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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Respondents do not dispute this case presents "clear evidence" of a formal delegation of legal authority from a federal agency, pursuant to statute, regulation, agency order, and a memorandum of understanding between petitioner and the FAA. Respondents' effort to brush that delegation aside as mere compliance with the law (*i.e.*, self-certification) fails for the same reasons identified by Judge O'Scannlain's dissent: it "misunderstands the FAA's regulatory regime and misapplies [this] Court's decision in *Watson* v. *Philip Morris Cos.*, 551 U.S. 142 (2007)."

This case presents an issue of exceptional importance. Congress mandates uniformity in national aviation standards, which makes it imperative that cases arising out of the FAA's delegation scheme are subject to a federal forum in which to adjudicate federal defenses based on those national standards. By diminishing the FAA's delegation scheme, the Ninth Circuit deepened the split among circuit courts concerning section 1442(a)(1)'s application to FAA designees and other contexts as well.

Respondents resort to raising "outstanding questions" that make review "premature." These are irrelevant to the Question Presented and the district court and panel decisions, neither of which considered these "outstanding questions." This case affords a straightforward opportunity for this Court to clarify how *Watson* applies in a case where a formal delegation of authority is established.

The acknowledged conflict in the Circuits and the violence done to the standards this Court set out in *Watson* are more than enough to warrant this Court's intervention, but if it has any doubt, then it should solicit the views of the United States.

A. The Decision Below Conflicts With *Watson*.

Respondents concede the FAA has granted petitioner a formal statutory and regulatory delegation of agency power to assist the FAA in carrying out duties on the FAA's behalf. See, *e.g.*, Pls.' Opp. i. They nonetheless contend the decision below "faithfully applies" *Watson* by dismissing that delegation as irrelevant. *Id.* at 9; Defs.' Opp. 7. Respondents are mistaken.

1. Respondents contend that, under *Watson*, a formal delegation of authority to determine compliance with regulations is no different than simply complying with them. See Defs.' Opp. 8, 12; Pls.' Opp. 10–11, 17–18. Not so. *Watson* held simple compliance with regulations does not support "acting under" status *in the absence of* a formal delegation of federal authority. See 551 U.S. at 156–57. Here, as Judge O'Scannlain recognized, in this case there is a formal delegation that this Court found missing in *Watson*, distinguishing *this* case "from the usual regulator/regulated relationship." *Id.* at 157; see Pet. App. 26a–27a.

For this same reason, correcting the Ninth Circuit's misapplication of *Watson* will not, as respondents suggest, result in an "opening of the floodgates" to federal court for all companies complying with federal laws and regulations. Defs.' Opp. 14; see Pls.' Opp. 11–12. Respondents ignore that removal is only granted to those private parties delegated responsibility by a federal officer and only in connection with such delegation. In this case, the FAA only designates a limited number of designees and not every case will involve questions about delegation. See *Gaylord* v. *Spartan Coll. of Aeronautics & Tech., LLC*, No. 16-CV-461-JED-JFJ, 2019 WL 3400682, at *7 (N.D. Okla. July 26, 2019). Therefore, applying section 1442 as intended

will not expand removability to run-of-the-mill negligence claims. See *Jacks* v. *Meridian Res. Co.*, 701 F.3d 1224, 1234 (8th Cir. 2012).

Respondents also commit the same error as the majority below by mischaracterizing the FAA's delegation as a "self-certification" scheme. Pet. App. 13a–15a; Pls.' Opp. 21–22. According to the FAA's own regulations, "[t]he ODA program does not introduce any type of self-certification." *Establishment of Organization Designation Authorization Program*, 70 Fed. Reg. 59,932, 59,933 (Oct. 13, 2005). While manufacturers must certify compliance with the FARs in their *application*, "the FAA retains the responsibility for policing compliance" and does so through the issuance of certifications by "FAA employees or their representatives," including ODA holders like petitioner. *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805–06, 816–17 (1984). In other words, petitioner carries out *the FAA*'s own separate and distinct certification duties that "convey[] the *agency's* formal approval to the aircraft," not the manufacturer's preliminary self-certification that its application and design meet federal requirements. Pet. App. 25a–26a (O'Scannlain, J., dissenting).[1]

This is precisely why the Solicitor General in *Watson* identified the FAA's delegation scheme as one that *would* support removal. Respondents misunderstand the import of the Solicitor General's position. See

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[1] Plaintiffs argue the FAA's certification regime is "quite similar" to FDA regulations for new drugs, presumably because *Watson* hinted these regulations would not give rise to "acting under" status for pharmaceutical companies. Pls.' Opp. 2, 16–17; *see Watson*, 551 U.S. at 157. But Plaintiffs identify no authority indicating the FDA delegates its regulatory approval process to pharmaceutical companies as the FAA did to petitioner here.

Defs.' Opp. 7, 12–13 (stating incorrectly that the Solicitor General supported Philip Morris); Pls.' Opp. 21 n.4 (arguing the Solicitor General's position is not entitled to deference). What the Solicitor General's position in *Watson* makes clear is that the question presented here is significant and warrants further review.

2. Plaintiffs also try to spin *Watson*'s discussion of delegation as limiting section 1442 to situations involving (or akin to) government contractors. Pls.' Opp. 18–21. The decision below did not rely on such a narrow construction of the statute, and *Watson* does not support it.

Watson addressed Philip Morris's two arguments for removal: (1) that the FTC's intense regulation was akin to close supervision of a government contractor, and (2) that the FTC delegated authority to an industry-financed testing lab and Philip Morris acted pursuant to that delegation. 551 U.S. at 153–54. This Court rejected the first because Philip Morris performed no task that the government itself would have to perform in the absence of a private contractor. *Id.* *Watson* rejected the second argument because there was "no evidence of any delegation of legal authority from the FTC . . . that might authorize Philip Morris to remove the case." *Id.* at 156. Nothing in *Watson* or the plain language of section 1442(a)(1) limits removal to "government contractors"—*i.e.*, those who would be able to assert a federal immunity defense.

Moreover, here there is a formal agreement between FAA and petitioner—the Memorandum of Understanding—establishing terms and conditions under which an ODA holder agrees to perform its inspection and certification duties on behalf of FAA using "the same standards, procedures, and interpretations applicable *to FAA employees accomplishing similar*

tasks." Fed. Aviation Admin., Order No. 8100.15, *Organization Designation Authorization Procedures* app. 1, fig. 14, at A1-17 (2006) ("ODA Order") (emphasis added). ODA holders such as petitioner perform "a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." *Watson*, 551 U.S. at 154. In this respect, petitioner is more akin to a government contractor than Philip Morris was. As Judge O'Scannlain observed, "[t]he clear consequence of Congress's handiwork is that FAA delegees perform the agency's tasks. Because Airbus is such a delegee, § 1442(a)(1) entitles it to a federal forum." Pet. App. 28a.

Plaintiffs also assert, without support, that ODA holders are not "acting under" the FAA because they lack the "close working relationship" with the FAA that contractors purportedly have with their federal superiors. Pls.' Opp. 19, 21–22. This argument is contrary to the ODA Order, which expressly contemplates oversight by FAA over the ODA holder. See, *e.g.*, ODA Order ¶ 3-13(d) (providing for FAA approval of ODA unit members within the organization). The argument also contradicts the Ninth Circuit's rationale that removal was improper because petitioner performs delegated functions "in accordance with" detailed "FAA-approved" procedures," subject to the ultimate approval of the FAA. Pet. App. 13a–14a. It also conflicts with the rationale of the Seventh Circuit in *Lu Junhong* v. *Boeing Co.*, 792 F.3d 805, 810 (7th Cir. 2015), that "acting under" status requires delegating to designees substantive rulemaking authority.

Ultimately, plaintiffs' attempts to contrast petitioner with a government contractor yield a distinction without a difference. If anything, plaintiffs' arguments confirm that the petition raises substantial questions regarding the interpretation of *Watson* and

application of the statute in cases outside the context of government contractors asserting federal immunity defenses.

B. This Court Should Resolve The Conflict Among The Circuits As To When A Formal Delegation Satisfies The "Acting Under" Requirement Of 28 U.S.C. § 1442(a)(1).

Review also is warranted because the Seventh, Ninth, and Eleventh Circuits have squarely addressed the Question Presented and reached conflicting results based on three different rationales. Only this Court can resolve the muddled state of the law. See Pet. 15–17.

1. This split of authority is not "fabricate[d]," as respondents suggest. Pls.' Opp. 22. Respondents contend *Magnin* v. *Teledyne Continental Motors*, 91 F.3d 1424 (11th Cir. 1996), predates *Watson* and presents no conflict with the decision below or the Seventh Circuit's decision in *Lu Junhong*. See Defs.' Opp. 15; Pls.' Opp. 22–27. But respondents ignore that *Magnin* is consistent with *Watson* because it correctly focused on the FAA's formal delegation of authority. See *Magnin*, 91 F.3d at 1428–29 & n.1.[2]

Again, the Solicitor General's brief in *Watson* proves the point; it cited *Magnin* approvingly while distin-

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[2] Defendants-Respondents assert *Magnin* "is of extremely limited value here" because it predates the 2005 creation of the ODA program. Defs.' Opp. 7–8, 15. They do not, however, explain why the later creation of the ODA program undermines *Magnin*'s holding that a DMIR—a private party formally delegated inspection authority by the FAA, precisely like an ODA—was "acting under" the FAA. *See Magnin*, 91 F.3d at 1428–29 & n.1.

guishing a formal delegation under the FAA's regulatory scheme (which would support removal) from the regulation of tobacco companies under FTC regulations (which does not). See Pet. 13–14. The Solicitor General's brief shows *Magnin* is consistent with the result in *Watson* and confirms that a formal delegation of authority from the FAA exemplifies the kind of "special relationship" missing in *Watson*.[3]

2. Respondents try to downplay the circuit split on the basis that the Ninth Circuit's decision is consistent with the Seventh Circuit's in *Lu Junhong*. Defs.' Opp. 15–18; Pls.' Opp. 24–27. Yet, the Ninth Circuit disclaimed *Lu Junhong*'s reasoning on two separate occasions before arriving at the same result based on a different rationale. See Pet. App. 13a, 15a. Plaintiffs try to wish away the Seventh Circuit's "rule-making-rule-compliance distinction," *id.* at 15a, as the "touchstone" of its rationale. Pls.' Opp. 25–26. But Judge Easterbrook could not be more unequivocal: "When discussing the possibility that delegation might create 'acting under' status, the [*Watson*] Court mentioned rule making rather than rule compliance as the key ingredient, and the FAA's order does not allow Boeing to change substantive rules." *Lu Junhong*, 792 F.3d at 810 (citation omitted) (citing *Watson*, 551 U.S. at 157). The Ninth Circuit understandably rejected this crabbed reading of *Watson* but made its own mistake by declaring the FAA's delegation insufficient if the designee must comply with detailed policies in carrying out delegated duties. See Pet. App. 15a. What is clear is that federal jurisdiction now is contingent on geography.

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[3] Plaintiffs argue *Magnin* is distinguishable because the *Magnin* plaintiff specifically pleaded the issuance of an airworthiness certificate proximately caused the injuries. Pls.' Opp. 22–24. That argument relates to the "nexus" prong of the removal inquiry, which the Ninth Circuit did not reach, as discussed below.

3. Respondents also wrongly assert there is a "broad consensus" that "has unified the lower courts' interpretation," making the Question Presented "settled"—notwithstanding the foregoing circuit conflict, the Solicitor General's position, and Judge O'Scannlain's dissent in this case. Defs.' Opp. 20; Pls.' Opp. 8, 22–24, 27–30. Respondents' characterization of the lower court decisions is incorrect.

First, the cases respondents cite mostly ordered remand because, while certain employees were individual FAA designees, the defendant itself was not. See, *e.g.*, *Andera* v. *Precision Fuel Components, LLC*, No. C12-0274-JCC, 2012 WL 12509225, at *3 (W.D. Wash. Aug. 1, 2012) (ordering remand where "certain Precision employees" were authorized "to certify the fuel control units," but where there was no allegation defendant itself was an FAA organizational designee). That distinction is inapplicable here because petitioner is not merely an employer of individual FAA designees; petitioner itself is the ODA holder. See Pet. 4–7.

Second, it is inaccurate that lower court decisions are uniform. District courts across the country have found "[d]elegees of the FAA may invoke the federal officer removal statute." *Gaylord*, 2019 WL 3400682, at *5 (citing *Magnin*, 91 F.3d 1424); see, *e.g.*, *Estate of Hecker* v. *Robinson Helicopter Co.*, No. 13-CV-0306-TOR, 2013 WL 5674982 (E.D. Wash. Oct. 17, 2013) (same); *Weidler* v. *Prof'l Aircraft Maint.*, No. CV 10-09376 SJO (CWx), 2011 WL 2020654 (C.D. Cal. May 13, 2011); *Scrogin* v. *Rolls-Royce Corp.*, No. 3:10cv442 (WWE), 2010 WL 3547706 (D. Conn. Aug. 16, 2010).

The district court decisions confirm the conflict: some courts follow *Magnin* (while others do not). This split and confusion at both the circuit and lower court levels warrant further review.

C. This Case Is An Excellent Vehicle For Resolving This Issue Of National Importance.

This case presents an opportunity for the Court to clarify the proper interpretation of *Watson* both in general and as applied in the FAA delegation context. See Pet. 19–23. Respondents counter the Court should not grant review because there are "outstanding questions" as to whether (1) there is a "causal nexus" between petitioner's delegation and plaintiffs' claims and (2) petitioner has a colorable federal defense. Defs.' Opp. 19–25; Pls.' Opp. 30–33. But these arguments are irrelevant to the Question Presented because the Ninth Circuit and district court did not reach those other elements for removal. See Pet. App. 9a, 16a n.9.

1. Plaintiffs assert this "is a design-defect case" where they are challenging petitioner's "design choices as a private manufacturer." Pls.' Opp. 8–9. Plaintiffs contend those choices cannot be attributed to the FAA and "do[] not implicate a significant risk of state-court prejudice" or "some federal interest," that would make removal proper. *Id.* at 6, 12, 27 (internal quotation marks omitted). For two reasons, this argument misses the point.

First, the argument continues to assume an overly restrictive interpretation of the statute. Petitioner is not claiming federal immunity (*i.e.*, that the aircraft's design is attributable to FAA). "[T]he statute's text is broader still" and not limited to that situation. Pet. App. 27a–28a. Indeed, courts regularly apply section 1442 where (as here) the federal defense is preemption. See Pet. 23 n.12.

This argument also is really directed to section 1442(a)(1)'s "nexus" prong—whether plaintiffs' claims are "for or relat[e] to" petitioner's conduct as a

federal designee—not whether an ODA holder is "acting under" the FAA. 28 U.S.C. § 1442(a)(1). It thus is irrelevant to the Question Presented and the district court and panel decisions, neither of which considered whether plaintiffs' claims relate to petitioner's actions as an ODA holder.

In any event, the nexus here exists. While plaintiffs' characterizations of the helicopter's design and petitioner's actions are incorrect, their claim that petitioner failed to implement major design changes that required a supplemental type certificate ("STC") are, at a minimum, *related to* petitioner's decisions not to develop and issue such an STC when it had the authority to do so. See 28 U.S.C. § 1442(a)(1); Pet. 7.[4] That connection more than satisfies the permissive nexus requirement under the statute. See *Latiolais* v. *Huntington Ingalls, Inc.*, 951 F.3d 286, 292 (5th Cir. 2020) (en banc) ("By the Removal Clarification Act, Congress broadened federal officer removal to actions, not just *causally* connected, but alternatively *connected* or *associated*, with acts under color of federal office.").[5]

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[4] Plaintiffs' complaint alleges petitioner failed to properly certify, test, and inspect the subject helicopter, belying their contention that they have not asserted claims related to petitioner's certification duties. *See* ER040 ¶ 215, ER048 ¶ 486.

[5] Plaintiffs crudely analogize this case to others involving the Boeing 737 Max. Pls.' Opp. 15–16. But those facts are not before the Court, and as petitioner's amicus has explained, the 737 Max crisis has not deterred the U.S. Secretary of Transportation's Special Committee from recommending "[t]he FAA should continue to make use of the current delegation system, which is solidly established, well controlled, and promotes safety through effective oversight." GAMA Br. 13 (alteration in original) (quoting *Official Report of the Special Committee to Review the Federal Aviation Administration's Aircraft Certification Process* 12 (Jan. 16, 2020),

2. Defendants-respondents also argue petitioner does not have a colorable federal defense. Defs.' Opp. 23–25.[6] They contend field or conflict preemption is not "colorable" because a single circuit has held the FARs do not preempt state-law design-defect claims and this Court declined to review that case. See *id.* Again, this is irrelevant to the Question Presented and the district court and panel decisions. The Ninth Circuit has held the FARs "preempt[] state law claims that encroach upon, supplement, or alter the federally occupied field of aviation safety and present an obstacle to the accomplishment of Congress's legislative goal to create a single, uniform system of regulating that field." *Ventress* v. *Japan Airlines*, 747 F.3d 716, 722–23 (9th Cir. 2014). Moreover, the Solicitor General has recently taken the position that FARs *do* preempt state-law claims but that the issue should percolate in the lower courts first. Pet. 7 n.5. Preemption is more than colorable in this case, and petitioner is entitled under section 1442(a)(1) to litigate its federal defense in a federal forum.

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https://www.transportation.gov/sites/dot.gov/files/2020-01/scc-final-report.pdf).

[6] Plaintiffs tellingly do not address this point.

CONCLUSION

For the foregoing reasons, the petition should be granted. Alternatively, the Court may wish to invite the Solicitor General to provide the views of the United States on this issue of critical importance to the FAA.

Respectfully submitted,

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