitly subject to the approval of, and potential rejection by, the Federal Aviation Administration. Consequently, Petitioner's role was marked by regulatory compliance, rather than authority. The Ninth's Circuit decision is therefore directly in line with the reasoning from *Watson*. *See Watson*, 551 U.S. at 153.

2. Petitioner relies heavily on Judge O'Scannlain's dissent to support its assertion that the Ninth Circuit misapplied *Watson*. Judge O'Scannlain's dissent, however, as noted by the majority, relies on an inapplicable Eleventh Circuit case—*Magnin*, 91 F.3d 1424—as well as the Solicitor General's opinion in *Watson*. *See* Pet. App. 11a.

Magnin was decided in 1996, well before the FAA adopted the ODA program, and before this Court decided *Watson*. *Magnin's* reasoning is inapplicable to today's regulatory scheme and, therefore, provides no assistance in determining when a private entity is "acting under" a federal officer. As to the Solicitor General's opinion from

Watson, the Ninth Circuit points out that this Court has already rejected that argument once before. *See* Pet. App. 11a. Petitioner's reliance on that opinion now, therefore, is questionable.

The majority accurately highlights the fundamental flaws in the dissent's analysis:

> The dissent seeks to minimize the persuasive power of *Fidelitad* by commenting that a different statutory regime was involved. *See Dissenting Opinion*, p. 995 n. 3. However, the dissent's summary comment elides the fact that we were confronted with the identical issue in *Fidelitad* that we resolve in this case, whether the "acting under" requirement of § 1442(a)(1) was satisfied. The dissent also fails to grapple with the reality that in *Fidelitad*, we cited with approval the Seventh Circuit's *Lu Junhong* decision. Finally, despite criticizing the precedent cited by the majority, the dissent did not, and cannot, cite one case from this circuit that supports its analysis of the "acting under" requirement. The best the dissent can muster is a case from the Eleventh Circuit, *Magnin v. Teledyne Cont'l Motors*, 91 F. 3d 1424 (11th Cir. 1996), decided eleven years prior to *Watson* and an argument form a Solicitor General that was rejected by the Supreme Court. *See Dissenting Opinion*, pp. 993-94.

See Pet. App. 11a. Put differently, the dissent's analysis—and by virtue, Petitioner's analysis—is in fact at odds with *Watson*.

3. Finally, and perhaps most importantly, the underlying policy of *Watson* was to prevent a proverbial "opening of the floodgates" path to federal court for private firms that merely comply with federal laws and regulations—as is the case with Petitioner. As this Court explained in *Watson*, granting private firms unfettered access to federal court, "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." *Watson*, 551 U.S. at 153. This type of expansion would contravene the long standing principal articulated by this Court in *Varig Airlines*; that is, "the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility to for policing compliance. *Varig Airlines*, 467 U.S. at 816. Allowing Petitioner to forever claim the status of "acting under" a federal officer will undoubtedly lead to the very scenario this Court sought to prevent in *Watson*. "Neither language nor history, nor purpose lead us to believe that Congress intended such expansion." *Watson*, 551 U.S. at 153.

The Ninth Circuit faithfully applied this Court's reasoning in *Watson*; a fact evident from the Court's analysis and its express statements to that effect. Further review by this Court is unnecessary and unwarranted.

B. The Ninth Circuit's Decision Does Not Create a Split of Authority Among the Circuits, But Is Instead In Line With The Circuit Courts That Have Decided Similar Issues Post-*Watson*.

The Ninth Circuit expressly noted that its decision brings it in line with the other Circuits that have addressed this issue. Indeed, all federal circuit courts to have addressed whether an FAA delegation supports "acting under" status pursuant to of § 1442(a)(1) after *Watson* have reached the same outcome, and this case is no exception. Consequently, and despite Petitioner's suggestion, there is no split of Circuit authority on this issue.

1. As a preliminary matter, Petitioner's reliance on *Magnin*, is inapposite. *Magnin* was decided eleven years before *Watson*, and nine years before the FAA's adoption of the ODA program. *See Magnin*, 91 F.3d 1424. *Magnin's* analysis, therefore, is wholly inapplicable to the modern regulatory scheme involved in this case. When laws and regulations change, so does the interpretation and application of those laws and regulations. *Magnin* should not be a factor in this Court's analysis.

2. When *Magnin* is properly removed from the analysis, Petitioner's assertion that a split in circuit authority exists relies solely on the claim that the Ninth Circuit's decision and the Seventh Circuit's decision in *Lu Junhong v. Boeing Co.*, 792 F.3d 805 (7th Cir. 2015) are at odds. They are not. Indeed, not only does the Ninth Circuit explain precisely how its decision comports with the Seventh Circuit's decision in *Lu Junhong*, an analysis of these two cases also shows that both the Ninth

and Seventh Circuits properly adhered to this Court's reasoning in *Watson*.

In *Lu Junhong*, the issue involved the design of a plane that broke apart during a flight. *Lu Junhong*, 792 F.3d at 807. Boeing contended 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 certification for aircraft under Federal Aviation Regulations." *Id.* at 808. Boeing asserted that by "carrying out those functions, Boeing is subject to FAA control, and it acts as a representative of the FAA Administrator." *Id.* The Seventh Circuit disagreed, explaining: "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 (citation omitted). The Seventh Circuit concluded with the following warning: "after today it would be frivolous for Boeing or a similarly-situated defendant to invoke § 1442 as a basis of removal." *Id.* at 813.

Petitioner ignores the Seventh Circuit's reasoning, but instead, focuses solely the method for reaching its conclusion—not the conclusion itself. That is, Petitioner asserts that the Seventh Circuit inferred that a critical factor for concluding whether an entity is "acting under" a federal officer is whether the party "engaged in 'rule making rather than rule compliance.'" Petition for Cert. pp. 16-17. Petitioner then seizes upon the fact that here, the Ninth Circuit acknowledged it was not adopting the specific "rule making vs. rule compliance" rubric, asserting this distinction creates the split of decisional authority among

the circuits. *Id*. This position is erroneous; the Ninth Circuit squarely addressed this very issue in its opinion.

Acknowledging that it was not adopting the precise rule articulated by the Seventh Circuit, *i.e.* the "rule making vs. compliance" distinction, the Ninth Circuit nevertheless explained that the Seventh Circuit's reasoning, and its ultimate decision in *Lu Junhong*, upheld the fundamental principles of *Watson*:

> Although we cited *Lu Junhong* with approval in *Fidelitad*, 904 F.3d at 1100, we notably did not incorporate the Seventh Circuit's rule-making-rule compliance dichotomy. Rather, we referenced *Lu Junhong* for the proposition that compliance with the law "does not bring a private actor within the scope of the federal officer removal statute" and neither does delegation of authority "to self-certify compliance with the relevant regulations."

See Pet. App. 13a. Moreover, Lu Junhong upheld the longstanding principle articulated by this Court in *Varig Airlines*. *Varig Airlines*, 467 U.S. at 816. ("the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance.").

The Ninth Circuit recognized that while the Seventh Circuit took a slightly different approach towards its decision, the core concept—and the result—were the same: mere compliance with federal regulations is insufficient to bring a private actor within the scope of § 1442(a)(1)'s "acting under" requirement. There is no dispute that

the Ninth Circuit and the Seventh Circuit agree on this fundamental principal from *Watson*. Accordingly, there is no circuit split and, consequently, no reason for this Court to intervene.

3. Finally, Petitioner suggests that review would promote clarity on when federal officer jurisdiction is appropriate in the non-aviation context. Respectfully, this argument lacks merit; *Watson* has already clarified this issue. Both the Ninth Circuit below, and the Seventh Circuit in *Lu Junhong*, were able to appropriately apply *Watson*—a non-aviation case that deals with the regulation of the cigarette testing process—correctly to the field of aviation. Moreover, both courts reached the correct conclusion: private actors that merely comply with federal laws and regulations are not "acting under" the FAA for purposes of § 1442(a)(1). Accordingly, *Watson* provides sufficient clarity for when federal officer jurisdiction is appropriate in industries across the board. Review, therefore, is not necessary.

Moreover, Petitioner's suggestion that more "clarity" is needed is, in and of itself, an erroneous proposition; a concept fabricated by Petitioner to create the appearance Supreme Court review is required. To the contrary, the relationship between the FAA and aircraft manufacturers has been well-defined, and well-understood within the aviation industry for decades. Beyond Petitioner's attempts here, there is no legitimate question percolating in the aviation community as to whether manufacturers are really "acting under" federal authority; they are not. As this Court noted in *Varig Airlines*, the concept is straightforward: The FAA, as the sole arbiter for aviation safety, creates and promulgates regulations, with which

manufacturers then have a responsibility to comply. The FAA remains at all times the agency responsible for creating those regulations, and for enforcing compliance. *See Varig Airlines*, 467 U.S. at 816-17: "[t]he FAA certification process is founded upon a relatively simple notion: the duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer and operator, while the FAA retains the responsibility for policing compliance." Petitioner's suggestion otherwise, or that this issue is misunderstood or requires clarification, is quite simply contrary to reality, the regulatory scheme, and the long-standing custom and practices within this Nation's aviation industry.

C. The Rarity Of This Issue Reaching The Federal Circuit Courts Of Appeal Since Watson And The Undeveloped Factual And Legal Issues Below Render Review By This Court Inappropriate and Premature.

Since *Watson* and the creation of the ODA program, the issue of whether a private actor and ODA holder is acting under the FAA has only reached the Federal Circuit Courts of Appeal twice, including the present case. *See Lu Junhong*, 792 F.3d 805; Pet. App. 1a-28a. Moreover, both of those cases identify, rely upon, and expressly follow *Watson*. The rarity of this issue alone renders this case inappropriate for Supreme Court review. Furthermore, the outstanding questions that remain as to whether the federal officer removal statute applies—that is, whether there is a causal nexus and a colorable federal defense—mean that any action taken by this Court now would not resolve the issue of whether Petitioner is entitled to federal officer jurisdiction, leaving open a host of fact-based

determinations potentially resulting in more confusion, rather than clarity.

1. In addition to the Ninth Circuit's decision here, the only other Circuit Court of Appeals to address the issue of whether a private action that is the holder of an ODA is "acting under" pursuant to § 1442(a)(1) is the Seventh Circuit. *See Lu Junhong*, 792 F.3d 805. Relying on *Watson*, both the Ninth and Seventh Circuit concluded that those private actors were not "acting under" the FAA so as to create federal officer jurisdiction. *See Lu Junhong*, 792 F.3d at 809; *see* Pet. App. 15a-16a.

Petitioner cites to a number of unpublished district court opinions to support its assertion that this case represents an issue that continuously arises nationally. Petition for Cert. pp. 22-23. In addition to being unpublished, not one of these district court cases was taken up on appeal. This fact, at minimum, shows that this case is not appropriate for review. This issue is settled. No further review is necessary. Any such review would only serve to confuse what is already established law in the post-*Watson* world: private actors that merely comply with federal laws and regulations are not "acting under" the FAA for purposes of § 1442(a)(1). Petitioner's request for review, therefore, must be denied.

2. Even if this Court granted review, and even if Petitioner ultimately prevailed in its argument that it was "acting under" the FAA pursuant to § 1442(a)(1), the issue of whether Petitioner is entitled to federal officer jurisdiction would not be resolved. In addition to establishing that it is a 'person' within the meaning of § 1442(a)(1), to be entitled to federal officer jurisdiction,

Petitioner must also establish that there is a causal nexus between its actions, taken pursuant to a federal officer's directions, and plaintiff's claims; and that it can assert a colorable federal defense. *See Durham*, 445 F.3d at 1251.

Neither the district court nor the Ninth Circuit reached these additional factors. Because analysis of these factors is particularly fact-driven, the record here has not been properly developed for this Court to render a decision on these elements and, ultimately, determine whether Petitioner is entitled to federal officer jurisdiction. Supreme Court review at this time, focused on a single element of a multi-element analysis, could conceivably result in substantially more confusion than clarity. Review at this time, therefore, is premature.

3. Analysis of the remaining factors of the federal officer removal statute show that even if Petitioner were found to be "acting under" the FAA, it is still not entitled to federal officer jurisdiction.

First, Petitioner cannot establish a causal nexus between its responsibilities discharged as an ODA holder and Plaintiffs-Respondents' claims. This requirement mandates that Petitioner establish that the underlying lawsuit "has arisen out of the acts done by [it] under color of federal authority and in enforcement of federal law." *Mesa v. California*, 489 U.S. 121, 131-32 (1989). To establish a sufficient nexus, Petitioner must "by direct averment exclude the possibility that [the underlying claim] was based on acts or conduct of [it] not justified by [its] federal duty.'" *Id.* at 132 (citation omitted).

In the *Estate of Hecker v. Robinson Helicopter Co.*, 2013 WL 5674982 (E.D. Wash. 2013), defendant Lycoming, the manufacturer of a helicopter engine, argued that removal to federal court was warranted by "its obligations as an ODA holder to monitor the ongoing airworthiness of the subject engine and to correct or warn of any unsafe conditions pursuant to 14 C.F.R. § 183.63." *Estate of Hecker*, 2013 WL 5674982 at 3. In remanding the case, the court noted that "Plaintiff has not sued Lycoming for failure to meet its obligation as an ODA holder under federal law. Instead, Plaintiff has asserted state law negligence and product liability claims—claims which do not arise from Lycoming's status as an ODA holder." *Id.* The court concluded that because "there is no causal connection between Plaintiff's claims and an action taken pursuant to Lycoming's federally-delegated authority," removal under the federal officer removal statute was not warranted. *See id.*

Similarly, in *Swanstrom v. Taledyne Continental Motors, Inc.*, 531 F. Supp. 2d 1325 (S.D. Ala. 2008), an aircraft engine manufacturer argued its FAA designated representative afforded it federal officer jurisdiction. *Swanstrom*, 531 F. Supp. 2d at 1328-31. The court disagreed and remanded the case because the complaint did not name a designated representative acting in that capacity. *Id.* at 1332-33. The claims, therefore, were based on the defendant's status as a manufacturer, not on any status as a designated representative. *Id.*

These cases are on point with the instant case. Here, Plaintiffs-Respondents have not sued over Petitioner's discharge of its certification responsibilities. Plaintiffs-Respondents have sued Petitioner in its

capacity as manufacturer of the subject aircraft. Plaintiffs-Respondents' claims are based solely on state law negligence and products liability law. In no way have Plaintiffs-Respondents asserted that Petitioner's discharge of ODA obligation gave rise to liability. Consequently, there is no causal connection between Petitioner's ODA status and the claims against it in the underlying action.

Second, Petitioner does not have a colorable federal defense. This Court has stated that "[f]ederal officer removal under § 1442(a) must be predicated upon averment of a federal defense." *Mesa*, 489 U.S. at 139. Here, Petitioner's asserted federal defense is preemption. Specifically, Petitioner asserts that "state-law design-defect claims are preempted by federal law, given that the design was compliant with federal aviation standards." Petition for Cert. p. 7.

The Third Circuit recently addressed the issue of whether the Federal Aviation Act provides a colorable federal defense in two separate opinions arising out of the same underlying case. In *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3rd Cir. 2016) (hereinafter *Sikkelee I*), the Third Circuit considered whether the Federal Aviation Act "field-preempted" products liability under state laws. *Sikkelee I*, 822 F.3d at 694-96. The Court held that it did not, noting:

> the fact that the regulations are framed in terms of standards to acquire FAA approvals and certificates—and not as standards governing manufacture generally—supports the notions that the acquisition of a type certificate is

> merely a baseline requirement and that, in the manufacturing context, the statutory language indicating that these are "minimum standards," 49 U.S.C. § 44701, means what it says.

Id. at 694.

Subsequently, in *Sikkelee v. Precision Airmotive Corp.*, 907 F.3d 701 (3rd Cir. 2018) (hereinafter *Sikkelee II*) the Third Circuit considered whether the Federal Aviation Act conflict-preempted products liability under state laws. *Sikkelee II*, 907 F.3d at 708. As with field-preemption, the Third Circuit held that it did not, noting that "[t]he nature of FAA regulations and Lycoming's interactions with the FAA—including the changes it made to its type certificate—demonstrate that Lycoming could have—indeed it had—adjusted its design." *Id.* at 713. The *Sikkelee II* court further stated "allowing state-law claims to proceed in this context complements, rather than conflicts with, the federal scheme." *Id.* at 714. "Moreover, 'immuniz[ing] aircraft and aviation component part manufacturers from liability for their defective product designs' is 'inconsistent with the [Federal Aviation] Act and its goal of fostering aviation safety.'" *Id.* at 715 (citation omitted; brackets in original). Indeed, the FARs set the floor for minimum safety standards. *See Estate of Becker v. Avco Corp.*, 387 P.3d 1066, 1070 (Wash. 2017). Nothing prohibits Petitioner from complying with these federal regulations **and** state law tort duties.

On January 13, 2020, this Court denied review for *Sikkelee II*. *Avco Corp. v. Sikkelee*, 140 S. Ct. 860 (2020). In doing so, this Court left in place the Third Circuit's holding that state-law design-defect claims are not preempted by

federal law. Petitioner, therefore, does not have a colorable federal defense.

This case is not appropriate for review. Since *Watson*, the issue of whether a private actor and ODA holder is acting under the FAA has only reached the Federal Circuit Courts of Appeal twice, with the same result. The rarity of this issue presenting itself renders this case inappropriate for review. Furthermore, the remaining elements that must be satisfied in order for Petitioner to be entitled to federal officer jurisdiction make review at this time premature. Finally, analysis of the remaining factors show that even if Petitioner were found to be "acting under" the FAA, it is still not entitled to federal officer jurisdiction. Review at this time, therefore, is not appropriate.

CONCLUSION

For the foregoing reasons, Airbus Helicopters, Inc.'s Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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