No. 08-460

In the Supreme Court of the United States

JOE ISAACSON, ET AL.,

Petitioners,

v.

DOW CHEMICAL COMPANY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to The United States Court Of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether federal contractors who manufactured a product that was designed by the federal government for use in military operations, and who were compelled to supply that product to the United States under the since-lapsed Defense Production Act of 1950, 64 Stat. 798 (codified at 50 U.S.C. App. § 2061 *et seq*.), were entitled to invoke the federal officer removal statute, 28 U.S.C. § 1442(a)(1), to remove from state to federal court suits asserting state-law claims arising from the production process.

RULE 29.6 STATEMENT

Respondent Monsanto Company has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent The Dow Chemical Company has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983 as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly-held company.

Respondent Valero Energy Corporation, the successor by merger to Ultramar Diamond Shamrock Corporation, has no parent company, and no publicly-held company owns 10 percent or more of its stock.

Respondent Maxus Energy Corporation is an indirect, wholly-owned subsidiary of YPF S.A. Approximately 85 percent of YPF S.A.'s stock is owned by Repsol YPF S.A., a publicly-held company.

Respondent Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc., is an indirect, wholly-owned subsidiary of YPF S.A. Approximately 85 percent of YPF S.A.'s stock is owned by Repsol YPF S.A., a publicly-held company.

Respondent Hercules Incorporated is wholly owned by Ashland Inc., a publicly-held company.

Respondent Uniroyal, Inc. is a dissolved corporation.

Respondent C.D.U. Holdings, Inc. is a dissolved corporation.

Respondent Uniroyal Chemical Corp. is wholly owned by the Crompton Corporation, a publicly-held company.

Respondent T H Agriculture & Nutrition Company, Inc. (now known as T H Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Koninklijke Philips Electronics N.V., a publicly-held company.

Respondent Thompson-Hayward Chemical Co. is a subsidiary of Harcros Chemicals Inc.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF THE QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

STATEMENT 1

THE PETITION SHOULD BE DENIED 9

A. The Decision Below Does Not Conflict With The Approach Taken By Other Courts To Removal By Government Contractors. 10

B. The Courts Below Correctly Held Removal Proper In The Circumstances Of This Case 14

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Mfrs. Mut. Ins. Co. v. *Sullivan*,
526 U.S. 40 (1999) 18

Arness v. *Boeing N. Am., Inc.*,
997 F. Supp. 1268 (C.D. Cal. 1998) 12

Boyle v. *United Techs. Corp.*,
487 U.S. 500 (1988) 11

City of Greenwood v. *Peacock*,
384 U.S. 808 (1966) 19

Dow Chem. Co. v. *Stephenson*,
539 U.S. 111 (2003) (per curiam) 5

Good v. *Armstrong World Indus., Inc.*,
914 F. Supp. 1125 (E.D. Pa. 1996) 13

Green v. *A.W. Chesterton Co.*,
366 F.Supp. 2d 149 (D. Me. 2005) 12, 13

In re "Agent Orange" Prod. Liab. Litig.,
304 F. Supp. 2d 404 (E.D.N.Y. 2004),
aff'd, 517 F.3d 76 (2d Cir. 2008),
petition for cert. filed, 77 U.S.L.W. 3242
(U.S. Oct. 6, 2008) (No. 08-461) 3, 4

In re "Agent Orange" Prod. Liab. Litig.,
818 F.2d 187 (2d Cir. 1987) 2, 4

Ivy v. *Diamond Shamrock Chems. Co.*,
996 F.2d 1425 (2d Cir. 1993) 4-5

TABLE OF AUTHORITIES—continued

Page(s)

CASES (cont'd)

Jefferson County v. *Acker*,
527 U.S. 423 (1999) 6, 9, 14, 17

Kelly v. *Martin & Bayley, Inc.*,
503 F.3d 584 (7th Cir. 2007) 19

Mesa v. *California*,
489 U.S. 121 (1989) 14, 16-17

Miller v. *Diamond Shamrock Co.*,
275 F.3d 414 (5th Cir. 2001) 9

Rendell-Baker v. *Kohn*,
457 U.S. 830 (1982) 18-19

Ryan v. *Dow Chem. Co.*,
781 F. Supp. 934 (E.D.N.Y. 1992) 14

Stephenson v. *Dow Chem. Co.*,
346 F.3d 19 (2d Cir. 2003) (per curiam) 6

Stephenson v. *Dow Chem. Co.*,
517 F.3d 76 (2d Cir. 2008),
petition for cert. filed, 77 U.S.L.W. 3242
(U.S. Oct. 6, 2008) (No. 08-461) 1, 2, 15, 16

Syngenta Crop Protection, Inc. v. *Henson*,
537 U.S. 28 (2002) 5

Watson v. *Philip Morris Cos.*,
551 U.S. 142, 127 S. Ct. 2301 (2007) .....*passim*

TABLE OF AUTHORITIES—continued

Page(s)

CASES (cont'd)

Willingham v. *Morgan*,
395 U.S. 402 (1969) ..... *passim*

Winters v. *Diamond Shamrock Chem. Co.*,
149 F.3d 387 (5th Cir. 1998) 3, 8, 9, 13, 14

STATUTES

28 U.S.C. § 1442(a)(1) ..... *passim*

28 U.S.C. § 1443(2) 19

42 U.S.C. § 1983 18

50 U.S.C. App. § 2071(a) 4

50 U.S.C. App. § 2166(a) 4

Defense Production Act of 1950,
64 Stat. 798 (codified at 50 U.S.C. App.
§§ 2061 *et seq*.) ..... i, 2

OTHER AUTHORITIES

EUGENE GRESSMAN ET AL., SUPREME COURT
PRACTICE (9th ed. 2008) 12

RICHARD H. FALLON, JR., ET AL., HART &
WESCHLER'S THE FEDERAL COURTS AND THE
FEDERAL SYSTEM (5th ed. 2003) 9

18 OXFORD ENGLISH DICTIONARY (2d ed. 1989) 15

BRIEF IN OPPOSITION

STATEMENT

These cases arise out of petitioners' state-law claims that they were injured by exposure to the chemical 2,3,7,8-tetrachlorodibenzo para dioxin ("dioxin"), trace amounts of which were present in various herbicides – collectively referred to here as "Agent Orange" – that respondents produced for use by the U.S. military during the Vietnam War. In *Stephenson* v. *Dow Chemical Co.*, 517 F.3d 76 (2d Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3242 (U.S. Oct. 6, 2008) (No. 08-461), the Second Circuit rejected those claims on the merits, holding them barred by the federal government contractor defense. The question posed by the petition here is whether the Second Circuit was correct in also holding that removal of these cases from state to federal court was proper under 28 U.S.C. §1442(a)(1), which permits removal by federal officers and those acting under them.

That question does not merit this Court's consideration. The decisions of the courts below favoring removal, which rested on the close control the government exercised over the production of Agent Orange, plainly are correct. Petitioners do not even assert a conflict in the courts of appeals on the question presented, and they are incorrect in contending that the district courts are confused on the standards governing removal under Section 1442(a)(1). Moreover, the lower courts have not yet had an opportunity to consider the impact of this Court's recent decision in *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 127 S. Ct. 2301 (2007), which is the first time the Court has addressed application of Section 1442(a)(1)

to a private entity; that makes review of the question presented here premature. And even if the Court were otherwise inclined to consider the issue, unique features of this case – among them, that the government invoked the since-lapsed Defense Production Act of 1950 (the "DPA"), 64 Stat. 798 (codified at 50 U.S.C. App. §§ 2061 *et seq.*), to *compel* respondents to produce Agent Orange – make it an especially ill-suited vehicle with which to resolve any question of general importance regarding the scope of federal-officer removal. Further review accordingly is not warranted.

1. The background regarding the development of Agent Orange and the procedural history of early Agent Orange litigation are set out in the brief in opposition to the petition for certiorari in No. 08-461, *Stephenson* v. *Dow Chemical Co.*[1] In brief, and insofar as is relevant here, the U.S. military used Agent Orange as a herbicide during the war in Vietnam to prevent enemy forces from concealing themselves and ambushing American, South Vietnamese, and other allied soldiers. The strategy is credited with saving the lives of thousands of allied troops. See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187, 192-93 (2d Cir. 1987) (Agent Orange's "success as a herbicide saved many, perhaps thousands of, lives").

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[1] Petitioners' statement of facts is misleading in significant respects. To offer one example, petitioners label it "uncontested" that "the United States government officials involved in the procurement process were not aware of the existence of dioxin in the final product they had contracted for." Pet. 6. In fact, as the district court noted, "[t]he government was aware of the dioxin in Agent Orange." Pet. App. 37a. See *id.* at 17a ("According to [respondents'] theory of the case, the Government knew that Agent Orange contained dioxin[.]").

The herbicidal properties of the components of Agent Orange, 2,4-dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"), had been discovered by the U.S. military during the Second World War, and it was the military that "developed these compounds as weapons of war." *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 404, 426 (E.D.N.Y. 2004), aff'd, 517 F.3d 76 (2d Cir. 2008), petition for cert. filed, 77 U.S.L.W. 3242 (U.S. Oct. 6, 2008) (No. 08-461).

As the defoliation program got underway, "[t]he government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam." Pet. App. 36a. Although respondents "'had produced 2,4-D and 2-4,5-T for commercial use before government involvement, their commercial formulations were never composed of a mixture of 100% pure 2,4-D/2,4,5-T, which the government required for the most part.'" *Id.* at 38a (quoting *Winters* v. *Diamond Shamrock Chem. Co.*, 149 F.3d 387, 399 (5th Cir. 1998)). Thus, "the Agent Orange supplied to the government was not a ready-to-order, preexisting or off-the-shelf chemical mixture." *Ibid.* Instead, as Judge Jack Weinstein, the district judge below, explained, "[f]ederal officers determined through government specifications that the 'formulation' for Agent Orange would be a 50/50 mix of the n-butyl esters of 2,4-D and 2,4,5-T." *Id.* at 36a-37a. As a consequence, respondents' contracts with the government "set forth or incorporated by reference detailed specifications for the herbicide." *Id.* at 37a.

Eventually, as the defoliation program accelerated, the government compelled respondents to produce Agent Orange under the DPA. See Pet. App.

37a. That statute, which by its terms expired on September 30, 1990 (see 50 U.S.C. App. § 2166(a)), granted the President the authority to "to require acceptance and performance" of "contracts or orders" deemed "necessary or appropriate to promote the national defense." 50 U.S.C. App. § 2071(a). Regulations promulgated under the DPA by the Business and Defense Services Administration required that every government order bearing a "rating" be "accepted and filled regardless of existing contracts and orders," on pain of criminal penalties. BDSA Reg. 2, §§ 10, 27, A907, A910.[2] Virtually all of respondents' contracts with the government were rated. A912, A917-18, A935-36. Ultimately, the government applied the DPA to effectively "commandeer[] the United States industry's entire capacity to manufacture 2,4,5-T [and] ordered [respondents] to accelerate the delivery of Agent Orange" (Pet. App. 37a), in 1967 directing each manufacturer to use its entire plant capacity for production of Agent Orange. See, *e.g.*, A935-36, A965, A967, A1325-26, A1485.

2. Some years after the Vietnam War ended, veterans and members of their families brought a class action against respondents, claiming that they had been injured by exposure to dioxin, an unwanted byproduct of the Agent Orange production process, present in minute quantities measurable in parts per million (the average dioxin content was 1.58 parts per million by weight). See *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d at 424; see also *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 187 (litigation by class action opt-outs); *Ivy* v. *Diamond*

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[2] "A___" refers to the defendants-appellees' appendix in the Second Circuit.

Shamrock Chems. Co., 996 F.2d 1425 (2d Cir. 1993) (litigation by class members who manifested injury after class action settlement but were nevertheless held subject to the bar of the settlement). More recently, a different group of plaintiffs brought additional actions against respondents, arguing that they were not bound by the class action settlement because they did not manifest injury until after the class settlement funds were exhausted in 1994. See Pet. App. 7a. This new group of plaintiffs included petitioners here, who initially brought their suits in various state courts. Defendants removed the suits to federal court and, along with actions initiated in federal court, the cases were consolidated in the Eastern District of New York pursuant to order of the Judicial Panel on Multi-District Litigation. *Ibid.* The district court held that the 1984 settlement barred these new plaintiffs' actions.

On appeal, the Second Circuit held that the federal courts had jurisdiction over petitioners' actions under the All Writs Act but reversed the district court's ruling that the post-1994 plaintiffs were bound by the class settlement, finding instead that they had not been adequately represented in the proceedings leading to the settlement. This Court affirmed the latter ruling by an equally divided Court, but it reversed the holding predicating federal jurisdiction on the All Writs Act, in light of its decision in *Syngenta Crop Protection, Inc.* v. *Henson*, 537 U.S. 28 (2002). It accordingly remanded the removed cases for reconsideration of the propriety of removal. See *Dow Chem. Co.* v. *Stephenson*, 539 U.S. 111 (2003) (per curiam); Pet. App. 8a. The Second Circuit then returned the cases to the district court for (1) a determination whether an alternative basis existed for removal jurisdiction and (2) resolution of the

merits of those claims that were properly in federal court. *Stephenson* v. *Dow Chem. Co.*, 346 F.3d 19, 21 (2d Cir. 2003) (per curiam).

On remand, Judge Weinstein held that the cases were properly removed under Section 1442(a)(1), which in relevant part provides for the removal of a suit against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or any agency thereof, sued in an official or individual capacity for any act under color of such office." Pet. App. 23a-42a. Judge Weinstein opined that removal is permissible under that provision if three elements are satisfied. First, "a defendant must demonstrate that it is a 'person' within the meaning of the statute." *Id*. at 30a. Second, the suit must be for an "'act under color of federal office,'" which calls for "a causal nexus between the defendant's actions under federal office and the plaintiff's state court claims" and requires "[a] substantial degree of direct and detailed federal control over the defendant's work." *Id.* at 30a, 32a. Third, "defendants must raise a colorable claim to a federal law defense," which "may be predicated on the federal government contractor defense." *Id*. at 30a, 36a.

Noting that this Court has rejected "a 'narrow, grudging interpretation'" of Section 1442(a)(1) (Pet. App. 35a (quoting *Jefferson County* v. *Acker*, 527 U.S. 423, 431 (1999))), Judge Weinstein found these requirements satisfied here. He held that "corporations are persons under Section 1442(a)(1)." *Id.* at 36a. He also determined that respondents "act[ed] under" a federal officer because "the government ordered specifications that differed from defendants' commercial applications," and "[t]he government's

full knowledge of the dioxin 'problem' inherent in the production of Agent Orange is evidence that the federal officials maintained control over the acts on which the litigation is based." *Id.* at 39a-40a. And Judge Weinstein reasoned that "[t]he government contractor defense is a colorable federal law defense in much the same way that self-defense is a colorable state-law defense to civil assault charges. In an assault case, the defendant may claim: 'He made me do it;' here a defendant may properly assert, 'the Government made me do it.'" *Id.* at 40a. Judge Weinstein added that this conclusion is strongly supported by the policy underlying federal officer removal because the government contractor defense, "while laying down a substantive rule, may be readily circumvented by state courts unsympathetic to the defendants." *Id.* at 41a.

3. The Second Circuit affirmed, relying in substantial part on this Court's decision in *Watson*. Pet. App. 1a-22a. The court of appeals agreed with Judge Weinstein that "removal in these cases fulfills the federal officer removal statute's purpose of protecting persons who, through contractual relationships with the Government, perform jobs that the Government otherwise would have performed." *Id.* at 6a.

Like the district court, the court of appeals found that corporations are "persons" within the meaning of Section 1442(a)(1). Pet. App. 12a. It also concluded that respondents "acted under" federal officers, pointing out that "[t]he words 'acting under' are to be interpreted broadly, and the statute as a whole must be liberally construed." *Id.* at 14a (citing *Watson*, 127 S. Ct. at 2304-05, and *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969)). The Second Circuit noted that, in *Watson*, this Court cited with evident

approval the Fifth Circuit's holding in *Winters*, 149 F.3d 387, that manufacturers of Agent Orange satisfied the "acting under" requirement because they helped federal officers "'fulfill * * * basic governmental tasks.'" Pet. App. at 15a (quoting *Watson*, 127 S. Ct. at 2308). So too, the Second Circuit held that, in this case, "the chemical companies 'assist[ed]' and 'help[ed] carry out[] the duties or tasks of' officers of the department of defense. See [*Watson*, 127 S. Ct.] at 2307. Defendants thus had the 'special relationship' with the Government required by the 'acting under' prong." *Id.* at 16a.

Finally, the court of appeals held that respondents were being sued for an "act under color of [federal] office." The court explained that, to satisfy this requirement, nongovernmental defendants "must demonstrate that the acts for which they are being sued – here, the production of dioxin in Agent Orange – occurred *because of* what they were asked to do by the Government." Pet. App. 17a. "According to [respondents'] theory of the case," the court continued, "the Government knew that Agent Orange contained dioxin, and the Government controlled the method of formulation"; "whether the challenged act was outside the scope of [respondents'] official duties, or whether it was specifically directed by the federal Government, is one for the federal – not state – courts to answer." *Id.* at 17a-18a (citing *Willingham*, 395 U.S. at 409). Finding that respondents also raised "a colorable federal defense" because the government contractor defense "is a creature of federal common law and serves to protect the interests of the Government rather than the contractor defendant" (*id.* at 19a, 20a), the court of appeals accordingly held removal proper.

THE PETITION SHOULD BE DENIED

The general contours of Section 1442(a)(1) are settled. The statute has three elements: it permits removal of suits against "[1] any person [2] acting under [a federal] officer * * * [3] for any act under color of such office." Section 1442(a)(1) is phrased "in sweeping terms" (RICHARD H. FALLON, JR., ET AL., HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 908 (5th ed. 2003)), and this Court has repeatedly "rejected a 'narrow, grudging interpretation' of the statute" (*Jefferson County*, 527 U.S. at 431), instead "ma[king] clear that the statute must be 'liberally construed.'" *Watson*, 127 S. Ct. at 2305.

The Second Circuit's application of these standards does not warrant review. Its decision is wholly consistent with the rulings of other courts of appeals that – as this Court noted in *Watson* – have approved the removal to federal court of suits against manufacturers of Agent Orange. See 127 S. Ct. at 2308 (citing *Winters*, 149 F.2d at 387); *Miller* v. *Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001). Nor is there significant confusion in the district courts on removal standards under Section 1442(a)(1); no court has held removal by a government contractor improper when, as here, the contractor is able to allege that "[t]he government designed, controlled, and supervised the production" of the assertedly harmful product. Pet. App. 36a. And the decision below plainly was correct in holding that Section 1442(a)(1) authorizes removal of a case, like this one, where "the relationship between the contractor and the Government is an unusually close one involving detailed regulation, monitoring, or supervision" and the suit centers on actions of the contractor in "help[ing]

[federal] officers fulfill * * * basic governmental tasks." *Watson*, 127 S. Ct. at 2308. The petition for certiorari accordingly should be denied.

A. The Decision Below Does Not Conflict With The Approach Taken By Other Courts To Removal By Government Contractors.

Petitioners assert that the Second Circuit held removal proper "based on the mere fact that [respondents are] government contractor[s]" (Pet. i), a characterization of the holding that is repeated throughout the petition. See Pet. 10, 12, 14, 16, 22, 28. This holding, petitioners continue, conflicts with the decisions of a handful of district courts, which are said to have rejected the proposition that "mere participation in the contract alone" justifies removal, instead looking to whether the "removing contractor was required or directed by federal authority to perform the *specific conduct challenged in the state-law claim*." *Id.* at 17, 18. But both prongs of this argument are wrong.[3]

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[3] Petitioners assert in a footnote to the petition that the Second Circuit's ruling that corporations are "persons" under Section 1442(a)(1) "conflicts with several district court opinions holding that the statute only applies to *natural* persons." Pet. 20 n.7. It is not entirely clear whether petitioners mean to challenge this aspect of the Second Circuit's decisions. Such a contention would, in any event, be insubstantial. The most recent of the two district court decisions relied upon by petitioners is more than 15 years old; for the reasons persuasively explained by the Second Circuit (at Pet. App. 12a-14a), the courts have more recently, and uniformly, held that corporations are "persons" within the meaning of the statute. See *id.* at 31a-32a (citing cases).

To begin with, petitioners mischaracterize the holding below. The Second Circuit expressly did *not* hold that any act by an entity that contracts with the United States supports removal, or that removal may be premised on the "mere fact" that the defendant entered into a contract with the government. To the contrary, it was central to the holdings of both courts below that Agent Orange was not an off-the-shelf product; it was designed by, and respondents produced it according to precise specifications provided by, the government. Pet. App. 18a, 38a. Nothing in the decisions of the court of appeals or district court supports removal of disputes arising out of the vast run of routine contracts performed by entities that provide light bulbs or chicken salad sandwiches to the government.

Moreover, both courts below also emphasized that removal by a private entity is proper only when the defendant advances a colorable federal contractor defense. Pet. App. 19a-22a, 35a. That requires a showing of substantial federal involvement in, and the exercise of government discretion regarding, the activities giving rise to the plaintiffs' suit. See *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511-12 (1988). Here, the court of appeals found a "special relationship" between respondents and the government, pointing to "close supervision of the private entity by the Government" and noting that, in providing "a product that the Government was using during war – a product that, in the absence of Defendants, the Government would have had to produce itself" – "the chemical companies 'assist[ed]' and 'help[ed] carry out[] the duties or tasks of' officers at the Department of Defense." Pet. App. 15a-16a (quoting *Watson*, 127 S. Ct. at 2307) (brackets added by the court). Petitioners therefore are simply wrong in

reading the Second Circuit's decision to hold that removal is proper "any time a defendant is sued for violations of state law that occurred while the defendant was performing under a contract with the federal government." Pet. 1.

It thus is not surprising that – wholly apart from the point that conflict with a district court decision ordinarily does not justify the grant of certiorari[4] – petitioners also are wrong in contending that the Second Circuit's decision is inconsistent with the district court decisions cited at Pet. 17-19. Although petitioners are correct in observing that courts have rejected the proposition that every suit involving a government contractor is removable, the Second Circuit, as noted, clearly did not endorse that proposition here. To be sure, some district courts have required a significant degree of government "regulation, monitoring, or supervision" of the contractor to justify removal. *Watson*, 127 S. Ct. at 2308. See *Green* v. *A.W. Chesterton Co.*, 366 F. Supp. 2d 149 (D. Me. 2005); *Arness* v. *Boeing N. Am., Inc.*, 997 F. Supp. 1268 (C.D. Cal. 1998) (cited at Pet. 18). But

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[4] See EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 256 (9th ed. 2008) ("The Supreme Court will not grant certiorari to review a decision of a federal court of appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a district court, whether in the same circuit or in another circuit."). While petitioners are correct in stating (Pet. 17) that decisions to remand are not appealable, the decision that removal is proper *may* be appealed – as was done in this case. Courts of appeals therefore address removal standards with some frequency. Indeed, this is the third decision of a court of appeals to address the specific question whether manufacturers of Agent Orange may remove under Section 1442(a)(1). As noted in text, each court to decide that question has held removal proper.

that is present in this case, where "[t]he government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam." Pet. App. 36a. See Pet. 15a, 17a.[5] Nothing in the district court decisions relied upon by petitioners suggests that removal is inappropriate in such circumstances.[6]

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[5] The record here shows extensive day-to-day direction of and control over Agent Orange production by Commerce and Defense Department officers. For example, the government assigned federal officers (including an Administrative Contracting Officer, an Industrial Specialist, a Quality Assurance Representative, a Preservation Packing Specialist, a Transportation Officer, and a Labor Relations Specialist) to oversee the execution and fulfillment of *each* Agent Orange contract (A1402); the Business and Defense Services Administration directed each manufacturer to provide monthly reports of production, total shipments, and end-of-month inventory of 2,4,5-T and 2,4-D (A2571); and it repeatedly ordered contractors to accelerate their herbicide production. A2571. Any factual quibbles petitioners may have with the lower courts' findings on these points are plainly inappropriate grounds for certiorari.

[6] In *Green*, for example, where the plaintiff claimed injury from exposure to asbestos used as insulation by a federal contractor, the district court held that "the removing defendant must demonstrate that the government specified the composition of the offending product at issue so that there is a 'causal nexus between the federal officer's directions and the plaintiff's claims.'" 366 F. Supp. 2d at 153 (quoting *Winters*, 149 F.3d at 398). Here, of course, the federal government *did* specify the composition of Agent Orange – and the court in *Green* relied for its standard on *Winters*, in which the Fifth Circuit *approved* removal by manufacturers of Agent Orange. Similarly, in *Good* v. *Armstrong World Industries, Inc.*, 914 F. Supp. 1125, 1129 (E.D. Pa. 1996), another asbestos case cited by petitioners (at Pet. 19), the defendant failed to show that "any * * * federal officer directly controlled and supervised [its] work." But respondents made such a showing here. Petitioners also are wrong in asserting that "[n]othing demonstrates the confusion among the

B. The Courts Below Correctly Held Removal Proper In The Circumstances Of This Case.

Petitioners also are incorrect in their challenge to the merits of the holding below. The Second Circuit's decision relied on standards articulated by this Court in *Watson*, *Jefferson County*, *Willingham*, and *Mesa* v. *California*, 489 U.S. 121 (1989). Its analysis – and its unexceptional holding that removal to federal court may be sought by private parties who assisted the United States in the conduct of a war by providing essential war materials, produced according to precise government specifications that were designed by the U.S. military and that differed materially from the formulation and use of commercial herbicides – is entirely consistent with this Court's doctrine.

1. Pointing to *Watson*, petitioners insist that respondents did not "act under" a federal officer because – on the assumption that the government did not specify the methods respondents were to use in manufacturing Agent Orange – respondents' relationship with the government did not involve "'subjection, guidance, or control.'" Pet. 23 (quoting *Watson*, 127 S. Ct. at 2307). But this contention assumes its conclusion. Nothing in the statutory mandate that the party seeking removal "act under" federal

federal courts more" than Judge Weinstein's change of mind between *Ryan* v. *Dow Chem. Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992), in which he held that Section 1442(a)(1) removal was not available to producers of Agent Orange, and this litigation, in which he reached the opposite conclusion. Pet. 15. In fact, the holding below *eliminated* any disagreement in the lower courts, as Judge Weinstein declared himself persuaded by the Fifth Circuit's holding favoring removal in *Winters*. See Pet. App. 27a-28a.

supervision requires a showing that the government dictated every detail of the means used by that party to carry out the tasks assigned to it by the government, and nothing in any decision of this Court suggests that such a showing is necessary. There is no question that, in this case, respondents were "'[s]ubject to the instruction, direction, or guidance of'" the United States (*Watson*, 127 S. Ct. at 2307 (quoting 18 OXFORD ENGLISH DICTIONARY 949 (2d ed. 1989))) within the ordinary meaning of those terms: respondents produced Agent Orange according to the government's "detailed specifications" (Pep. App. 37a); "[t]he government was aware of the dioxin in Agent Orange" (*ibid.*); the government actually compelled respondents to produce Agent Orange under the DPA, on pain of criminal penalties; and, as we have noted, the government exercised substantial day-to-day direction and control over Agent Orange production. See note 5, *supra*; see also Pet. App. 16a ("Defendants received delegated authority; they were not simply regulated by federal law."), *id.* at 36a ("The government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam."), *id.* at 39a ("federal officials maintained control over the acts on which the litigation is based").[7]

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[7] For this reason, petitioners are wrong in their improbable assertion that the Second Circuit's removal holding is inconsistent with the same panel's simultaneous ruling on the merits regarding application of the government contractor defense. Petitioners point to the court of appeals' observation, in its merits ruling, that respondents "'were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.'" Pet. 24 (quoting *Stephenson*, 517 F.3d at 93). But as we show in text, removal does not turn on a demonstration that

There should be no doubt that this relationship satisfies the "acting under" standard articulated in *Watson*. "[T]he relationship between [respondents] and the Government [was] an unusually close one involving detailed regulation, monitoring, or supervision." 127 S. Ct. at 2308. "The assistance that [respondents] provide[d] federal officers * * * help[ed] officers fulfill * * * basic governmental tasks" (*ibid.*) – that is, fighting a war. And respondents surely "'lawfully assist[ed]' the federal officer[s] 'in the performance of [their] official duty.'" *Id.* at 2307.[8] Respondents accordingly "acted under" a federal officer.

2. Petitioners get no further in contending that respondents did not act "under color" of federal authority. In making this argument, petitioners rely on *Mesa* for the proposition that "the fact that * * * fed-

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the government mandated every particular of the defendant's conduct; it is enough that, as here, respondents were "'[s]ubject to the instruction, direction, or guidance of'" the United States. *Watson*, 127 S. Ct. at 2307.

[8] Petitioners err in asserting that "the panel's review of the substantial record below revealed that the alleged 'regulation, monitoring or supervision' never existed." Pet. 22 n.8. See also *Id.* at 10 (contending that the court of appeals "expressly rejected the district court's conclusion that 'the government designed, controlled and supervised the production of Agent Orange'"). Neither the Second Circuit's holding on removal nor its companion ruling on the merits even remotely suggested the absence of significant government control over the design and production of Agent Orange. Petitioners' argument that the Second Circuit's ruling on the merits raised doubts about the state of the record on this point is wrong; the portion of the merits decision quoted by petitioner (*id.* at 22-23 n.8) addressed, not the degree of control exercised by the government, but the extent of the government's knowledge of the possible dangers of exposure to Agent Orange. See *Stephenson*, 517 F.3d at 98 n.19.

eral officer defendants were being prosecuted for acts committed while on duty was insufficient to show that they were acting under color of federal office," and maintain that "the Second Circuit clearly erred in holding below that *private* contractors can do just that." Pet. 25. But this contention rests on a plain misunderstanding both of *Mesa* and of the Second Circuit's holding.

In *Mesa*, the Court held removal improper because the defendants did not offer a federal defense *at all*. See 489 U.S. at 129, 133-34. Here, in contrast, respondents advance the government contractor defense, which "clearly 'ar[ose] out of [Defendants'] duty' pursuant to their contractual relationship with the Federal Government." Pet. App. 20a (quoting *Willingham*, 395 U.S. at 407; bracketed material added by the court). Petitioners do not deny that the government contractor defense satisfies the requirement of a "colorable federal defense" identified in *Mesa*. 489 U.S. at 129.[9] And for this purpose, it is enough that the federal defense is plausible; the Court does "not require the [defendant] virtually to 'win his case before he can have it removed.'" *Jefferson County*, 527 U.S. at 431 (quoting *Willingham*, 395 U.S. at 407).

Petitioners also are wrong on two counts when they maintain that the Second Circuit's analysis of

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[9] Petitioners do note that there is "federal court authority questioning this proposition," pointing to a single district court decision that, in dictum, expressed uncertainty on the point. Pet. 21 n.7. But as Judge Weinstein explained below, the many courts that have actually decided the question were unanimous in holding that the government contractor defense is a "colorable federal defense" for removal purposes. Pet. App. 36a; see also *id*. at 20a-21a.

the "under color" requirement is inconsistent with decisions of this Court interpreting "identical language in federal civil rights statutes." Pet. 26. For one thing, the language of Section 1442(a)(1) and that of 42 U.S.C. § 1983, which was at stake in the decisions cited by petitioners at Pet. 26, is *not* identical. Section 1983, which refers to actions taken "under color of state *law*," is directed at circumstances where a private actor essentially is acting *as* the State. See *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 52 (1999) (emphasis added). Section 1442(a)(1), which refers to actions taken "under color of [federal] *office*" and expressly contemplates removal by private persons who are *not* officers of the United States, does not require the same sort of exercise of governmental authority.

In any event, and even disregarding that distinction in the statutory text, the decisions cited by petitioners are in fact consistent with the approach taken by the Second Circuit here. In *American Manufacturers*, the Court held only that a private party does not act under color of state law within the meaning of Section 1983 when it "'is subject to state regulation'"; "subtle encouragement" by the State does not convert private activity into state action. 526 U.S. at 52-53. But here, of course, the federal government – by specifically requesting and then, by invoking the DPA, *compelling* production of Agent Orange – offered far more than "subtle encouragement" to respondents. Similarly, in *Rendell-Baker* v. *Kohn*, 457 U.S. 830 (1982), the Court held that a private party does not become a state actor simply because it is a government contractor when the particular actions challenged "were not compelled or even influenced by any state regulation." *Id.* at 840-41. See *id.* at 844 (White, J., concurring in the

judgment) (action not "based upon some rule of conduct or policy put forth by the State"). That holding has no application to a situation like the one here, where a private party is compelled to produce materials designed by the United States for use in the prosecution of military action. These decisions offer no reason to question the correctness of the holding below.[10]

3. Finally, even if there were some doubt about the proper scope of Section 1442(a)(1), this case would not be an appropriate one in which to consider the question. *Watson*, the first modern decision in which the Court has discussed application of the statute to a government contractor, is little more than a year old. The lower courts have not yet had an opportunity to apply the Court's analysis to any significant degree, and it appears that the only decision of a court of appeals other than this one to apply *Watson* did so in a factual setting (tobacco regulation) identical to that considered in *Watson*. See *Kelly* v. *Martin & Bayley, Inc.*, 503 F.3d 584 (7th Cir. 2007) (per curiam). It therefore would be appropriate for this Court to await further consideration of the issue by the lower courts before weighing in itself.

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[10] Petitioners draw no more support from *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), which they cite at Pet. 27. The Court there held that the civil rights removal statute, 28 U.S.C. § 1443(2), applies only to federal officers and those acting under them, and therefore could not be invoked by private parties who were not acting in concert with federal officers. See 384 U.S. at 810, 815, 821, 824. That holding has no bearing in this case, where there is no doubt that respondents were acting at the behest of the federal government.

Moreover, as we have noted, this case involves a unique consideration that plainly bears on application of the proper removal analysis: respondents were *compelled* to supply Agent Orange to the government by invocation of the DPA. Because that statute is no longer in effect, and there accordingly is no possibility that a case with this unusual feature will arise in the future, resolution of the dispute here would provide little useful guidance to the lower courts. If the Court is inclined to consider the scope of Section 1442(a)(1), it would be appropriate to do so in a vehicle that has more in common with the usual run of government contractor cases.

Petitioners' policy arguments in favor of immediate review are insupportable. Their contention that the Second Circuit's decision "has the potential to overwhelm already over-burdened federal courts" (Pet. 27-28) rests on a misstatement of the holding below, which does *not* permit removal of "virtually all" suits brought against government contractors. *Id.* at 28. And petitioners' assertion regarding the purported inconvenience of litigating in federal court (*id.* at 28-29), as well as their suggestion that an expansive removal rule is inconsistent with principles of federalism (*id.* at 30-32), simply disregards the particular goals that Congress sought to advance in Section 1442(a)(1). The courts below did not, as petitioners would have it, depart from controlling law by improperly "voic[ing] their concerns about the capacity of state courts to handle litigation." Pet. 31-32. Instead, this Court, in decisions dating back more than a century, consistently has identified the congressional purpose behind Section 1442(a)(1) and its many statutory predecessors: "Congress has decided that federal officers, and indeed the federal Govern-

ment itself, require the protection of a federal forum." *Willingham*, 395 U.S. at 407.

As the Court put it most recently in *Watson*, "the removal statute's 'basic' purpose is to protect the Federal Government from * * * interference with its 'operations'" at the hands of hostile state courts. 127 S. Ct. at 2306. "State court proceedings may reflect 'local prejudice' against unpopular federal laws or federal officials," "States hostile to the Federal Government may impede * * * the enforcement of * * * federal law," "[a]nd States may deprive federal officials of a federal forum in which to assert federal immunity defenses." *Ibid.* And, as the plain terms of Section 1442(a)(1) indicate, "some of these same considerations may apply" when "a private person acts as an assistant to a federal official." *Id.* at 2307. For this reason, "[t]he federal officer removal statute is not 'narrow' or 'limited,'" and its important policy "should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." *Willingham*, 395 U.S. at 406-07.

These considerations apply with full force to this litigation. The Vietnam War, like the other great national controversies that prompted enactment of Section 1442(a)(1)'s predecessor statutes (see *Watson*, 127 S. Ct. at 2305), was the source of heated debate and, in some quarters, considerable hostility to the policies of the national government. The Agent Orange defoliation program, which had a central role in that debate, has not become less controversial over time. The court of appeals therefore was quite correct in observing that "removal in these cases fulfills the federal officer removal statute's purpose of protecting persons who, through contractual relationships with the Government, perform jobs that the

Government otherwise would have performed." Pet. App. 6a. Indeed, as Judge Weinstein noted below, "[b]ecause government contractor cases are freighted with factual findings, [the government contractor defense], while laying down a substantive rule, may be readily circumvented by state courts unsympathetic to the defendants." *Id.* at 41a. And "[i]f cases such as those in the present wave of Agent Orange claims were scattered throughout state courts[,] manufacturers would have to seriously consider whether they would serve as procurement agents to the federal government," an outcome that would "provide a significant deterrent to necessary military procurement." *Ibid.* Because the decision below accordingly is faithful to the language and purpose of Section 1442(a)(1), and because there is no confusion in the lower courts that requires this Court's attention, this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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