No. _____

In The

# Supreme Court of the United States

JOE ISAACSON,
PHYLLIS LISA ISAACSON, ET AL.,

*Petitioners,*

v.

DOW CHEMICAL COMPANY,
MONSANTO COMPANY, ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether a private corporation that was performing under a federal government contract but is sued for actions neither addressed in the contract nor otherwise directed or controlled by the government may nevertheless remove a state court civil action to federal court under 28 U.S.C. § 1442(a)(1) based on the mere fact that it is a government contractor.

## PARTIES TO THE PROCEEDING

Petitioners (with circuit court docket numbers):

Joe Isaacson (05-CV-1820)
Phyllis Lisa Isaacson (05-CV-1820)
J. Michael Twinam (05-CV-1509)
Robert S. Bauer (05-CV-1693)
Sandra J. Bauer (05-CV-1693)
Sheryl A. Walker (05-CV-1694)
Eric C. Walker (05-CV-1694)
Stephen J. Walker (05-CV-1694)
William Hamilton (05-CV-1694)
Esther M. Hamilton (05-CV-1694)
Sherman Clinton Stearns (05-CV-1695)
Dortha Monyene Stearns (05-CV-1695)
Charles T. Anderson (05-CV-1698)
Vickey S. Garncarz (05-CV-2450)

Respondents:

Dow Chemical Company
Monsanto Company
Hercules Incorporated
Occidental Chemical Corporation
Ultramar Diamond Shamrock Corporation
Chemical Land Holdings, Inc.
T-H Agriculture and Nutrition Company, Inc.
Thompson Hayward Chemical Company
Harcros Chemicals, Inc.
Uniroyal, Inc.
C.D.U. Holdings, Inc.
Uniroyal Chemical Company

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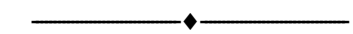
## INTRODUCTION

This case presents an important question concerning the allocation of state and federal judicial authority that has divided the lower federal courts. The court of appeals held that 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, regardless of whether the conduct forming the basis for suit was addressed in the contract or otherwise directed or controlled by the government, the defendant may remove the case to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), as a "person acting under" a federal officer being sued for acts done "under color of such office." This extraordinarily broad holding, permitting virtually every government contractor to have its cases litigated in federal court, conflicts with numerous decisions of other federal courts holding that this and other statutes covering conduct done "under color" of government office only apply where the government actually directed the precise conduct that is the basis for the suit. The Court should grant the petition to resolve this split over whether every government contractor is entitled to federal court jurisdiction simply because it was performing a government contract.



## OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-22a) is reported at 517 F.3d 129 (2d Cir. 2008). The order denying rehearing is unreported and reproduced at App. 43a-44a. The opinion and order of the district court (App., *infra*, 23a-42a) denying petitioners' motion for remand is reported at 304 F. Supp. 2d 442 (E.D.N.Y. 2004). A related opinion on the merits of Petitioners' claims was handed down by the Court of Appeals on the same day as its decision below, and is reported at 517 F.3d 76 (2d Cir. 2008).

## JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 2008. Petitioners filed a timely petition for rehearing with a request for rehearing *en banc*, which the court of appeals denied on May 8, 2008. On July 28, 2008, Justice Ginsburg extended the time for filing a petition for a writ of *certiorari* until October 6, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The federal officer removal statute, 28 U.S.C. § 1442(a), provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of

the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) 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, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

## STATEMENT OF THE CASE

### A. The Underlying Case Against Respondents

Petitioner Joe Isaacson enlisted in the Air Force and served in Vietnam from September 1968 to September 1969. During his tour of duty, Isaacson served as a crewman at one of the airfields that supported Operation Ranch Hand, the name for the campaign in which airplanes took off to spray mixtures of chemical herbicides, including those containing the "Agent Orange" contaminant dioxin. In 1996, when he was working as a junior high school assistant principal, Isaacson was diagnosed with non-Hodgkin's lymphoma, a rare cancer recognized to be

caused by exposure to dioxin. After his diagnosis, Isaacson filed a lawsuit against Respondents, the manufacturers of Agent Orange, in state court in New Jersey, alleging that his exposure to the chemical products they manufactured caused his cancer.[1]

Isaacson's case itself arises out of the government's purchase of various herbicides for use in Vietnam – primarily "Agent Purple," an equal blend of 2,4-Dichlorophenoxyacetic acid ("2,4-D") and various esters of 2,4,5-Tricholorophenoxyacetic acid ("2,4,5-T"), and "Agent Orange," an equal blend of 2,4-D and one 2,4,5-T ester (hereinafter collectively referred to as "Agent Orange."). The 2,4,5-T in each of these Agents was contaminated by an extremely toxic, unwanted

[1] Even though the cases brought by the different Petitioners herein were never consolidated before the district court, the Second Circuit issued one opinion regarding removal directed to all the cases that were before it. In this decision it only discussed the *Isaacson* Petitioners directly. The other district court cases that were included within the Second Circuit's decision were: *Twinam v. Dow Chemical Co.* (05-CV-1509); *Bauer v. Dow Chemical Co.* (05-CV-1693); *Walker v. Dow Chemical Co.* (05-CV-1694); *Stearns v. Dow Chemical Co.*, (05-CV-1695); *Anderson v. Dow Chemical Co.* (05-CV-1698); and *Garncarz v. Dow Chemical Co.* (05-CV-2450). These Petitioners or their spouses or the parent of Petitioners listed herein likewise served in Vietnam, were exposed to Agent Orange, and were diagnosed in or after 1995 with cancer and/or other illnesses caused by exposure to dioxin. This Petition is jointly brought on behalf of all Petitioners referenced by case number in the court of appeals' decision. *See* App. 1a. However, it will specifically highlight the case of the *Isaacson* Petitioners just as the Second Circuit did.

byproduct, dioxin (2,3,7,8-Tetrachlorodibenzo-para-dioxin or TCDD).

Certain relevant facts regarding Isaacson's claim are uncontested: 1) during the manufacture of 2,4,5-T, increasing amounts of dioxin were produced in direct relationship to the amount of heat used during the manufacturing process; *see In re "Agent Orange" Product Liability Litigation*, 517 F.3d 76, 83-84 (2d Cir. 2008), AB47-56, AS22, 25;[2] 2) Respondents knew at the time they were manufacturing 2,4,5-T that dioxin was a byproduct of its manufacture and that it could cause harm to humans exposed to it, *see In re "Agent Orange,"* 517 F.3d at 84; 3) Respondents had unfettered control over their often proprietary manufacturing processes; *Id.* at 83, AB47-56;[3] 4) no contract specified or even mentioned the existence of dioxin in the product being delivered to the U.S.

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[2] Petitioners' Appendix herein is designated "App. __a." The following are references made to the record before the Second Circuit: the related *Bauer* [05-CV-1693] opening and reply briefs are designated "AB" and "RB," respectively; the *Isaacson* [05-CV-1820] opening and reply briefs are designated "AI" and "RI"; the related *Stephenson* [05-CV-1760] opening and reply briefs are designated "AS" and "RS"; Petitioners'/Appellants' Court of Appeals' Appendix is designated "AA."

[3] *See also Hercules Inc. v. United States*, 24 F.3d 188, 197 (Fed. Cir. 1994) ("Put another way, nothing the government did or failed to do had any impact upon Hercules' and Thompson's production of Agent Orange."); *Maxus Energy Corp. v. United States*, 898 F. Supp. 399, 402 (N.D. Tex. 1995) ("Diamond was responsible for controlling product quality."), *aff'd*, 95 F.3d 1148 (5th Cir. 1996).

government, AS40, AB33-34; 5) unlike Respondents, 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, AS40, AB34-36; and 6) unlike Respondents, the United States government did not possess the equipment necessary to test for dioxin contamination of 2,4,5-T. RS28, AA6454-4.[4] Finally, it is this dioxin that Petitioners claim caused the injuries of which they now complain.

### B. The District Court and the Issue of Remand

Respondents removed the action to the United States District Court for the District of New Jersey, which accepted the removal based on the All Writs Act, 28 U.S.C. § 1651. *See* App. 26a-28a (district court opinion below, recounting procedural history of case).

The case was then consolidated as part of Multi-district Litigation No. 381, *In re "Agent Orange" Product Liability Litigation*, and transferred to the Eastern District of New York. The district court (Weinstein, J.) granted Respondents' motion to dismiss the claims of Isaacson and another Plaintiff ("Stephenson") as barred by a nationwide class action settlement approved almost two decades earlier, even

[4] By contrast, Respondents regularly tested their products for the level of dioxin contamination. *See*, *e.g.*, RB37-38, AA6837-6838. The government itself did not know that such a test could be performed until 1970. AA6454-4.

though Isaacson was uninjured at the time of the settlement and all settlement funds had been expended by the time of his diagnosis.

On appeal, the United States Court of Appeals for the Second Circuit affirmed the assertion of jurisdiction over Isaacson's claims based on the All Writs Act, while holding that their actions were not barred and thus could proceed. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 256-61 (2d Cir. 2001).

This Court granted Respondents' petition for a writ of *certiorari* and affirmed by an equally divided Court the Second Circuit's judgment reversing the dismissal of Stephenson's claims, while vacating the Second Circuit's judgment as to Isaacson's claims. *Dow Chem. Co. v. Stephenson*, 539 U.S. 111 (2003). The Court remanded Isaacson's case for reconsideration in light of *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), which held that the All Writs Act does not create federal question jurisdiction.

On remand, the Second Circuit vacated the district court's dismissal order as to Isaacson on grounds that jurisdiction did not lie under the All Writs Act and remanded the case for consideration of alternative grounds for federal jurisdiction. *Stephenson v. Dow Chem. Co.*, 346 F.3d 19 (2d Cir. 2003). The alternative ground advanced to the district court was whether removal could still be maintained

under the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

The district court had previously considered this issue in another "*Agent Orange*" case and decided that the facts did not warrant removal under 28 U.S.C. § 1442(a)(1). *See Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). In *Ryan*, the district court had granted remand, holding that the defendants "are being sued for formulating and producing a product all of whose components were developed without direct government control and all of whose methods of manufacture were determined by the defendants." *Id*. at 950. *Ryan* further found that the government had "bought the chemical components for Agent Orange and other defoliants as existing products privately developed and used them in mixtures which were derived from the defendants' standard recipes." *Id*. Accordingly, *Ryan* concluded that "[t]he government sought only to buy ready-to-order herbicides, not to cause, control, or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries." *Id*.

However, when addressing Isaacson's remand motion, the same district court, reviewing the same factual record, held that federal jurisdiction was properly asserted under the federal officer removal statute. *See* App. 23a-42a. In its decision below, the district court held, as it had in *Ryan*, that the Respondent corporations were "persons" under § 1442(a)(1). App. 31a-32a. But the district court reversed its *Ryan* ruling that the government contractor defense alone

did not satisfy the statute's implied requirement that a colorable federal law defense be asserted. App. 40a. More significantly, the district court reversed its earlier understanding of the facts and held that Respondents showed that they were "acting under color of federal office," because "the government designed, controlled and supervised the production of Agent Orange." App. 36a. This finding was necessary because the district court interpreted the law as requiring a "causal nexus between the defendant's action under federal office and plaintiff's state law claims," App. 32a, and held that this is satisfied "when there is evidence of intimate government involvement in the design decisions causally related to the alleged tort." App. 34a.

On March 2, 2005, the district court ruled that all other Petitioners herein had also been properly removed.

### C. The Decision of the Court of Appeals

After the district court granted summary judgment for Respondents based on their assertion of the government contractor defense, Petitioners appealed the district court's removal decision to the Second Circuit, which affirmed the district court's finding of jurisdiction. App. 1a-22a. However, rather than simply follow the district court's rulings, the Second Circuit went a long way toward rejecting the district court's factual underpinning. It held the same as the district court only by significantly broadening the

removal statute's coverage to create federal jurisdiction over virtually *any* conduct committed by a government contractor during the performance of the government contract. *See* App. 14a-18a.[5]

In particular, with respect to the removal statute's principal provisions limiting its coverage to persons "acting under" a federal officer and being sued for an act done "under color of such office," the Second Circuit's analysis markedly contrasted with that of the district court. This is because the Second Circuit, in its simultaneously but separately-issued summary judgment opinion, *In re "Agent Orange," supra*, 517 F.3d 76, expressly rejected the district court's conclusion that "the government designed, controlled and supervised the production of Agent Orange," finding instead that:

> The defendants do not contest that the government's contractual specifications for Agent Orange are silent regarding the method of manufacturing or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced. . . . Indeed, they admit that they were under no federal contractual

[5] The court of appeals did, however, embrace the district court's rationales in holding that Respondents were "persons" covered by the removal statute, App. 11a-14a, and that the federal government contractor defense standing on its own satisfied the requirement that a colorable federal law defense be asserted. App. 19a-22a.

> duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.

*Id*. at 93.

Having thus separately rejected the factual basis for the district court's jurisdictional ruling, the Second Circuit proceeded in its removal opinion to interpret the removal statute's "acting under" and "acts under color" requirements far more broadly than has any other court. First, with regard to whether Respondents were acting under a federal government officer, the Second Circuit found that this requirement is to be "interpreted broadly, and the statute as a whole must be liberally construed." App. 14a. Based on this broad and liberal construction, the Second Circuit held that, "through their contracts with the Government to produce Agent Orange, [it was enough that] the chemical companies **assisted** and **helped carry out** the duties or tasks of officers at the Department of Defense," so that Respondents "thus had the special relationship with the Government required by the 'acting under' prong." App. 16a (citation omitted) (emphasis added).

In addressing the removal statute's requirement of acts done "under color of" federal office, the court of appeals likewise found that "[t]he hurdle erected by this requirement is quite low," and that, to show causation under this prong, "Defendants must only establish that the act that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) occurred while Defendants were performing their

official duties." App. 16a-17a. Alternatively, the Second Circuit held that it would be sufficient to base its determination upon a removing government contractor's own "**theory of the case**," *i.e.* that "the Government knew that Agent Orange contained dioxin, and the Government controlled the method of formulation." App. 17a (emphasis added). Yet, the "theory" that the government controlled production was exactly what the panel itself had expressly rejected in its summary judgment opinion as not being supported by any evidence. *In re "Agent Orange,"* 517 F.3d at 93.

In affirming the district court, the Second Circuit substantially broadened the federal officer removal statute to cover every conceivable government procurement contractor sued for conduct that occurred while it was performing the contract. Without considering whether the government directed or even knew of the conduct at issue, the court of appeals held that there is federal jurisdiction for all government contractors so long as the acts complained of either occur while they are performing the contract or the contractor merely theorizes that the acts were done under government direction.

## REASONS FOR GRANTING THE PETITION

This Court has held that, to remove a case under 28 U.S.C. § 1442(a)(1), the removing party must: 1) be an eligible "person" under the statute; 2) raise a colorable federal defense; 3) assert that the acts complained of were undertaken while "acting under an officer" of the United States government; and 4) establish that the suit is "for an act under color of [federal] office," by demonstrating a **"'causal connection' between the charged conduct and asserted official authority."** *Willingham v. Morgan,* 395 U.S. 402, 409 (1969) (emphasis added). However, the court of appeals' expansive interpretation renders this four-part analysis moot as to government contractors. Indeed, it grants removal rights to federal contractors that are broader than those recognized for federal employees whose removal claims this Court has scrupulously evaluated and limited.

First, the Second Circuit held that corporations that contract with the government are always "persons," and thus proper removing parties. App. 11a-14a. Second, under the Second Circuit's analysis, government contractors meet the colorable defense requirement by definition. App. 19a-22a. Third, the court of appeals held that the "special relationship" required pursuant to the "acting under" provision is met by the mere fact that the defendant entered into a government contract. App. 14a-16a. Finally, the Second Circuit rendered moot the question of whether the act performed was done "under color of [federal] office" by holding that contractors satisfy this by

showing that the act occurred at any time in the course of performing the government contract or by conjuring up a "theory" that the act was undertaken at the government's direction, App. 16a-18a, a "theory" that the court accepts at face value even if it is blatantly wrong. In short, according to the Second Circuit, any suit filed against a government contractor for any acts undertaken during the contract's performance is removable under 28 U.S.C. § 1442(a)(1).

This holding radically expands the existing division among federal courts over how much government control is needed for a private actor to be deemed to be "acting under" a government officer and to be sued for acts done "under color of" such office. The approach taken by the Second Circuit conflicts with the courts of nearly every other circuit regarding what is necessary in order to determine when a private actor is acting "under color" of government office when performing the acts complained of in a lawsuit.

In sharp contrast to the decision below, numerous federal courts have held in granting motions to remand that state-law claims against federal contractors fall within the removal statute only if they are targeted at conduct that the government specifically directed. These decisions are consistent with this Court's ruling in *Mesa v. California*, 489 U.S. 121 (1989), that removal under this statute is unavailable *even to federal officers* if they could not assert a basis in federal law for their on-the-job conduct that state

authorities were prosecuting. These decisions also are more consistent with rulings by this Court and various circuit courts addressing private action under civil rights statutes covering acts done "under color of" state law, *see*, *e.g.*, 42 U.S.C. § 1983, and holding that such statutes require focus on "'the specific conduct of which the plaintiff complains.'" *American Manuf.'s Mutual Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

Nothing demonstrates the confusion among federal courts more than the extreme variability in addressing the removal issue shown by the courts below first in *Ryan*, *supra*, and then in the two decisions in this case. Each of these decisions articulates entirely different standards regarding how much, *if any*, government control is required to bring a private contractor's conduct violating state law within the ambit of the federal officer removal statute. In *Ryan v. Dow Chemical Co*., 781 F. Supp. 934 (E.D.N.Y. 1992), the district court held that:

> removal by a 'person acting under' a federal officer must be predicated upon a showing that the acts that form the basis for the state civil or criminal suit were performed pursuant **to an officer's direct orders or to comprehensive and detailed regulations**. . . . [A] person or corporation establishing only that the relevant acts occurred under the general auspices of a federal office or officer is not entitled to section 1442(a)(1) removal.

*Id*. at 947 (emphasis added). In its decision below, by contrast, the same district court held that removal instead required just "a substantial degree of direct and detailed federal control." App. 32a. When Petitioners appealed this ruling, the Second Circuit went further by finding that all that was necessary was for "the chemical companies [to have] assisted and helped carry out the duties or tasks of officers at the Department of Defense," in order for Respondents to have "the 'special relationship' with the Government required by the 'acting under' prong." App. 16a (citation omitted).

As explained below, this Court's review is essential to bring clarity to this important jurisdictional provision meant to maintain a proper division between state and federal judicial authority as it applies to the multitude of claims that are asserted against private companies performing under all manner of contracts with the federal government.

## I. THE SECOND CIRCUIT'S DECISION DIVIDES THE FEDERAL COURTS ON SIGNIFICANT ISSUES PERTAINING TO THE PROPER APPLICATION OF THE FEDERAL OFFICER REMOVAL STATUTE.

The Second Circuit's expansive interpretation of 28 U.S.C. § 1442(a)(1), allowing government contractors to invoke federal jurisdiction for virtually every state-law claim, directly conflicts with significant federal case law requiring, depending upon the court,

direct and detailed control of the government contractor's activities and/or a direct connection between the state-law claims being brought and the federal authority. Much of this contrary authority is in federal district court opinions, because orders granting remand are not appealable under 28 U.S.C. § 1447(c). *See Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124, 127 (3d Cir. 1998) (dismissing appeal of remand order rejecting § 1442(a)(1) removal by government contractor that manufactured asbestos-insulated turbines for Navy aircraft carrier); *cf. Powerex Corp. v. Reliant Energy Services, Inc.*, 127 S. Ct. 2411, 2416 (2007) (holding that § 1447(c) bars review of remands for lack of jurisdiction). In light of this prohibition, this Court has recognized splits of authority involving district courts over questions of removal and subject matter jurisdiction as warranting *certiorari* review. *See*, *e.g.*, *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 349 and n.2 (1999); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 and n.3 (1981).

This is such a case because the conflict between the Second Circuit's decision below and a wealth of district court authority applying § 1442(a)(1) is clearly defined. The Second Circuit held that a government contractor is deemed to be "acting under" a federal officer by virtue of mere participation in the contract alone, App. 16a, and that *any* action taken while performing the contract is deemed "under color" of federal office. App. 17a. By contrast, this expansive interpretation of the statute was rejected by a district court in the Eleventh Circuit. *See Kennedy v. Health*

*Options, Inc.*, 329 F. Supp. 2d 1314, 1318 (S.D. Fla. 2004) ("The contractual relationship between intermediaries and the Health Care Financing Administration does not in itself constitute the direct and detailed control that is required to assert federal jurisdiction.").

Moreover, a number of district courts have remanded cases involving government contractors based upon a review of whether the removing contractor was required or directed by federal authority to perform the *specific conduct challenged in the state-law claim*. In *Green v. A.W. Chesterton Co.*, 366 F. Supp. 2d 149 (D. Me. 2005), for example, the court remanded claims by a surviving spouse of a shipyard worker against the manufacturer of asbestos-insulated turbines on Navy ships. In rejecting the defendant's § 1442(a)(1) removal arguments, *Green* held that the statute's "acting under" provision required evidence that "the US Navy specified the incorporation of asbestos into the defendant's product to which the decedent was exposed so that there is a 'causal nexus between the federal officer's directions and the plaintiff's claims.'" *Id*. at 155 (quoting *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998)).

Similarly, in *Arness v. Boeing North American, Inc.*, 997 F. Supp. 1268 (C.D. Cal. 1998), involving claims by persons exposed to trichloroethylene manufactured for use on an Air Force base and disposed therefrom, the court rejected the private defendants' removal arguments for claims of negligent disposal

because defendants failed to allege that disposal activity was undertaken at the government's behest. The court held that "the critical question under the federal officer removal statute is to what extent defendants acted under federal direction at the time they engaged in the conduct now being sued upon." *Id*. at 1275-76 (citation omitted). In *Good v. Armstrong World Industries, Inc.*, 914 F. Supp. 1125 (E.D. Pa. 1996), where a Navy yard worker was exposed to asbestos in turbine generators, the court likewise rejected federal officer removal because neither the removal notice nor the supporting affidavit "establishe[d] that a federal officer required the use of asbestos in the design and manufacture of the turbine generators." *Id*. at 1130.[6]

Other courts have looked more specifically at a contractor's state-law duties. In *Freiberg v. Swinerton & Walberg Property Serv's, Inc.*, 245 F. Supp. 2d 1144 (D. Colo. 2002), the court remanded claims by a nuclear weapons production facility worker against an on-site contractor whose work exposed the plaintiff to asbestos. In rejecting the contractor's arguments for

[6] *See also Akin v. Big Three Industries, Inc.*, 851 F. Supp. 819, 823 (E.D. Tex. 1994) ("Finally, GE must establish a nexus between the acts it performed at the direction of the Secretary of the Air Force and the present claims for relief."); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992) ("Defendant General Dynamics must next show that it was 'acting under' an officer of the United States by establishing a nexus between the actions of the federal officers and the actions for which the defendant is being sued.").

removal under § 1442(a)(1), *Freiberg* held that the contractor failed to satisfy the statute's causal nexus requirement because it could not demonstrate that "the state action 'has arisen out of the acts done by' the defendant 'under color of federal authority and in enforcement of federal law,'" and could not "'exclude the possibility that' the state action 'was based on acts or conduct of his not justified by his federal duty.'" *Id*. at 1155 (quoting *Mesa*, 489 U.S. at 131-32). Similarly, based on state-law failure to warn claims by the surviving spouse of steel mill worker exposed to asbestos installed pursuant to a World War II era defense plant contract, the court rejected federal officer removal because of the defendant's failure to show "that the government authority it operated under directly interfered with its ability to fulfill its state law obligation to warn its employees of safety hazards."

In sum, the Second Circuit's decision amplifies the fact that there is considerable division and confusion among federal courts over the federal officer removal statute's application to claims against government contractors.[7] In order to bring

[7] The Second Circuit's predicate holding that Respondent corporations are "persons" entitled to removal under the statute, App. 14a-16a, likewise conflicts with several district court opinions holding that the statute only applies to *natural* persons and not corporate entities. *See*, *e.g.*, *Krangel v. Crown*, 791 F. Supp. 1436, 1442 (S.D. Cal. 1992); *Roche v. American Red Cross*, 680 F. Supp. 449, 455 (D. Mass. 1988). Additionally, the Second Circuit's holding that Respondents' assertion of the

(Continued on following page)

consistency and clarity to this important area of jurisdictional law, the Court should grant *certiorari*.

## II. THE SECOND CIRCUIT'S EXPANSION OF § 1442(a)(1) TO COVER *ALL* PRIVATE CONDUCT DONE IN CONNECTION WITH GOVERNMENT CONTRACTS IS LEGALLY ERRONEOUS.

Beyond its incompatibility with other federal court decisions, the ruling below should be reviewed because it is manifestly incorrect. Specifically, the Second Circuit's expansive reading of the federal officer removal statute's "acting under" and particularly its "under color" of federal office provisions conflicts with this Court's decisions applying this statute and identically worded provisions of federal law.

### A. The Second Circuit Broadened the Removal Statute's "Acting Under" Provision Beyond Recognition.

First, as discussed, the Second Circuit held that Respondents satisfied the statute's "acting under" a

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government contractor defense satisfies the statute's requirement of a colorable federal defense, App. 19a-22a, is in tension with federal court authority questioning this proposition. *See*, *e.g.*, *Freiberg*, 245 F. Supp. 2d at 1151 n.5 (D. Colo. 2002) (questioning "whether the government contractor 'defense' asserted by [defendant] is the type of federal interest or immunity for which § 1442(a)(1) was intended to provide an exclusively federal forum").

federal officer requirement simply by virtue of the fact that they contracted with the government to provide a product used by the military. App. 16a. In *Watson v. Philip Morris Companies, Inc.*, 127 S. Ct. 2301 (2007), this Court addressed the same provision in both holding that a private defendant's conduct in complying with federal regulations does not constitute "acting under" a federal officer, and that this is so "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id*. at 2308. This Court found instead that the "acting under" requirement refers to a relationship that "typically involves 'subjection, guidance, or control.'" *Id*. at 2307 (quoting Webster's New International Dictionary 2765 (2d ed. 1953)).

To be sure, *Watson* discussed the Fifth Circuit's ruling in *Winters*, *supra*, which had granted removal by defendants that contracted to manufacture Agent Orange.[8] *Watson* stated with regard to the Agent

[8] Significantly, and unlike in *Winters*, the panel's review of the substantial record below revealed that the alleged "regulation, monitoring or supervision" never existed. Moreover, in its separate opinion on summary judgment, the panel below limited *Winters* and the Fifth Circuit's companion decision of *Miller v. Diamond Shamrock Co.*, 275 F.3d 414 (5th Cir. 2001), as follows:

> The Fifth Circuit relying in large part on our *Agent Orange I* determination concluded the same. *See Miller*, 275 F.3d at 421. But we are required to review the factual record anew as it is presented to us, not as it was presented to a different panel twenty years ago. **And we note, as we did in *Agent Orange I*, that we were in 1987 without the benefit of briefing**

(Continued on following page)

Orange manufacturers in *Winters* that they were "helping the government to produce an item it needs," and that, "*at least arguably*, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform." 127 S. Ct. at 2307 (emphasis added). However, after recognizing this arguable distinction, *Watson* concluded that it "need not further examine here (a case where private contracting is not at issue) whether and when particular circumstances may enable private contractors to invoke the statute." *Id*.

However, the Second Circuit's own factual analysis makes it clear that the court erred in relying on *Watson*'s *dicta* regarding "Agent Orange" contractors. *See* App. 15a. Instead, it should have followed *Watson*'s actual holding that § 1442(a)(1) requires a relationship involving "subjection, guidance, or control." 127 S. Ct. at 2307. The absence of such subjection, guidance, or control of Respondents' activities (*i.e.* their defective manufacturing processes resulting in the production of large amounts of the toxic dioxin contaminant) is made clear by the Second Circuit's

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**by the parties on this subject.** *Agent Orange I Opt-Out Op.*, 818 F.2d [187, 190 (2d Cir. 1987)].

*In re "Agent Orange,"* 517 F.3d at 98 n.19 (emphasis added). In fact, at the time *Winters* and *Miller* were being decided, all "*In re Agent Orange*" documents were being stored at the National Archives and were relatively inaccessible. For this or other reasons, in response to Respondents' extensive submissions, plaintiffs' counsel offered no evidence in *Winters* and just a single affidavit by Admiral Elmo Russell Zumwalt, Jr. in *Miller*.

own finding in its simultaneously issued summary judgment opinion:

> The defendants do not contest that the government's contractual specifications for Agent Orange are silent regarding the method of manufacturing or that the government harbored no preference, expressed or otherwise, regarding how the herbicides were to be produced. . . . Indeed, they admit that they were under no federal contractual duty to produce Agent Orange using any particular manufacturing process or with any particular reference to the toxicity levels.

*In re "Agent Orange,"* 517 F.3d at 93. As a result, the Second Circuit did not *and could not* hold that Respondents were under government control or compulsion to produce Agent Orange with the extremely toxic dioxin additive that is the basis of Petitioners' state-law claims. Absent such government control, the Second Circuit's "acting under" determination is contrary to this Court's articulated requirements in *Watson*, and thus merits review and reversal by this Court.

### B. The Second Circuit's Determination That There Need Not Be Any Underlying Analysis as to Whether a Contractor Acted "Under Color of Office" is Contrary to Every Decision of This Court.

The Second Circuit's even more expansive interpretation of the removal statute's requirement of acts

done "under color" of federal authority is contrary to this Court's ruling in *Mesa*, *supra*, denying removal of a state's prosecution of federal *officers* for acts they committed on duty. In *Mesa*, the Court addressed homicide and reckless driving prosecutions brought by the State of California against two United States Postal Service Workers for acts they committed while performing their Postal Service duties. 489 U.S. at 123-24. Although the parties agreed that these federal employees were "persons acting under" an "officer of the United States," they disputed whether the employees were being prosecuted for "act[s] under color of such office." *Id*. at 125. In unanimously answering this latter question in the negative, the Court held that the fact that these federal officer defendants were being prosecuted for acts committed while on duty was insufficient to show that they were acting under color of federal office. *Id*. at 135. In light of *Mesa*'s holding that federal officers themselves cannot remove state-law claims based solely on the fact that they address conduct committed while on duty, the Second Circuit clearly erred in holding below that *private* contractors can do just that by removing claims based on the mere fact that they were performing under a government contract with no reference whatsoever to federal authorization of the specific conduct being prosecuted. *See* App. 17a ("[E]ven if plaintiffs were to prove that the dioxin contamination occurred because of an act not specifically contemplated by the government contract, *it is enough that the contracts gave rise to the contamination*.") (emphasis added).

Furthermore, the Second Circuit's expansive interpretation of the removal statute's provision covering acts done "under color" of federal office conflicts with decisions by this Court and various circuit courts alike holding that identical language in federal civil rights statutes requires focus on "the specific conduct of which the plaintiff complains." *American Manufacturers*, 526 U.S. at 51 (addressing 42 U.S.C. § 1983) (citation omitted); *see also Tancredi v. Metropolitan Life Ins. Co.*, 316 F.3d 308, 312 (2d Cir. 2003) (quoting *American Manufacturers*); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 836 (9th Cir. 1999) ("Instead, contemporary decisions stress the necessity of a *close nexus* between the state and the challenged conduct rather than application of a mechanistic formula.") (emphasis in original) (citation omitted); *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1452 (10th Cir. 1995) (same).

Under the identical language of § 1983, this Court has held that "[a]cts of . . . private contractors *do not become acts of the government by reason of their significant or even total engagement in performing public contracts*." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (emphasis added). The decision below flies in the face of this authority by holding that § 1442(a)(1)'s identical "under color" provision requires that defendants "only establish that the act that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) occurred while Defendants were performing their official duties." App. 16a.

Also in accord with the fact that the statute requires focus on the specific conduct being sued upon in the state action is this Court's interpretation of the identical "under color" language found in the civil rights removal statute, 28 U.S.C. § 1443(2), pertaining to persons engaged in law enforcement. *City of Greenwood v. Peacock*, 384 U.S. 808, 824 (1966) ("[W]e hold that the second subsection of § 1443 confers a privilege of removal only upon federal officers or agents and those authorized to act with or for them **in affirmatively executing duties** under any federal law providing for equal civil rights.") (emphasis added).

Since the Second Circuit's expansive application of § 1442(a)(1)'s "under color" provision cannot be squared with this Court's consistent requirement that the specific action must have been performed subject to federal officer direction or control, certiorari should be granted to reverse this clear error of law in concluding that the acts giving rise to removal include those done without any federal authorization or knowledge whatsoever.

## III. THE SECOND CIRCUIT'S DECISION RAISES JURISDICTIONAL ISSUES OF EXCEPTIONAL IMPORTANCE.

Finally, certiorari should be granted because, based upon the Second Circuit's exceptionally broad removal policy, a significant infusion of cases involving government contractors has the potential to

overwhelm already over-burdened federal courts. There is no question that the number of contracts entered into by the government has mushroomed in recent years. The 2007 defense budget alone allocated over $84 billion for contract procurement.[9] As this contracting has expanded, the number of suits brought against government contractors will inevitably keep pace.[10] Under the ruling below, virtually all of these cases will be removable to federal court.

There is widespread agreement that the federal judiciary is already stretched to the limit.[11] With such burgeoning dockets, it is rather easy to forget that the entire federal Article III judiciary has roughly half the judges of the state of California and that federal

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[9] *See* www.defenselink.mil/comptroller/defbudget/fy2007/fy2007_p1.pdf at 4.

[10] *See*, *e.g.*, *In re Blackwater Security Consulting, LLC*, 460 F.3d 576 (4th Cir. 2006) (denying appeal of order remanding survivor wrongful death and fraud claims against defense subcontractor for misrepresenting terms of and providing inadequate security provisions for support services performed in Iraq); *see also Kennedy v. Health Options*, *supra*, 329 F. Supp. 2d at 1314 (remanding state law damages claim against private Medicare insurer for injuries resulting from denial of medical care).

[11] *See, e.g.*, Wilkinson, *The Drawbacks of Growth in the Federal Judiciary*, 43 Emory L.J. 1147 (Fall 1994); Rehnquist, *Seen in a Glass Darkly: The Future of the Federal Courts*, 1993 Wis. L. Rev. 1, 4, 7-9 (overburdening the federal courts will result in a "decline in the high quality of justice the nation has long expected of the federal courts," and a key to avoiding that result is to limit "inefficient allocations of jurisdiction").

courts are necessarily courts of limited jurisdiction – both
Constitutionally and practicably. The decision below, however, threatens these limitations by construing the federal officer removal statute as broadly as possible. By contrast, this Court has cautioned in analogous circumstances that the federal diversity jurisdiction statute should be strictly construed to "reliev[e] the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts.'" *City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 76 (1941) (quoting Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510).

Furthermore, routing injured parties, including our soldiers and veterans, to often distant federal courts exacts an unreasonable price on people who often have limited resources. Distance from the courthouse alone can limit participation in the judicial process. And this is only one of the reasons prosecuting cases in federal courts is generally viewed as more expensive than litigation in state court.[12] This factor, and the location of their counsel in major cities where federal courts are almost always located, provide an advantage to large corporate defendants

[12] *See also* Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 Am. U. L. Rev. 369, 404 (1992) (finding that both plaintiff and defense attorneys agree that "federal court litigation is more expensive to undertake" than state court litigation).

and is no doubt one reason these defendants routinely press for a federal forum.[13]

Moreover, our system of federalism embodies the principle that state, not federal, courts should be the principal arbiters of state law. State courts have long been the primary guardians of these state-law rights, and federal law consistently has been construed to respect the vital role played by state courts. *See*, *e.g.*, *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 407 (1981) (Brennan, J., dissenting) ("state courts remain the preferred forum for interpretation and enforcement of state law"); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) ("[T]he policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").

As one commentator has explained:

> To offer a private corporation acting on its own initiative the ability to remove a case brought against it in state court to a federal forum, simply because that corporation is being paid by the federal government to provide a product, is to infringe upon a state's sovereignty by thwarting its ability to adjudicate disputes in its own judicial system. A state has an important interest in resolving cases filed in its courts. . . . The only interest significant enough to be protected by federal

[13] *See* Gibbs, *Forum Shopping Through Federal Agent Removal Jurisdiction and CAFA*, 86-FEB Mich. B.J. 20 (Feb. 2007).

> officer removal is the interest in enforcement of federal law in support of a supreme national government.[14]

To be sure, this Court has consistently held that giving federal courts the right to resolve federal officers' official defenses in response to state-law prosecutions prevents those prosecutions from unfairly hindering the federal government in performing its job. But it is the threat that state prosecution may impede the federal government's operations that has undergirded the federal officer removal statute. *See*, *e.g.*, *Mesa*, 489 U.S. at 137 ("Congress' enactment of federal officer removal statutes since 1815 served 'to provide a federal forum for cases where federal officials must raise defenses arising from their official duties.'") (quoting *Willingham*, 395 U.S. at 405). However, when the federal government does not control the charged acts, as it did not here, and those same acts are subject to state prosecution when the identical products are contracted for by anyone other than the government, then arrogating jurisdiction to federal court serves no purpose.

The only policy argument advanced by the courts below for federal jurisdiction is one that should be unavailing. Both the district court and the court of appeals below voiced their concerns about

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[14] Note, *The Boyle Festers: How Lax Causal Nexus Requirements and the "Federal Contractor Defense" Are Leading to a Disruption of Comity Under the Federal Officer Removal Statute*, 46 Emory L.J. 1629, 1657 (1997) (footnotes omitted).

the capacity of state courts to handle litigation. *See* App. 41a (district court); 9a-10a (circuit court). In other words, they distrust the state court system and view expansive removal jurisdiction as a way to protect corporate defendants from the vagaries of state prosecution. But this Court has already dismissed such arguments: "We have . . . not found the need to adopt a theory of 'protective jurisdiction' to support Art. III 'arising under' jurisdiction . . . and we do not see any need for doing so here." *Mesa*, 489 U.S. at 137. Indeed, such a policy is antithetical to our federal system.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 2008

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006

(Argued: June 18, 2007 Decided: February 22, 2008)
Docket Nos. 05-1820-cv; 05-1509-cv; 05-1693-cv; 05-1694-cv; 05-1695-cv; 05-1698-cv; 05-2450-cv

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Joe Isaacson and Phyllis Lisa Isaacson,

*Plaintiffs-Appellants,*

—v.—

Dow Chemical Co., Monsanto Co., Hercules, Inc., Occidental Chemical Corp., Ultramar Diamond Shamrock Corporation, Maxus Energy Corp., Chemical Land Holdings, Inc., T-H Agriculture and Nutrition Co., Thompson Hayward Chemical Co., Harcros Chemicals, Inc., Uniroyal, Inc., C.D.U. Holding Inc. and Uniroyal Chemical Company,

*Defendants-Appellees.*

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J. Michael Twinam,

*Plaintiff-Appellant,*

—v.—

Dow Chemical Company, Monsanto Co., American Home Products, Inc., Hercules Incorporated, Occidental Chemical Corporation, Ultramar Diamond, Chemical Land Holdings, Inc., Maxus Energy Corp., Harcros Chemicals, Inc., Shamrock Corp., Thompson Hayward

Chemical Co., T-H Agriculture, Uniroyal Chemical Co. and Valero Marketing Corporation,

*Defendants-Appellees.*

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Robert S. Bauer and Sandra J. Bauer,

*Plaintiffs-Appellants,*

—v.—

Dow Chemical Company, Monsanto Company, Pharmacia Corp., formerly known as Monsanto Co., Solutia, Inc., Hercules, Inc., Thompson Hayward Chemical Co., T-H Agriculture & Nutrition Co., Occidental Chemical Corporation, Occidental Petroleum Corporation, Uniroyal, Inc., C.D.U. Holding, Inc., Uniroyal Chemical Company, Harcros Chemicals, Inc., Ultramar Diamond Shamrock Corporation, Maxus Enegy Corp., Tierra Solutions, Inc. and Chemical Land Holdings, Inc.,

*Defendants-Appellees.*

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Sheryl A. Walker, E.C.W., A minor, by his Mother and Next Friend on behalf of Sheryl A. Walker, Stephen J. Walker, William Hamilton and Esther M. Hamilton, His wife, Individually and on Behalf of All Others Similarly Situated,

*Plaintiffs-Appellants,*

—v.—

Dow Chemical Company, Monsanto Company, Pharmacia Corp., Solutia, Inc., Hercules, Inc., Thompson Hayward Chemical Co., T-H Agriculture & Nutrition Co., Occidental Petroleum Corporation, Occidental Chemical Corp., Uniroyal, Inc., C.D.U. Holding, Inc., Uniroyal Chemical Company, Harcros Chemicals, Inc., Ultramar Diamond Shamrock Corporation, Maxus

Energy Corp., Tierra Solutions, Inc., Chemical Land Holdings, Inc., and Valero Energy Corporation, doing business as Valero Marketing and Supply Company,

*Defendants-Appellees.*

Does 1-100,

*Defendants.*

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Sherman Clinton Stearns and Dortha Monyene Stearns,

*Plaintiffs-Appellants,*

—v.—

Dow Chemical Company, Hercules Inc., Occidental Chemical Corp., Thompson Hayward Chemical Co., Elementis Chemicals, Inc., T.H. Agriculture and Nutrition Company, Inc., Maxus Energy Corp., El Paso Gas Transmission Company, Valero Energy Corporation, doing busines as Valero Marketing and Supply Company and Uniroyal Chemical Company,

*Defendants-Appellees.*

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Charles T. Anderson,

*Plaintiff-Appellant,*

—v.—

Dow Chemical Company, Monsanto Company, Occidental Chemical Corporation, Hercules, Inc. and Valero Energy Corporation, doing business as Valero Marketing and Supply Company,

*Defendants-Appellees,*

Pfizer, Inc., Solutia, Inc., E.I. Dupont de Demours & Co., Elementis Chemicals, Inc., Roche Holdings, Ltd.,

Harcros Chemicals, Inc., Crompton Corporation, Repsol-YPF, ConocoPhillips Company, Wyeth, Inc., Velsicol Chemical Corporation,

*Defendants.*

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Vickey S. Garncarz,

*Plaintiff-Appellant,*

—v.—

Dow Chemical Company, Uniroyal Chemical Corp., and Occidental Chemical Corporation,

*Defendants-Appellees.*

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BEFORE:

MINER, SACK, HALL, *Circuit Judges:*

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This is one of two opinions addressing appeals from a judgment of the United Staets District Court for the Eastern District of New York (Weinstein, J.) dismissing this multidistrict litigation. This opinion concerns the March 2005 order of the district court denying plaintiffs' motions to remand seven actions to state court. Because we agree that the district court has jurisdiction over these actions under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), the order of the district court is AFFIRMED.

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HALL, *Circuit Judge*:

We are asked to determine whether the federal officer removal statute, 28 U.S.C. § 1442(a)(1), allows defendant chemical companies ("Defendants"), who contracted with the Government to produce Agent Orange for military use in the Vietnam War, to remove to federal court actions filed in state court alleging violations of state law in connection with that production. Those plaintiffs who contest federal jurisdiction claim that Defendants do not qualify as "persons" who were "acting under" a federal officer performing acts "under color of federal office" when they committed the challenged acts. We disagree. Defendants have demonstrated that they are "persons" within the meaning of the statute; that they were "acting under" a federal officer; that there is a causal connection between the formulation, manufacturing, packaging, and delivery of Agent Orange and the state prosecutions; and that they have raised a colorable federal defense to the state suits. Moreover, 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. *See Watson v. Philip Morris*

*Cos., Inc.,* 127 S.Ct. 2301, 2308 (2007). We therefore affirm the orders of the district court denying the plaintiffs' motions to remand.

## BACKGROUND

Our decision today on the applicability of the federal officer removal statute affects only seven of the sixteen appeals in the present litigation. The plaintiffs in these seven appeals ("Plaintiffs") filed actions in state courts in Illinois, Missouri, New Jersey, New York, and Texas in which they alleged violations of state law, and they asserted that removal would be improper because diversity of citizenship was not complete. *See* Isaacson Compl. (filed in New Jersey); Twinam Compl. (filed in New York); Bauer Compl. (filed in Missouri); Walker Compl. (filed in Missouri); Stearns Compl. (filed in Texas); Anderson Transfer Order (from complaint filed in Texas); Garncarz Compl. (filed in Illinois). Defendants removed all of the cases to the federal district courts in their respective states. After Defendants had removed the cases, the Judicial Panel on Multidistrict Litigation transferred the cases to the United States District Court for the Eastern District of New York.

The district court first dismissed all of the cases because it found that they were impermissibly attempting to attack collaterally a 1984 class action settlement of claims stemming from harms suffered by veterans as a result of their exposure to Agent Orange. On appeal, this Court, following the Supreme

Court's decisions in *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999), vacated the dismissal and remanded because Plaintiffs were not bound by the settlement. *See Stephenson v. Dow Chem. Co.,* 273 F.3d 249, 259-61 (2d Cir. 2001). This Court also held that the district court had subject matter jurisdiction over the claims under the All Writs Act because, although the settlement funds were depleted, the state actions would require interpretation of the scope of the settlement and could disturb the judgment. *See id.* at 256.

The Supreme Court affirmed the judgment vacating the order of dismissal, but it vacated this Court's judgment to the extent that that judgment had affirmed the assertion of removal jurisdiction under the All Writs Act. *See Dow Chem. Co. v. Stephenson,* 539 U.S. 111 (2003). The Supreme Court further directed this Court to reconsider the question of federal jurisdiction over the claims in light of *Syngenta Crop Protection, Inc. v. Henson,* 537 U.S. 28 (2002). *See Dow Chem. Co.,* 539 U.S. at 112. On remand, we found it "clear in light of *Syngenta* that federal jurisdiction with respect to the Isaacson's claims cannot be grounded on the All Writs Act." *Stephenson v. Dow Chem. Co.,* 346 F.3d 19, 21 (2d Cir. 2003). We therefore remanded the case to the district court for further analysis of the jurisdictional question.

Once back in the district court, Defendants moved for summary judgment, and Plaintiffs moved

to remand the actions to state court. The district court granted Defendants' motion for summary judgment, *see In re Agent Orange Prod. Liab. Litig. (Agent Orange I),* 304 F. Supp. 2d 404 (E.D.N.Y. 2004), and in a separate memorandum and order, it denied the Isaacson plaintiffs' motion to remand, because it found that jurisdiction was proper pursuant to the federal officer removal statute, *see In re Agent Orange Prod. Liab. Litig. (Agent Orange II),* 304 F. Supp. 2d 442 (E.D.N.Y. 2004). In March 2005, the district court denied the remaining motions to remand.

In its jurisdictional ruling, the district court found that Defendants had satisfied the requirements for invoking the federal officer removal statute because: (1) they were "persons" within the meaning of the statute; (2) they were "acting under color of a federal office," because the Government specified the formulation of Agent Orange, was aware that it contained dioxin, knew about the "dioxin 'problem,'" and controlled the method of warning; and (3) the government contractor defense was a colorable federal law defense. *See Agent Orange II,* 304 F. Supp. 2d at 449-51. The court further noted the policy considerations supporting removal: (1) the scattering of Agent Orange claims throughout the state courts would have a chilling effect on manufacturers' acceptance of government contracts; (2) the vagaries of state tort law would deter military procurement; and (3) state courts may circumvent *Boyle v. United Technologies Corp.,* 487 U.S. 500 (1988), the Supreme

Court's preeminent decision on the government contractor defense, if they are unsympathetic to defendants. *Agent Orange II,* 304 F. Supp. 2d at 451. The court observed that its present decision was contrary to its prior decision in *Ryan v. Dow Chemical Co.,* 781 F. Supp. 934 (E.D.N.Y. 1992), where it had held, in virtually identical circumstances and with roughly the same defendants, that the federal officer removal statute did not apply. *See Agent Orange II,* 304 F. Supp. 2d at 445. The court explained its reversal of course by noting that *Ryan* was "no longer persuasive" and that *Ryan*'s holding had been called into question by the Fifth Circuit in *Winters v. Diamond Shamrock Chemical Co.,* 149 F.3d 387, 392 (5th Cir. 1998). *See Agent Orange II,* 304 F. Supp. 2d at 445.

Plaintiffs appeal the district court's memorandum and order finding removal jurisdiction over their state law claims and the district court's later order denying all motions to remand.

## DISCUSSION

We review de novo the district court's denial of the motions to remand. *See Whitaker v. Am. Telecasting, Inc.,* 261 F.3d 196, 201 (2d Cir. 2001). The federal officer removal statute provides that a case may be removed from state to federal court when the case is brought against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof,

sued in an official or individual capacity for any act under color of such office." 28 U.S.C. § 1442(a)(1). In this case, because they are not federal officers themselves, Defendants must satisfy a three-pronged test to determine whether they may effect removal. First, they must show that they are "person[s]" within the meaning of the statute who "act[ed] under [a federal] officer." *Id.* Second, they must show that they performed the actions for which they are being sued "under color of [federal] office." *Id.* Third, they must raise a colorable federal defense. *Jefferson County v. Acker,* 527 U.S. 423, 431 (1991). We consider each of these requirements in turn.

## I. Corporate Persons and the "Acting Under" Requirement

To satisfy the first requirement, Defendants must show that they were "person[s] acting under" "color of" a federal officer. As an initial matter, we address whether Defendants are "persons."

### A. Corporate Persons Under the Federal Officer Removal Statute

Section 1442 extends removal power to the United States, its agencies, federal officers, and persons acting under federal officers. Although Plaintiffs argued in their briefs that the defendant chemical companies do not fall under § 1442 because they are not natural persons, another panel of this Court decided, after briefs were due in this case, that corporate

persons qualify as "persons" under § 1442. *In re Methyl Tertiary Butyl Esther ("MTBE") Prods. Liab. Litig.,* 488 F.3d 112, 124 (2d Cir. 2007). Although *MTBE* thus forecloses any argument that corporations are not "persons" under the federal officer removal statute, because that case did not detail its reasoning on this issue, we take this opportunity to explain that result.

By statute, we presume that the term "person" includes corporations "unless the context indicates otherwise." 1 U.S.C. § 1. The context in which the term "person" is used in § 1442 gives no indication that corporations are excluded. In fact, § 1442 also lists other non-natural entities, such as the United States and its agencies, which suggests that interpreting "person" to include corporations is consistent with the statutory scheme. The presumption is not irrebuttable, and it can be overcome where the legislative history of the statute under consideration shows that "the normal rule of construction set forth in 1 U.S.C. § 1 would run contrary to the statutory intent." *Toy Mfrs. of Am., Inc. v. Consumer Prod. Safety Comm'n,* 630 F.2d 70, 74 (2d Cir. 1980). As a federal district court in California observed in *Krangel v. Crown,* 791 F.Supp. 1436 (S.D. Cal. 1992), the legislative history of § 1442 reflects only "the absence of express congressional intent to expand the protection of the federal officer removal provision beyond all federal officers to include non-natural entities." *Id.* at 1442. The *Krangel* Court found that the term "person" did not include corporate persons

based on this absence. As noted above, however, 1 U.S.C. § 1 establishes a baseline presumption that the term "person" includes corporate persons; the legislative history of § 1442 is relevant only to the extent it reflects a contrary statutory intent. Because the legislative history is devoid of evidence suggesting that Congress intended § 1442 not apply to corporate persons, the ordinary presumption established in 1 U.S.C. § 1 controls.

The 1996 amendment of § 1442 to include agencies does not change the result. Prior to its amendment in 1996, the statute allowed removal in cases against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office." 28 U.S.C. § 1442(a)(1) (1948). As written, the pre-1996 version was unclear on whether it applied only to actions against officers or if it also applied to actions against the United States and its agencies. The amendment clarified that it applied to "[t]he United States," "any agency thereof," "any officer . . . of the United States," "any officer . . . of any agency," and "any person acting under [any such] officer." *Id.* Whether or not the term "person" included corporations was, and remains, an entirely separate issue from whether or not the statute applied to both agencies and agency officers. The 1996 modification with respect to the latter, therefore, cannot be interpreted as reflecting any preexisting understandings with respect to the former.

Based on these considerations, we agree with the panel in *MTBE* that the term "person" includes corporate persons. We also note that in so holding, our Circuit is in agreement with the Fifth Circuit, *see Winters,* 149 F.3d at 398, and several district courts, *see Good v. Armstrong World Indus., Inc.,* 914 F. Supp. 1125, 1127-28 (E.D. Pa. 1996); *Pack v. AC & S, Inc.,* 838 F. Supp. 1099, 1102-03 (D. Md. 1993); *Fung v. Abex Corp.,* 816 F. Supp. 569, 572 (N.D. Cal. 1992).

### B. The "Acting Under" Requirement

Defendants must show that they were "acting under" a federal officer. The words "acting under" are to be interpreted broadly, and the statute as a whole must be liberally construed. *See Watson,* 127 S.Ct. at 2304-05; *Willingham v. Morgan,* 395 U.S. 402, 407 (1969) ("Th[e] policy [of providing the protection of a federal forum to federal officers] should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1).").

In *Watson,* 127 S.Ct. 2301, the Supreme Court expanded on what kind of relationship between the federal officer and the private actor is needed to satisfy the "acting under" requirement. There, the Court considered whether the Philip Morris Companies were "acting under" a federal officer or agency when they tested and advertised their cigarettes in compliance with the Federal Trade Commission's detailed regulations. *Id.* The Court held that they did not qualify as "acting under" a federal officer, reasoning

that the "help or assistance necessary to bring a private person within the scope of the [federal officer removal] statute does *not* include simply *complying* with the law." *Id.* at 2307. Instead, an entity "act[s] under" a federal officer when it "*assist*[*s*], or . . . help[s] *carry out,* the duties or tasks of the federal superior." *Id.* In other words, there must exist a "special relationship" between the two. *Id.* at 2310. For example, close supervision of the private entity by the Government would constitute such a special relationship:

> [T]he private contractor in such cases is helping the Government to produce an item that it needs. The assistance that private contractors provide federal officers goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks. In the context of [*Winters,* 149 F.3d 387], for example, Dow Chemical fulfilled the terms of a contractual agreement by providing the Government with a product that it used to help conduct a war. Moreover, at least arguably, Dow performed a job that, in the absence of a contract with a private firm, the Government itself would have had to perform.

*Id.* at 2308.

Similarly, in this case, Defendants contracted with the Government to provide 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. Unlike the tobacco companies in

*Watson,* Defendants received delegated authority; they were not simply regulated by federal law. Through their contracts with the Government to produce Agent Orange, the chemical companies "assist[ed]" and "help[ed] carry out[ ] the duties or tasks of" officers at the Department of Defense. *See id.* at 2307. Defendants thus had the "special relationship" with the Government required by the "acting under" prong.

## II. "Under Color of" Federal Office

The second prong requires Defendants to show that the acts complained of – that is, producing dioxin through the manufacturing of Agent Orange – were taken "under color of [federal] office." 28 U.S.C. § 1442(a)(1). Over time, this second prong has come to be known as the causation requirement. *See Maryland v. Soper (No. 1),* 270 U.S. 9, 33 (1926). To satisfy this requirement as applied to a federal officer, "[i]t must appear that the prosecution of him for whatever offense has arisen out of the acts done by him under color of federal authority and in enforcement of federal law, and he must by direct averment exclude the possibility that it was based on acts or conduct of his, not justified by his federal duty." *Id.* at 33. The hurdle erected by this requirement is quite low, as "[t]he statute does not require that the prosecution must be for the very acts which the officer admits to have been done by him under federal authority." *Id.* Rather, "[i]t is enough that his acts or his presence at the place in performance of his official duty constitute

the basis, though mistaken or false, of the state prosecution." *Id.* Translated to non-governmental corporate defendants, such entities 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. We credit Defendants' theory of the case when determining whether a causal connection exists. *Jefferson County v. Acker,* 527 U.S. 423, 432 (1999).

We agree with the district court that the "acting under" prong is satisfied here. To show causation, Defendants must only establish that the act that is the subject of Plaintiffs' attack (here, the production of the byproduct dioxin) occurred *while* Defendants were performing their official duties. *See Willingham,* 395 U.S. at 409; *see also Soper,* 270 U.S. at 33. Defendants have made the required showing. According to their theory of the case, the Government knew that Agent Orange contained dioxin, and the Government controlled the method of formulation. The action that Plaintiffs challenge, the production of dioxin, naturally would have occurred during the performance of these government-specified duties. And even if Plaintiffs were to prove that the dioxin contamination occurred because of an act not specifically contemplated by the government contract, it is enough that the contracts gave rise to the contamination. Indeed, whether the challenged act was outside the scope of Defendants' official duties, or whether it was specifically directed by the federal Government, is one for

the federal – not state – courts to answer. *See Willingham,* 395 U.S. at 409.

Plaintiffs' arguments to the contrary are unpersuasive. They first claim that Agent Orange was an off-the-shelf product and, therefore, could not have been manufactured under color of federal office. As we point out in our companion opinion, however, commercially available products did not contain the Agent Orange herbicides in a concentration as high as that found in Agent Orange. *See In re "Agent Orange" Prod. Liab. Litig.,* ___ F.3d ___ (2008). Plaintiffs' off-the-shelf argument thus fails.

Plaintiffs also suggest that the production of Agent Orange was not under color of federal office because Defendants voluntarily bid for the government contracts under which they produced Agent Orange. We find no authority for the suggestion that a voluntary relationship somehow voids the application of the removal statute. To require the relationship to have been not only "special" but also coerced makes little sense in light of the statute's purpose, and it is particularly strange when applied to natural persons who are acting under a federal officer – all of whom, we would trust, are doing so voluntarily.

In light of the broad interpretation that we must afford the requirement that there be a causal connection between Defendants' federal duties and the conduct for which they are being sued, Defendants have satisfied the "acting under" prong of the statute.

### III. Colorable Federal Defense

Finally, Defendants must raise a colorable federal defense. *Jefferson County,* 527 U.S. at 431; *Mesa v. California,* 489 U.S. 121, 132-34 (1989). The district court found that Defendants had raised a colorable government contractor defense. *Agent Orange II,* 304 F.Supp.2d at 450. As described more fully in our companion opinion, the government contractor defense protects a government contractor from liability under state tort law when the Government approved the product's general design, the product conformed to that design, and the contractor warned the Government of the risks of the product. *See In re "Agent Orange" Prod. Liab. Litig.,* ___ F.3d ___ (2008).

Courts have imposed few limitations on what qualifies as a colorable federal defense. At its core, the defense prong requires that the defendant raise a claim that is "defensive" and "based in federal law." *Mesa,* 489 U.S. at 129-30. More specifically, such defense must "aris[e] out of [the party's] official duties." *Arizona v. Manypenny,* 451 U.S. 232, 241 (1981). Given that the removal statute more generally is "not 'narrow' or 'limited'" and that one of its purposes is "to have such defenses litigated in the federal courts," the federal defense requirement is satisfied in "all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law." *Willingham,* 395 U.S. at 406-07. To be "colorable," the defense need not be "clearly sustainable," as the purpose of the statute is to secure that

the validity of the defense will be tried in federal court. *Id.* at 407.

The government contractor defense, which is a creature of federal common law and serves to protect the interests of the Government rather than the contractor defendant, *see In re "Agent Orange" Prod. Liab. Litig.,* ___ F.3d ___ (2008), is "defensive" and "federal," *Mesa,* 489 U.S. at 129-30. Moreover, as asserted by Defendants in this case, the defense clearly "ar[ose] out of [Defendants'] duty" pursuant to their contractual relationship with the Federal Government. *Willingham,* 395 U.S. at 407; *see also Manypenny,* 451 U.S. at 241. And as found by the district court, Defendants' assertions satisfy the particular requirements of the defense. *Agent Orange II,* 304 F. Supp. 2d at 450.

Plaintiffs object, however, based on an argument that (1) only "official immunity defenses" qualify as "colorable federal defenses," and (2) the government contractor defense is not an "official immunity defense" and, therefore, cannot satisfy the federal defense requirement. Contrary to Plaintiffs' claims, we find no support for the proposition that only "official immunity defenses" satisfy the "colorable federal defense" requirement. Although *Willingham* states that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court," 395 U.S. at 407, the Court proffers official immunity as only one reason for removal; it does not limit removal to situations that involve official immunity. Furthermore, in

*Mesa,* the Supreme Court confirms that in *Cleveland, Columbus & Cincinnati. R.R. v. McClung,* 119 U.S. 454 (1886), the defendant, a federal customs collector being sued for violation of his federal duty, satisfied the colorable federal defense requirement, not by asserting official immunity, but by defending on the basis that federal law did not impose any such duty. *Mesa*, 489 U.S. at 129-30. Compliance with federal law, therefore, provides a colorable federal defense under some circumstances, but it is not coterminous with an immunity defense.

Because we find that a defense need not be an immunity defense to qualify as a colorable federal defense under the removal statute, we need not decide here whether the government contractor defense is an immunity defense – an issue on which courts have disagreed. *Compare Murray v. Northrop Grumman Info. Techs., Inc.,* 444 F.3d 169, 175 (2d Cir. 2006) (citing *Boyle* as analogous to the holding that a private contractor administering a congressional job training program for Irish nationals was entitled to official immunity from state tort liability), *Densberger v. United Tech. Corp.,* 297 F.3d 66, 75 (2d Cir. 2002) (noting that *Boyle* "extended the immunity afforded to the federal government's discretionary functions under the Federal Tort Claims Act to government contractors"), *and Kerstetter v. Pac. Scientific Co.,* 210 F.3d 431, 435 (5th Cir. 2000) ("Government contractor immunity is derived from the government's immunity from suit where the performance of a discretionary function is at issue."), *with United States ex rel. Ali v.*

*Daniel, Mann, Johnson & Mendenhall,* 355 F.3d 1140, 1147 (9th Cir. 2004) ("[T]he government contractor defense does not confer sovereign immunity on contractors."), *and In re Joint E. & S. Dist. N.Y. Asbestos Litig. (Grispo v. Eagle-Picher Indus., Inc.),* 897 F.2d 626, 631 (2d Cir. 1990) (noting that *Boyle* did not grant military contractors "blanket immunity," but rather "hinge[d] the military contractor defense upon the military contractor's having followed a government-approved requirement contrary to a state tort law duty").

* * *

The district court properly found that it had jurisdiction over the present actions under the federal officer removal statute. Defendants are "persons" within the meaning of the statute who are entitled to stand in the shoes of a federal officer because of the "special relationship" they shared with the Government. The production of dioxin occurred "under color of [federal] office" because it occurred while Defendants were performing their "official" duty, pursuant to government contract, of manufacturing Agent Orange. Finally, Defendants have adequately raised the government contractor defense, which qualifies as a colorable federal defense.

## CONCLUSION

The order of the District Court denying Defendants' motions to remand is AFFIRMED.

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

| | |
|---|---|
| In re<br>"AGENT ORANGE"<br>PRODUCT LIABILITY LITIGATION | MDL No. 381 |
| JOE ISAACSON and PHILLIS LISA ISAACSON,<br>Plaintiffs,<br>-against-<br>DOW CHEMICAL COMPANY, et al.,<br>Defendants. | MEMORANDUM & ORDER (REMOVAL)<br>98-CV-6383 (JBW)<br>(Filed Feb. 12, 2004) |

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I. Introduction

Plaintiff, Joe Isaacson, is a Vietnam veteran. He claims injuries from exposure to Agent Orange during his service in Vietnam from 1968 to 1969. Defendants manufactured and sold Agent Orange to the United States for use by the military as a defoliant in Vietnam. This case has been remanded to determine whether there is federal jurisdiction. *See Stephenson v. Dow Chemical Co.*, 346 F.3d 19 (2d Cir. 2003).

Originally filed in New Jersey state court, the complaint alleged claims under state law only. Defendants removed the case to federal court, asserting a variety of jurisdictional grounds: 28 U.S.C. §§ 1651 (All Writs Act), 1442 (acting under federal officer), 1332 (diversity), and 1331 (federal question). The District Court for the District of New Jersey approved removal based on the All Writs Act, 28 U.S.C. § 1651. The case was then transferred to this court by the Multidistrict Panel. MDL 381. The Court of Appeals for the Second Circuit approved removal solely on the basis of the All Writs Act. *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001).

The Supreme Court remanded in light of its holding in *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28 (2002), indicating that the All Writs Act alone would not support removal. *Dow Chemical Co. v. Stephenson*, 123 S. Ct. 2161 (2003) (per curiam). On remand from the Supreme Court, the Second Circuit determined that jurisdiction could not be grounded in the All Writs Act and remanded the case to this court

to determine if there is an alternate ground supporting federal jurisdiction. *Stephenson v. Dow Chemical Co.*, 346 F.33d 19 (2d Cir. 2003).

Pending is plaintiff's motion to remand the case to state court on the ground that there is no basis for federal jurisdiction. Defendants contend that the case is removable.

It would not be removable on diversity grounds since diversity of parties is lacking. Nor would it be removable on the ground that plaintiffs have stated a federal cause of action since the Court of Appeals by a split decision disagreed with this court that federal substantive law was the predicate for Agent Orange claims. *See In re "Agent Orange" Prod. Liab. Litig.*, 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981). The only other basis is the federal officer removal statute. 28 U.S.C. § 1442(a)(1).

For reasons indicated below, the motion to remand is denied. Federal jurisdiction is properly asserted under the federal officer removal statute. A prior decision of this court reached a contrary conclusion in an Agent Orange case. *See Ryan v. Down Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992). The *Ryan* decision is no longer persuasive. As the Court of Appeals for the Fifth Circuit pointed out in rejecting *Ryan*'s conclusion, this court recognized its decision on the point as "close" and "uncertain." *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 392 (5th Cir. 1998). *Ryan* was "not legally capable of appellate review." *Id*. *Winters*, a persuasive appellate

decision, on facts almost identical to those in *Ryan* held the federal officer removal statute applicable to the defendants in the instant case. *Id*. at 401; *see also Miller v. Dow Chemical Co.*, 275 F.3d 414, 417 (5th Cir. 2001) (same).

## II. Facts

The facts supporting removal of the case on the basis of the federal officer removal statute are set forth in extensive contractual and other documents. *See In re "Agent Orange" Products Liability Litigation*, Judgment and Order of Dismissal, ___ F. Supp. 2d ___ (E.D.N.Y. Feb. 9, 2004) ("*Judgment in Agent Orange III*"). *Judgment in Agent Orange III* contains a description of the relevant facts. It is deemed incorporated in this memorandum and order.

## III. Law

### A. General Rule

The federal officer removal statute allows executive branch officials and persons acting under them to remove to a federal court civil and criminal actions brought against them in a state court for their official acts. The relevant portion of Section 1442(a)(1) of Title 28 of the Untied States Code reads:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the

> district and division embracing the place wherein it is pending:
>
> (1) 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, sued in an official or individual capacity for any act under color of such office. . . .

The statute has its origins in Congress's response to the New England states' opposition to the War of 1812. *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). Its reach was extended through the years, taking its current form in the enactment of the Judicial Code of 1948. *Mesa v. California*, 489 U.S. 121, 126 (1989).

Section 1442(a)(1) is designed to prevent state courts from interfering with the implementation of federal law. It does so by allowing those whose activities on behalf of the federal government may be inhibited by state court actions to remove the cases to a presumably less biased federal forum. If one defendant may remove under section 1442, then the entire case is removed to federal court even if some defendants could not have removed the case under the statute. *See, e.g., Falls Riverway Realty v. City of Niagra Falls*, 754 F.2d 49, 52 (2d Cir. 1985) (noting that one government defendant removed the "entire case"); 3 Moore's Federal Practice ¶ 1442.2. Subject matter jurisdiction is conferred over properly removed actions. *Niagra Mohawk Power Corp. v. Bankers Trust Co.*, 791 F.3d 242, 244 (2d Cir. 1986).

In general, lawsuits may be removed from state court to federal court only if a federal district court would have had original jurisdiction over the suit – the "well pleaded complaint rule." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). The federal officer removal statute expands the scope of federal jurisdiction; an action may be properly removed if it satisfies three elements. *See, e.g., Mesa*, 489 U.S. at 136 ("The removal statute itself merely serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal even if a federal defense were alleged.").

First, a defendant must demonstrate that it is a "person" within the meaning of the statute. Second, the defendant must establish that the suit is "for any act under color of [federal] office," i.e., there is a "causal connection between the charged conduct and asserted official authority." *Willingham*, 395 U.S. at 409 (citations omitted). Causation exists if the predicate acts of the state suit were undertaken while a person was acting as or under a federal officer, and the acts were under color of the relevant federal office. *Ryan*, 781 F. Supp. at 939. Third, defendants must raise a colorable claim to a federal law defense. *Mesa*, 489 U.S. at 131-38.

Defendants claim to have been persons "acting under" federal officers within the meaning of section 1442(a)(1) when they manufactured and delivered to the Department of Defense for use in war the herbicides that plaintiff alleges injured him. The primary question in the instant case is whether defendants'

conduct allegedly giving rise to plaintiffs' state law claims constituted acts under a federal officer within the meaning of section 1442(a)(1).

B. Elements of Section 1442(a)(1)

1. Definition of Person

"[U]nless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, . . . , and joint stock companies, as well as individuals. . . ." 1 U.S.C. § 1. The Supreme Court has not ruled on whether corporations can be considered persons under the federal officer removal statute. In its most recent explication of the meaning of "person," the Court held that a federal agency was not a person under the statute. *Int'l Primate Protection League v. Adm'r of Tulane Educ. Fund*, 500 U.S. 72 (1991). Responding to the *International Primate* decision, Congress amended the statute to allow for removal by federal agencies. Federal Courts improvement Act of 1996, Pub. L. 104-317, 110 Stat. 3847, 3850; *see also Nebraska ex. rel Dept. of Soc. Servs. v. Bentson*, 146 F.3d 676, 678 (9th Cir. 1998); *Dalrymple v. Grand River Dam Auth.*, 145 F.3d 1180, 1184 n.6 (10th Cir. 1998) (deeming the amendment a legislative reversal of *International Primate*).

Congress's amendment of the statute to emphasizes its broad scope supports the conclusion that "person" encompasses more than mere individuals. Protection of federal government operations in today's organizational climate where so much of our economy

and government outsourcing depends upon corporations requires this result. Under section 1442(a)(1) a "person" includes a corporation. *See Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998); *Thompson v. Comm. Ins. Co.*, 1999 U.S. Dist. LEXIS 21725 (S.D. Ohio 1999); *Arness v. Boeing N. Am., Inc.*, 997 F. Supp. 1268, 1272 (C.D. Cal. 1998); *Ruffin v. Armco Steel Corp.*, 959 F. Supp. 770, 773 (S.D. Tex. 1997); *Good v. Armstrong World Indus.*, 914 F. Supp. 1125, 1127-1128 (E.D. Pa. 1996); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992); *Akin v. Big Three Indus., Inc.*, 851 F. Supp. 819, 822-23 (E.D. Tex. 1994); *Ryan*, 781 F. Supp. at 946-47.

2. Acting Under Color of Federal Office

The "color of office" requirement should not be frustrated by a "narrow" construction. Courts interpret the rule broadly to achieve the protective purpose of the statute. *Willingham*, 395 U.S. at 407. This element requires a causal nexus between the defendant's actions under federal office and plaintiff's state court claims. *Id*. at 409; *Winters*, 149 F.3d at 398. A substantial degree of direct and detailed federal control over the defendant's work is required. *Winters*, 149 F.3d at 398; *Arness*, 997 F. Supp. at 1273.

Cases applying section 1442(a)(1) involving defense contractors support the defense's contentions in the present litigation. In *Winters*, for example, plaintiffs sued Agent Orange manufacturers under

almost identical facts. *See Judgment in Agent Orange III*. Defendants sought removal. The court determined that it was sufficient that the government specified "the composition of Agent Orange so as to supply the causal nexus between the federal officer's directions and the plaintiff's claims." *Winters*, 149 F.3d at 398. Central to the court's holding was a finding identical to that in the instant case – "that the government maintained strict control over the development and subsequent production of Agent Orange." *Id*. at 399.

The Fifth Circuit approved removal based on the federal officer statute in a subsequent Agent Orange case. *Miller v. Dow Chemical Co.*, 275 F.3d 414, 417 (5th Cir. 2001). By contrast – unlike the case at bar – federal control was almost nonexistent in *Arness v. Boeing North American*. The plaintiffs had sued Boeing based on Boeing's disposal of a toxic substance used to "flush rocket engine hardware." 997 F. Supp. at 1273. Government specifications required Boeing to clean the engines with a toxic substance, but did not specify how Boeing was to dispose of the cleanser. The court found that a federal officer did not direct or control Boeing's disposal of the toxin, and, thus, there was no connection between the plaintiff's claims and Boeing's actions at the direction of a federal officer. *Id*. at 1275.

*Akin v. Big Three Indus., Inc.*, illustrates a properly removable case. 851 F. Supp. 819 (E.D. Tex. 1994), *removal aff'd by Akin v. Ashland Chemical Co.*, 156 F.3d 1030 (10th Cir. 1998). A corporate

manufacturer of jet engines was involved in a toxic tort case arising out of chemical exposure at an Air Force base. The defendants produced the jet engines in accordance with government specification. Repairing the engines involved a grinding process, which necessarily gave rise to the emission of objectionable chemicals. The court held that the "acting under" requirement is satisfies when "a government contractor builds a product pursuant to Air Force specifications and is later sued because compliance with those specifications allegedly causes person injuries. *Id*. at 823-24. Likewise, in *Crocker v. Borden*, the claim was based on exposure to asbestos while the plaintiffs were shipyard employees. 852 F. Supp. 1322 (E.D. La. 1994). Defendants utilized asbestos as insulation in marine turbines. The marine turbines were manufactured pursuant to government specifications for the Navy. The court held that this government control established the necessary "causal nexus." *Id*. at 1327. *See also, e.g., Reed v. Fina Oil & Chemical Co.*, 995 F. Supp. 705 (E.D. Tex. 1998) (government dictated processes through which the victim initially came into contact with chemicals allegedly causing disease; government controlled specifications of chemicals); *Pack v. AC and S, Inc.*, 838 F. Supp. 1099 (D. Md. 1993) (government had extensive control over manufacture of turbines, even specifying type of asbestos cloth).

The "causal nexus" is also satisfied when there is evidence of intimate government involvement in the design decisions causally related to the alleged tort.

As stated in *Arness*, defendants must show that the government directed the actions on which the plaintiffs based their claims. 997 F. Supp. at 1275. By contrast, in *Good v. Armstrong World Industries, Inc.*, plaintiffs sued for injuries related to asbestos exposure. 914 F. Supp. 1125 (E.D. Pa. 1996). The court found that the Navy was involved in the design and manufacture of the turbines, but that it did not specify the use of asbestos. Acting under the general direction of the Navy "is not the same as acting under the direct and detailed control of a federal officer." *Id*. at 1129. *But cf. Crocker v. Borden*, 852 F. Supp. 1322 (1994) (opposite holding under similar facts). Similarly, in *Anderson v. Avondale Indus., Inc.*, defendant's attempt at removal was defeated by an inability to prove "intimate government oversight or involvement in the design or production of [a lagging adhesive]." 1994 U.S. Dis. LEXIS 17598, *10 (E.D. La. 1994).

3. Colorable Claim to a Federal Law Defense

Removal "must be predicated on the allegation of a colorable federal defense." *Mesa*, 489 U.S. at 129. In deciding whether a defendant has such a defense, courts reject a "narrow, grudging interpretation;" they do not require that the defense is likely to be successful on the merits. *Jefferson County v. Acker*, 527 U.S. 423, 431 (1999) (citation omitted).

Support of removal may be predicated on the federal government contractor defense. *See, e.g. Judgment in Agent Orange III*; *Winters*, 149 F.3d at 401; *Miller*, 275 F.3d at 418; *Guillory v. Ree's Contract Serv., Inc.*, 872 F. Supp. 344, 346 (S.D. Miss. 1994) (denying removal on other grounds); *Crocker*, 852 F. Supp. at 1327; *Akin*, 851 F. Supp. at 823; *AC & S, Inc.*, 838 F. Supp. at 1103; *Fung v. Abex Corp.*, 816 F. Supp. 569, 573 (N.D. Cal. 1992). *But see Freiberg v. Swinerton & Walberg Prop. Servs.*, 245 F. Supp. 2d 1144, 1151 n.5 (D. Colo. 2002) (questioning "whether the government contractor 'defense' asserted by Swinerton here is the type of federal interest or immunity for which § 1442(a)(1) was intended to provide an exclusively federal forum").

IV. Application of Law to Facts

Defendants corporations are persons under Section 1442(a)(1).

The government designed, controlled, and supervised the production of Agent Orange as a product vital to the prosecution of the war in Vietnam. *See Judgment in Agent Orange III*. Formal military specifications and requirements for Agent Orange were prepared and promulgated by the government. After the testing of many different herbicides, the military concluded that a mixture of the butyl esters of 2,4-D and 2,4,5-T was most effective for military defoliation purposes. Federal 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. The government determined that "extremely high dose rates" of these undiluted herbicides were required for effective military use.

Commencing in 1961, defendants produced and delivered Agent Orange to the United States pursuant to numerous contracts entered into with the Defense General Supply Center, the Defense Fuel Supply Center, the United States Army or the United States Air Force. The contracts set forth or incorporated by reference detailed specifications for the herbicide. Those specifications were promulgated by the government. A government directive issued pursuant to Section 101 of the Defense Production Act of 1950 commandeered the United States industry's entire capacity to manufacture 2,4,5-T, ordering defendants to accelerate the delivery of Agent Orange. *See, e.g., Hercules, Inc. v. United States*, 516 U.S. 417, 419 (1996) ("The military prescribed the formula and detailed specifications for manufacture.") The government also strictly and precisely defined the markings that were to be placed on drums of Agent Orange supplied by defendants, prohibiting the placement of warnings.

The government was aware of the dioxin in Agent Orange. It knew more about its dangers than defendants. The herbicidal properties of 2,4-D and 2,4,5-T were explored in research conducted by the United States military during World War II. In the 1950s, scientists at the Army Chemical Corps Warfare Laboratories located at Edgewood Arsenal, Maryland

learned of dioxin as a toxic by-product in the manufacture of 2,4,5-T. The President's Science Advisory Committee ("PSAC"), an organization within the White House, was briefed by the military on the Vietnam defoliation program in 1963 and recognized dioxin as an element in Agent Orange.

As the Court of Appeals for the Fifth Circuit concluded in *Winters* and *Miller*, the Agent Orange supplied to the government was not a ready-to-order, preexisting or off-the-shelf chemical mixture. The court noted in *Winters*:

> Although the defendants 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 (98% for 2,4-D and 99% for 2,4,5-T) in its contracts with the defendants. Instead, the defendants had always included a substantial percentage of inert ingredients to dilute the two active ingredients and required further dilution before commercial application. In contrast, the government's specifications for Agent Orange included use of the two active chemicals in unprecedented quantities for the specific purpose of stripping certain areas of Vietnam of their vegetation. To quickly achieve this goal, the government dictated that Agent Orange contain only the active

> ingredients 2,4-D and 2,4,5-T and it applied the product in Vietnam without dilution.

*Winters*, 149 F.3d at 399; *see also Miller*, 275 F.3d at 419.

This case is distinguishable from *Arness v. Boeing North American*. As already noted, in *Arness*, defendants were sued based on the effect of their method of disposal of a toxic by-product. 997 F. Supp. At 1273. The government had not specified the manner in which the toxic by-product would be disposed of. Here, the government ordered specifications that differed from defendants' commercial applications. In addition, the method of warning and application was completely in the government's hands.

The 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. *See Miller*, 275 F.3d 418; *Winters*, 149 F.3d at 400. *See also, e.g., Akin v. Big Three Indus., Inc.*, 851 F. Supp. 918 (E.D. Tex. 1994); *Pack v. AC and S, Inc.*, 838 F. Supp. 1099 (D. Md. 1993); *Fung v. Abex Corp.*, 816 F. Supp. 569 (N.D. Cal. 1992); *Judgment in Agent Orange III*.

The final element of removal under Section 1442(a)(1) is whether defendants have established a "colorable federal [law] defense." *Mesa v. Califronia*, 489 U.S. 121, 129 (1989). Although the Supreme Court has stated that "one of the most important reasons for removal is to have the validity of the

defense of official immunity tried in a federal court," *Willingham*, 395 U.S. at 407, the Court did not limit the scope of federal law defenses in removal cases to immunities. The government contractor defense is a colorable federal law defense in much the same way 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.'" *In re Joint Eastern and Southern Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Indsustries, Inc.)*, 897 F.2d 626, 632 (2d Cir. 1990).

An element of the government contractor defense is that the contractor must inform the government of any dangerous consequences known to it but not to the government. This requirement is satisfied in the present case. *See Judgment Agent Orange III*; *see also, e.g., Winters*, 149 F.3d at 401.

The defendants have satisfied all elements for removal to federal court based on section 1442(a)(1) of Title 28 of the United States Code. As "persons" acting under a federal officer, in the Agent Orange litigation, defendants were proxies for the government.

## V. Policy Considerations Supporting Removal

The military contractor defense is based upon substantive policy considerations as well as pragmatic procedural factors in controlling litigation. The government contractor defense provides substantive

protection for the armed forces and its suppliers. *See Boyle v. Untied Technologies Corp.*, 487 U.S. 500, 512 (1988). Section 1442(a)(1) provides procedural protection. Failure to apply the federal officer removal statute would allow into the back door of state litigation what the government contractor defense barred at the front door.

If 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. Since the advent of Agent Orange litigation in 1979, mass tort law has become more hazardous for defendants. While on balance state tort law does more good than harm, its vagaries and hazards would provide a significant deterrent to necessary military procurement.

Because government contractor cases are freighted with factual findings, *Boyle*, while laying down a substantive rule, may be readily circumvented by state courts unsympathetic to the defendants. Central to "Congress' concern [was] local hostility to federal authority." *Mesa*, 489 U.S. at 140 (BRENNAN, J., concurring). "Congress has decided that federal officers, and indeed, the Federal Government itself, require the protection of a federal forum. This policy should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)." *Willingham*, 395 U.S. at 407. While there are theoretical protections in the Supreme Court's power to directly review a state court's decision prejudicial to

the federal government and its contractors, very few cases can be reviewed by this route. *Cf.* Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 Colum. L. Rev. 1888, 1918 (2003) (noting that in habeas corpus cases that "the task of error-correction, once the province of the Supreme Court on direct review, has been farmed out to the district courts.").

## VI. Conclusion

Plaintiffs' motion to remand is denied. No costs or disbursements.

SO ORDERED.

/s/ Jack B. Weinstein
Jack B. Weinstein

Dated February 9, 2004
Brooklyn, New York

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DANIEL PATRICK MOYNIHAN
UNITED STATES COURTHOUSE
500 PEARL STREET
NEW YORK 10007

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[CATHERINE O'HAGAN WOLFE,
CLERK Letterhead]

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 7th day of May two thousand eight.

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Nos. 05-1820-cv, 05-1509-cv, 05-1693-cv, 05-1694-cv, 05-1695-cv, 05-1698-cv, 05-2450-cv.

Appellants having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc,*

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: _____
Frank Perez, Deputy Clerk