05-1820-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

In Re:
"Agent Orange"
Products Liability Litigation

JOE ISAACSON AND PHYLLIS LISA ISAACSON,

Plaintiff-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 & NUTRITION CO., THOMPSON-HAYWARD CHEMICAL CO., HARCOS CHEMICAL, UNIROYAL, INC., C.D.U. HOLDING INC. and UNIROYAL CHEMICAL COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae Public Citizen, Inc., states that it is a nonprofit, non-stock corporation that has no parent corporations and has issued no publicly held stock; hence, no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Legislative Materials:

INTEREST OF AMICUS CURIAE

With the consent of all parties to this appeal, amicus curiae Public Citizen, Inc., a national consumer advocacy organization, submits this brief on behalf of its approximately 130,000 members. Public Citizen appears before Congress, administrative agencies, and courts on a wide range of issues involving the protection of the public against corporate and governmental overreaching and wrongdoing. In particular, Public Citizen works to improve public health and to ensure access to the court system to redress injuries and illnesses caused by unsafe and defective products. As a result, Public Citizen has an interest in both the substantive and procedural aspects of litigation involving Agent Orange and other hazardous products that have caused severe latent injuries and illnesses to persons exposed to them. More generally, Public Citizen seeks to counter the misuse of procedural devices, such as removal, as well as the substantive defense of implied preemption, which increasingly are invoked by defendants in a range of litigation involving public health and safety to burden plaintiffs and escape liability under state law.

In addition to representing Public Citizen (and others) as parties in a range of litigation, Public Citizen attorneys regularly file amicus curiae briefs on behalf of Public Citizen and other individuals and organizations. For example, Public Citizen filed an amicus curiae brief in the Supreme Court of the United States at an earlier stage of this litigation, defending this Court's judgment that the plaintiffs in

this case were not bound by the earlier class action settlement approved by the district court. *Dow Chem. Corp. v. Stephenson*, 539 U.S. 111 (2003). Public Citizen has also very recently joined in an amicus curiae brief in support of rehearing in another case involving an unreasonably expansive application of the federal officer removal statute, 28 U.S.C. § 1442(a)(1), which is at issue here. *Watson v. Philip Morris Cos.*, 420 F.3d 852 (8th Cir. 2005) (rehearing pending). In addition, Public Citizen has regularly participated, in various capacities, in cases posing issues concerning federal preemption defenses. *E.g., Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005); *FDA v. Brown & Williamson*, 529 U.S. 120 (2000); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996); and *Price v. Philip Morris Inc*., No. 96236 (Ill. S. Ct.) (pending).

Public Citizen submits this amicus curiae brief because the district court's decision places an unwarranted procedural obstacle in the way of plaintiffs asserting tort claims in state courts. Unduly expansive notions of federal preemption that are increasingly invoked by defendants in such cases already pose significant difficulties for plaintiffs seeking redress for their injuries. The district court's decision adds to the problem by cloaking private corporations in the guise of federal government actors and providing them the same right to remove a case to federal court as a federal officer sued for actions under color of his office. In so

doing, the district court provides defendants with a significant tactical advantage, and an opportunity for forum-shopping, in circumstances bearing little resemblance to those for which the federal officer removal statute was developed. Because of its interest in preventing distortion of federal jurisdictional concepts for the benefit of corporate defendants, Public Citizen files this brief in support of the appellants' request that the district court's judgment be vacated and the action be remanded to the state court where it was filed.

SUMMARY OF ARGUMENT

The district court held that, in developing and manufacturing the herbicide Agent Orange for sale to the United States government—and in choosing to use manufacturing methods that they knew would result in its contamination with the hazardous chemical dioxin—the defendants were, in effect, acting as agents of the federal government in the performance of official government functions. Therefore, the district court ruled, the defendants may avail themselves of the removal statute applicable to "any officer (or any person acting under that officer) of the United States or any agency thereof, sued … for any act under color of such office …." 28 U.S.C. § 1442(a)(1). The district court's extension of the mantle of "ac[tion] under color of federal office" to protect the defendants' activities in this case contrasts sharply with that court's own thorough rejection of federal officer

removal, on identical facts, in *Ryan v. Dow Chemical Co.*, 781 F. Supp. 934 (E.D.N.Y. 1992).

In effectively reversing its own decision in *Ryan*, the district court committed a number of fundamental legal errors. First, by treating privately held corporations as "persons" protected by the removal statute, the court cut the statute loose from its longstanding purpose of protecting vulnerable individuals in government service (as well as, more recently, the government itself). Second, by permitting invocation of the statute by a defendant seeking to invoke the "government contractor" defense, the court deviated from the teaching of Supreme Court opinions holding that the point of the statute is to permit the assertion of *official immunity* defenses, of which the government contractor defense is not one. Third, by permitting invocation of the statute because of a private enterprise's compliance with government specifications in manufacturing a product for purchase by the government, the court disregarded the basic requirement that removal is permitted only when a person acts under the direction of a federal officer in taking actions under color of federal office—that is, when he acts as *an agent of the federal government* in performing an *official function*. The defendants' development, manufacture, and sale of herbicides cannot be equated with the performance of an official function of the government of the United States.

Finally, the district court's invocation of "policy" to justify its about-face on the scope of federal officer removal is thoroughly misguided. Whatever the importance of protecting federal agencies, officers, and employees from interference by state authorities, there is no reason to think that private enterprises that do business with the federal government are the subjects of hostility by state courts or that state courts are unable to adjudicate their defenses to liability (including, if applicable, the federal contractor defense) fairly and conscientiously. Moreover, unwarranted expansions of federal jurisdiction carry risks of their own—including the possibility that lower federal courts may at times be too eager to supply federal defenses to relieve corporate wrongdoers of state-law liability.

ARGUMENT

I. The Federal Officer Removal Statute Should Not Be Construed Overbroadly.

The district court, citing *Willingham v. Morgan*, 395 U.S. 402 (1969), asserted that the federal officer removal statute should broadly interpreted. *In re "Agent Orange" Prod. Liab. Litig.*, 304 F. Supp. 2d 442, 447 (E.D.N.Y. 2004). *Willingham*, however, while rejecting an unduly narrow construction of the statute, held only that it must be interpreted broadly enough to serve its core purpose—that is, "it is broad enough to cover all cases where federal officers can raise a colorable defense *arising out of their duty to enforce federal law.*" *Id*. at 406-07 (emphasis added). Similarly, the Supreme Court emphasized in *Arizona v. Manypenny*, 451

U.S. 232, 241 (1981), that "removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense *arising out of his official duties*" (emphasis added).

By contrast, when the Supreme Court has faced attempts to stretch the statute beyond its intent, it has declined to construe it expansively. *See International Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991); *Mesa v. California*, 489 U.S. 121 (1989). As the Court stated in *Mesa*, respect for state courts dictates that the "language of § 1442(a) cannot be broadened" beyond its "fair construction." *Id*. at 140 (quoting *Maryland v. Soper (No. 2)*, 270 U.S. 36, 43-44 (1926)). Section 1442 removal remains "an 'exceptional procedure' which wrests from state courts the power to try" cases under their own laws, and, therefore, "the requirements of the showing necessary for removal are strict." *Screws v. United States*, 325 U.S. 91, 111-12 (1945) (opinion of Douglas, J.) (citing *Soper (No. 2)*, 270 U.S. at 42).

II. The Corporate Defendants Are Not "Persons" Entitled To Invoke Federal Officer Removal.

The defendants, as corporations, are not "persons" qualified to invoke the statute. Although the district court followed the majority of courts in holding that a corporation is a person under the statute, that issue has never been authoritatively resolved, and there are substantial arguments that the statute only applies to natural persons. *See Krangel v. Crown*, 791 F. Supp. 1436, 1442 (S.D. Cal. 1992). The

history of the removal statute, which was canvassed extensively by the district court in *Ryan*, *see* 781 F. Supp. at 941-44, as well as by the Supreme Court in *Willingham*, 395 U.S. at 405-06, *Mesa*, 489 U.S. at 125-28, and *Primate Protection*, 500 U.S. at 85-86, shows an overwhelming concern for the protection of vulnerable individual officers and employees of the federal government against arrest or other interference by state authorities in the performance of their duties. As the Supreme Court put it in *Primate Protection*, addressing the statutory predecessors to § 1442(a)(1), "Congress expressly limited whatever removal power it conferred upon federal defendants to individual officers," and the Congress that enacted the current version of the statute in 1948 similarly determined "that *individual officers* … needed the protection of a federal forum in which to raise their federal defenses." 500 U.S. at 85, 86 (emphasis added).

Moreover, when read in context, the statutory language granting removal rights not only to an "officer," but also to a "person acting under his direction" does not reflect an intent to grant protection to corporations and other artificial entities, but rather an intent to protect federal employees and other individual agents who do not qualify as "officers of the United States," a term of art referring to officers who exercise significant authority. *See Primate Prot.*, 500 U.S. at 81

(noting limited scope of term "officers of the United States");[1] *see also Ryan*, 781 F. Supp. at 941 (noting that the need to protect "[s]ubordinate [customs] inspectors" was among the reasons for enactment of the first federal officer removal statute). Thus, the committee report accompanying the 1948 legislation that created § 1442(a)(1) in its current form explained that "[t]he revised subsection … is extended to apply to all officers and employees of the United States and any agency thereof." H.R. Rep. No. 80-308, at A134 (1947) (quoted in *Primate Protection*, 500 U.S. at 84). Nothing in the history of the statute as canvassed in the relevant judicial decisions suggests that Congress intended to benefit corporations doing business with the government.

Although the Supreme Court has never addressed a case involving the application of the statute to a corporation, in *Primate Protection* the Court demonstrated the limits of the statute in holding that the term "officer … or person acting under him" did not apply even to federal agencies. 500 U.S. at 82-84. Immediately after *Primate Protection*, this Court, in *Mignona v. Sair Aviation, Inc*., 937 F.2d 37 (2d Cir. 1991), considered a removal attempt by an entity called the "Hancock Field

[1] Indeed, *Primate Protection* suggests that the 1948 enacting Congress may have even had a more limited definition of "officer of the United States" in mind, *see* 500 U.S. at 81, making it all the more essential to add the word "person" to ensure coverage of subordinate employees.

Aero Club," which purported to be a "Nonappropriated Fund Instrumentality (NAFI) activity" of the federal government. *Id*. at 39. The Court rejected removal because "Hancock, an impersonal entity, is not an 'officer' of the United States," and is also not an "agency" under the then-recent decision in *Primate Protection*. *Id*. at 41. *Mignona*'s rejection of removal by Hancock on the ground that it was an "impersonal entity" strongly suggests that a corporation should fare the same under the removal statute.[2]

Following *Primate Protection*, Congress amended § 1442(a)(1) to permit the United States and federal agencies, in addition to federal officers and persons acting under them, to invoke removal. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 206, 110 Stat. 3847, 3850. The district court suggested that "Congress's amendment of the statute to emphasize its broad scope supports the conclusion that 'person' encompasses more than mere individuals." *In*

[2] This Court has recently adjudicated the merits of a case removed by a corporation under 28 U.S.C. § 1442(a)(1), *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67 (2d Cir. 1998), which it should at least arguably have dismissed for lack of subject matter jurisdiction if, as we argue, a corporation cannot invoke § 1442(a)(1). However, a decision that merely assumes jurisdiction without explicitly addressing a jurisdictional issue is not binding precedent on the jurisdictional point. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.") (citation omitted); *accord Adeleke v. United States*, 355 F.3d 144, 150 (2d Cir. 2004).

re "Agent Orange," 304 F. Supp. 2d at 447. In fact, the way Congress amended the statute supports the opposite inference. Congress did not bring agencies within the ambit of the statute by changing the definition of "person," which the Court in *Primate Protection* had held did not encompass agencies. Rather, Congress left in place the statutory protection for officers and persons acting under them, and Congress added the United States and federal agencies as a *separate category* of entities that could invoke the statute. Nothing in Congress's action reflects an intention to change, let alone expand, the definition of "person" or to benefit any non-human entities other than the United States and its agencies.

Thus, if the statute applies to corporations because they are "persons," it must also have done so before 1996, when actual agencies of the United States were prohibited from invoking the statute—an incongruous result, to say the least. Moreover, holding the statute to apply to corporations and other non-natural "persons" would imply that this Court's decision in *Mignona* was wrongly decided, and that the Hancock Field Aero Club could have obtained removal had it merely claimed to be an artificial person rather than calling itself an "agency," which doomed its removal effort under *Primate Protection*. In short, nothing in the history of the statute suggests that Congress intended to grant to corporations and other non-human entities an entitlement that, until 1996, was not even available to the government and its own agencies; and nothing in the 1996 amendment of the

statute suggests that in extending that entitlement to agencies, Congress also gave it to corporations.

III. The Federal Contractor Defense Is Not A Defense Arising Out Of The Duty To Enforce Federal Law.

As the Supreme Court held in *Mesa*, *Willingham*, and *Manypenny*, the purpose of the removal statute is to permit removal where "federal officers can raise a colorable defense *arising out of their duty to enforce federal law*." *Willingham*, 395 U.S. at 406-07 (emphasis added). *Mesa* emphasized that the requirement of such a defense is integral to the statute and stems from the language requiring that the conduct for which the defendant is sued be "under color of such office." 489 U.S. at 126. The requirement is directly connected to the statutory purpose of protecting the assertion of immunities arising from the performance of official federal duties. As the Fourth Circuit has put it, the removing defendant must "allege a 'colorable' federal defense to th[e] action 'arising out of [his] duty to enforce federal law.'" *Jamison v. Wiley*, 14 F.3d 222, 239 (4th Cir. 1994). Here, the defendants have no immunity defense arising out of a duty to enforce federal law and do not claim that they do.

Rather, the defendants assert the "federal contractor defense" recognized by the Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). There, the Court held that, under certain defined conditions, where a government contractor could not "comply with both its contractual obligations [to the govern-

ment] and the state-prescribed duty of care," tort liability under state law is impliedly preempted by federal law. *Id.* at 509. Such a defense is not premised on a broad immunity of federal contractors from regulation under state law, but rather upon a specific conflict between the tort duty alleged and the contractual duty to the government. That is, the defense applies when a state tort action "seek[s] to impose upon the person contracting with the Government a duty contrary to the duty imposed by the Government contract." *Id.* at 508. The Court expressly distinguished such a defense from the immunity available to "an official performing his duty as a federal employee," *id.* at 505, and it disavowed extending official immunity to the actions of contractors. *Id.* at 505.[3]

The distinction between an official immunity defense sufficient to invoke the statute and a lesser defense such as the one involved here is illustrated by this Court's decision in *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67. There, the court held that Medicare fiscal intermediaries, which enter into not-for-profit contracts under which they act "as adjuncts to the government and are carrying out a traditional government function," *id.* at 74, are entitled to invoke the same "offi-

[3] As the Supreme Court observed, "the civil liability of federal officials for actions taken in the course of their duty" is "controlled by federal law," *Boyle*, 487 U.S. at 505, but state-law principles applicable to actions of federal contractors in the course of carrying out their contracts are not wholly displaced, and are overridden only to the extent that they conflict with contractual duties. *See id.* at 512.

cial immunity" defense available to government officers and employees and, indeed, the government itself. *Id.* at 72-74. Because the private entities in that circumstance are themselves carrying out an official government function, *id.* at 74, or, in the words of the removal statute, acting "under color of [federal] office," this Court held that "'immunity protect[s] them to the same extent that it protects government employees.'" *Id.* (quoting *Mangold v. Analytic Servs., Inc*., 77 F.3d 1442, 1447 (4th Cir.1996)).[4]

The federal contractor defense, unlike the immunity recognized in *Pani*, is not a defense triggered by the performance of an official function under color of federal office, but is a more limited defense based on implied conflict preemption. The Supreme Court in *Mesa* emphasized that the fundamental purpose of the federal officer removal statute is protection of the ability to assert official immunity defenses in federal court, and that the presentation of such a defense is critical to the invocation of the statute. *Mesa*, 489 U.S. at 139; *see also Jefferson County, Alabama v. Acker*, 527 U.S. 423, 431 (1999) (permitting invocation of statute based on a claim of official immunity from state taxation). The preemption defense

[4] In the Court's discussion of immunity, it cited directly to *Barr v. Mateo*, 360 U.S. 564 (1959), an official immunity case involving government officers, to describe the type of immunity it was applying, and cited *Boyle* only as a "*cf.,*" underscoring the distinction between official immunity and the more limited defense available to private entities under that case. *See Pani*, 152 F.3d at 73.

available to federal contractors does not, under *Mesa*, qualify as a basis for removal. *See Freiberg v. Swinerton & Walberg Prop. Servs., Inc.*, 245 F. Supp. 2d 1144, 1151 n.5 (D. Colo. 2002) ("I … question 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. Providing A Product in Conformity With Governmental Specifications Is Not Enough To Make A Contractor A Federal Actor For Removal Purposes.

The statute requires that a removing defendant make a showing not only that he is an "officer of the United States" or a "person acting under that officer," but also that the actions for which he is being sued were performed "under color of such office." 28 U.S.C. § 1442(a)(1). The statute thus requires that the defendant show that he acted under the direction of an officer of the United States in performing an official action, or, put another way, that he was "effectively an agent or employee of the government" performing "official functions" on its behalf. *Virden v. Altria Group, Inc.*, 304 F. Supp. 2d 832, 846, 845 (N.D. W. Va. 2004); *see also Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991) (a defendant invoking the removal statute must be so "intimately involved with government functions as to occupy essentially the position of an employee"); *Brown & Williamson Tobacco Corp. v. Wigand*, 913 F. Supp. 530, 533 (W.D. Ky. 1996) (tobacco whistleblower Jeffrey Wigand could not remove an action brought against

him for giving grand jury testimony because "he has not been directed to perform official functions as an officer or agent of the government"). The requirement that a removing defendant act under official direction in the performance of an official function excludes from the coverage of the statute entities that are merely conducting their own private business under regulatory or other requirements imposed by the federal government. *See Virden*, 304 F. Supp. 2d at 844-45 (citing cases).

The statutory language demanding that the defendant show that he has been sued for conduct "under color of [federal] office" underscores the point. As the Supreme Court has explained, the "under color of office" language of the removal statute is narrower than the "under color of law" language used in federal civil rights statutes such as 42 U.S.C. § 1983. *Screws*, 325 U.S. at 111-12 (opinion of Douglas, J.). The Supreme Court has repeatedly emphasized that even extensive imposition of government requirements on the activities of a business does not make its actions "under color of law"; rather, a private person acts under color of law only when its action "may be fairly treated as that of the [government] itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974); *accord Blum v. Yaretsky*, 457 U.S. 991 (1982). Similarly, the fact that a business is operating under government contracts whose specifications it must meet does not transform its conduct into government action. As the Supreme Court has stated, "many private corporations['] … business depends primarily on contracts to build roads, bridges,

dams, ships, or submarines for the government. Acts of such 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).[5]

A fortiori, if contractual conditions are not enough to make private corporations' business activities "under color of law," they also cannot bring private conduct within the narrower category of action "under color of [federal] office" within the meaning of 28 U.S.C. § 1442(a)(1). This is not to suggest that a contractor may never be deemed to act "under color of office" for purposes of the statute (assuming, for argument's sake, that the contractor is a "person" within the meaning of the statute). As the district court observed, 304 F. Supp. 2d at 447, and as the *Pani* case illustrates, there are instances where the performance of official government functions is outsourced to private or nominally private entities, and in those circumstances, a contractor may genuinely be said to be acting "under color of federal office." But where a private business merely sells a product to the govern-

[5] For the same reason, a government contractor may not claim the federal government's immunity from federal taxation unless its actions are "so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States v. New Mexico*, 455 U.S. 720 (1982). Absent such close identity, the exercise of state authority does not present the problem of "clashing sovereignty" (*id.*) that the federal tax immunity (like the federal officer removal statute) is intended to avoid.

ment, for a profit, subject to government specifications, is it genuinely performing an official government function and itself exercising the authority of federal office? No. Such activities do not render the company's for-profit activities governmental action; they do not entitle the company to federal immunities from state regulation or taxation; they do not transform the company's activities into exercises of the power of federal office. In short, a federal contractor that supplies a product to the government does not, in the words of the statute, act "under color of [federal] office." It therefore may not invoke the removal provision.[6]

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[6] Even if compliance with product specifications could in theory render a contractor a person acting under the direction of a federal officer and under color of his office, the removing defendant would still need to establish that the specific acts for which the plaintiff sought to impose liability on the defendant were carried out under federal compulsion. Here, as the court held in *Ryan*, any federal compulsion related principally to the marketing of the product, and not to the design and manufacturing activities for which the plaintiffs here seek to hold the defendants liable. 781 F. Supp. at 950. The Fifth Circuit's decision in *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387 (5th Cir. 1998), on which the district court relied in reversing its view on the nature of the federal compulsion, does not address the extensive factual record, discussed in the appellants' brief, demonstrating that federal compulsion was not responsible for the presence of dioxin in the defendants' products. At a minimum, the district court's grant of summary judgment to the defendants in the face of that showing was incorrect.

Our argument, however, is broader and less fact-specific. Where the district court—and other courts—have fundamentally gone astray is in overlooking that the actions of a contractor in fulfilling product specifications are not exercises of federal official authority, and should not be the basis of removal under § 1442(a)(1), *regardless* of whether the action relates to matters dictated by federal contract specifications. Such factual circumstances may determine whether the

(footnote continued)

V. The District Court's Invocation Of "Policy" Was Misguided.

The district court ultimately sought to justify its about-face on the removal issue by referring to what it called "substantive policy considerations and pragmatic procedural factors." *In re "Agent Orange,"* 304 F. Supp. 2d at 451. The court's primary concern was that "[f]ailure 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." *Id.* In other words, the district court premised the availability of removal at least in part on the supposition that state courts cannot be trusted to give effect to substantive federal-law defenses against tort liability.

Ordinarily, of course, state courts are presumed competent to decide questions of federal law. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988). Moreover, there is no general right to remove cases from state court merely because federal law provides a defense—even a preemption defense such as the federal contractor defense. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987) ("[A] case may not be removed to federal court on the basis of ... the defense of pre-emption ...."); *Franchise Tax Bd. of Cal. v. Construction Laborers*

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federal contractor defense may be successfully invoked, but they do not render the contractor a federal actor for removal purposes.

Vacation Trust for So. Cal., 463 U.S. 1, 10 (1983). It is, therefore, just untrue that a denial of removal is the same as allowing in the "back door" a claim that is properly barred by a federal preemption defense, and it is insulting to state courts to suggest otherwise.

Of course, the federal officer removal statute does reflect a historical concern that state authorities and state courts may be insufficiently protective of the immunities of federal officers and employees and, indeed, the federal government itself. Although that concern has been characterized by some courts as "anachronistic," *Freiberg*, 245 F. Supp. 2d at 1150; *accord Williams v. General Electric Corp.*, 2005 WL 2035352, at *3 (M.D. Pa. Aug. 22, 2005), the statute obviously remains in effect and must be followed. Moreover, the frictions and possibilities for clashing authority inherent in a federal system may continue to lend some support for the notion that federal agencies, and their officers and employees, should not be forced to rely on state tribunals for the vindication of their federal immunities.

But is there similar reason to believe that private corporations that do business with, among others, the federal government, are subject to prejudice and unwarranted interference from state courts and authorities? The first time the district court confronted the removal issue, it rightly characterized any such notion as "speculative." *Ryan*, 781 F. Supp. at 934. Providing an expansive reading of the

statute for the benefit of private companies who do business with the government based on such a speculative concern would be, as the district court put it in *Ryan*, "incompatible with the respect owed to state courts under our federal system." *Id.* Unfortunately, the district court's decision in this case is fraught with the lack of respect that the court warned against when it first addressed the issue.

Moreover, if it should appear that state courts cannot be trusted to adjudicate cases against corporations that contract with the government, Congress can act to provide them removal rights, as it acted to extend removal rights to federal agencies after the *Primate Protection* decision. If private actors are to be cloaked with the immunities otherwise available only to government officers and entities, "it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs.… for the political process is 'uniquely adapted to accommodating the competing demands' in this area." *United States v. New Mexico*, 455 U.S. at 737-38 (citation omitted).

Finally, the extension of removal jurisdiction to allow the lower federal courts, rather than state courts, to adjudicate federal preemption defenses may not be without costs. The district court's supposition that the lower federal courts' ability to decide the scope of federal preemption defenses is superior to that of state courts is highly questionable. Recent experience suggests that federal trial and

even appellate courts may be overeager to extend the mantle of federal preemption to choke off tort litigation against corporate defendants. Thus, the Supreme Court has repeatedly had to take up cases to emphasize the limited scope of federal preemption, often in circumstances where the lower federal courts had erroneously applied preemption defenses. *See, e.g., Bates v. Dow Agrosciences LLC*, 125 S. Ct. 1788 (2005) (effectively overruling nearly every federal circuit regarding preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (state-law damages action premised on failure to install boat propeller guard not preempted by Federal Boat Safety Act, effectively overruling unanimous federal authority favoring preemption); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (rejecting preemption under federal Medical Device Amendments, disagreeing in whole or in part with eight federal circuit courts); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 508 n.2 (1992) (finding state tort claims generally not preempted despite unanimity of contrary federal circuit court authority); *see also Nixon v. Missouri Mun. League*, 541 U.S. 125 (2004); *Pharmaceutical Research & Mfrs. of America v. Walsh*, 538 U.S. 644 (2003); *Rush Prudential HMO v. Moran*, 536 U.S. 355 (2002); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424 (2002).

We say this not to disparage the federal courts, but merely to point out that the courts should not be too hasty to let their jurisdictional rulings be swayed by an

assumption of superior institutional competence to decide particular issues. Indeed, the risk is that the same courts that bend jurisdictional concepts to allow them to decide particular issues may also be inclined to overprotect the interests that led them to claim jurisdiction.[7] A proper respect for the abilities of state courts, together with an appropriate modesty concerning the extension of federal judicial authority, counsels against expanding the federal officer removal statute on the basis of the "policy considerations" invoked by the district court.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's holding that the case was properly removed under 28 U.S.C. § 1442(a)(1) and should remand to the district court with a direction that the case be remanded to the state court in which it was originally filed.

[7] Here, it should be recalled, an earlier assertion of jurisdiction based on the All Writs Act was matched by a substantive ruling that gave greater effect to the underlying settlement than could be justified by the demands of fairness and due process. *See Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (holding that appellants could not be bound to Agent Orange settlement), *vacated in part, aff'd in part by equally divided Court sub nom. Dow Chem. Corp. v. Stephenson*, 539 U.S. 111 (2003).

Respectfully submitted,

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RULE 32(a)(7)(C) CERTIFICATE

I hereby certify that the foregoing Brief for Amicus Curiae Public Citizen, Inc., in Support of Appellants is composed in a 14-point proportional typeface, Times New Roman. As calculated by my word processing software (Microsoft Word 2002) the Brief (exclusive of those parts permitted to be excluded under the Federal Rules of Appellate Procedure) contains 5,524 words.

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2005, two copies of the foregoing Brief for Amicus Curiae Public Citizen, Inc., in Support of Appellants were served by regular U.S. Mail on the following:

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