No. _____

In the
Supreme Court of the United States

TYSON FOODS, INC., et al.,

Petitioners,

v.

ROLANDETTE GLENN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In the early days of the COVID-19 pandemic, disruptions in supply and high consumer demand threatened to create national food shortages. The federal government responded by enlisting private industry to combat that threat by directing meat-processing facilities to remain open in accordance with CDC and OSHA guidance if at all possible. That federal direction was eventually formalized in an Executive Order instructing meat-processing facilities to continue or resume operations consistent with federal guidance, notwithstanding contrary state or local direction. In accord with that federal direction, petitioner Tyson Foods, Inc., continued to operate its facilities under federal supervision during the early days of the pandemic. Plaintiffs are present and former employees of Tyson, as well as representatives of Tyson employees' estates, who filed suit in Texas state court alleging that Tyson violated state-law duties by continuing to operate its plants and exposing employees to COVID-19. Petitioners removed those suits to federal court under the federal-officer removal statute, explaining that Tyson had acted under federal direction—something particularly clear where, as here, plaintiffs' claims arose based in part on events post-dating the Executive Order. The Fifth Circuit, however, ordered the cases remanded to state court, asserting that the federal direction and supervision here was insufficient to warrant a federal forum.

The question presented is:

Whether a private actor that assists the federal government in securing the national food supply during a national emergency, under extensive federal

supervision and direction, is entitled to removal under the federal-officer removal statute.

PARTIES TO THE PROCEEDING

Petitioners Tyson Foods, Inc., Tyson Fresh Meats, Inc., Jason Orsak, Erica Anthony, and Maria Cruz, were defendants in the district court and appellants in the Fifth Circuit. Transplace Texas, LP, Axiom Medical, and Community Health Care Network LLC d/b/a Matrix Medical Network, were also defendants in the district court in *Chavez v. Tyson Foods, Inc.* (3:21-cv-01184-C), but were not involved in the proceedings before the Fifth Circuit.

Respondents Rolandette Glenn, Idell Bell, Kerry Cartwright, Tammy Fletcher, Laveka Jenkins, Kiesha Johnson, Ronald Johnson, Daisy Williams, Danica Wilson, John Wyatt, Crystal Wyatt, Maria Yolanda Chavez, individually and on behalf of Minor LC and Estate of Jose Angel Chavez, Angel Chavez, Rita Elaine Cowan, individually and on behalf of the Estate of Thomas David Cowan, and Clifford Bell, individually and as personal representative of the Estate of Beverly Whitsey, were plaintiffs in the district court proceedings and appellees in the Fifth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Tyson Foods, Inc. has no parent company and no publicly held corporation owns 10% or more of its stock. Petitioner Tyson Fresh Meats, Inc. is a wholly owned subsidiary of Tyson Foods, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

Glenn v. Tyson Foods, Inc., No. 21-40622 (5th Cir.), consolidated with *Chavez v. Tyson Foods, Inc.*, No. 21-11110 (5th. Cir.) (judgment entered July 21, 2022; petition for rehearing en banc denied Aug. 29, 2022).

Glenn v. Tyson Foods, Inc., No. 9:20-cv-00184-MJT (E.D. Tex.) (remand order entered Aug. 12, 2021).

Chavez v. Tyson Foods, Inc., No 3:21-cv-01184-C (N.D. Tex.) (remand order entered Oct. 27, 2021).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

In the throes of the greatest national health crisis in a century, ensuring that the nation's food supply remained secure ranked high among the federal government's priorities. In our system of free enterprise, the federal government could not accomplish that critical task alone; it depended on the cooperation of private companies, including food-processing companies like petitioner Tyson Foods, Inc. ("Tyson"). But, in the early days of the COVID-19 pandemic, Tyson was receiving contrary directions from competing authorities. While the federal government was telling Tyson to continue to produce food to keep grocery stores nationwide stocked, state and municipal authorities were demanding that Tyson shutter its local facilities. The President definitively resolved any uncertainty over whose directives Tyson should follow by issuing an Executive Order making clear that, in the face of state and local efforts to shut them down, food-processing facilities should continue operating in accordance with federal guidelines. And the Secretary of Agriculture quickly followed up with a letter instructing plants to remain open or reopen as soon as possible consistent with federal guidance and warning that "[f]urther action under the Executive Order and the Defense Production Act is under consideration and will be taken if necessary" should they fail to comply.

Tyson has now been sued under state law for following the federal government's direction, and that federal direction entitles Tyson to a federal forum under the federal-officer removal statute, 28 U.S.C. §1442(a). Simply put, Tyson should not have to defend

actions taken at the behest of the federal government against the contrary requirements of state tort law in state court.

The Fifth Circuit's decision rejecting that conclusion cannot be reconciled with this Court's decisions or those of other lower courts correctly following them. The panel reasoned that Tyson could not have been "acting under" a federal officer because Tyson was not explicitly "told that it *must* keep its facilities open." App.3. But neither federal-officer removal doctrine nor the Defense Production Act ("DPA"), which the President invoked in his Executive Order, demands actual coercion. Likewise, nothing in this Court's fountainhead case for "acting under" federal-officer removal, *Maryland v. Soper*, 270 U.S. 9 (1926), suggests that a private party is only entitled to removal if commandeered or coerced, and for good reason. Coercion is immaterial. A private driver who volunteers to assist federal officers is just as entitled to removal as one who is pressed into service. And the DPA does not require formal orders; it is equally satisfied by informal "jawboning" because Congress designed the DPA to "accord the Executive Branch great flexibility in molding its priorities [and] policies to the frequently unanticipated exigencies of national defense." *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 993 (5th Cir. 1976). In short, nothing in the law or common sense requires private entities to resist government entreaties for assistance in the height of a crisis and to insist on a formal, coercive order. The Fifth Circuit's contrary conclusion not only conflicts with this Court's cases, but creates perverse incentives for the next crisis.

The panel strayed even further afield in reasoning that Tyson cannot have been "acting under" a federal officer because "[p]ackaging and processing poultry has always been a private task—not a governmental one." App.12. Federal-officer removal is routinely available in government contracting cases where the government contracts precisely because it needs goods or services that it does not typically supply itself. And no one can seriously think that the federal government would have stood idly by if private industry were not up to the task of maintaining the food supply in the early days of the pandemic—especially given the President's extraordinary Executive Order and the directives from the Secretary of Agriculture that followed. In fact, the federal government has statutory obligations to ensure the availability of food even in ordinary times, and it fulfills them almost exclusively by relying on private parties to produce the necessary food.

The issue here is profoundly important. In the midst of a national crisis, the federal government demanded the assistance of companies like Tyson to maintain the food supply. When state and local regulations began to interfere with that national imperative, the President issued an Executive Order exhorting continued operations in conformity with federal guidance, despite contrary state and local direction. If companies like Tyson now face liability in state court based on the retroactive imposition of state-law requirements that would have frustrated federal objectives, the promise of the Executive Order will have proven illusory. And the incentives for the next crisis will be perverse. If the decision below is allowed to stand, then the message will be clear:

When asked by the federal government to take immediate action in an emergency, private parties are best served by declining to act until formal, express orders are issued, wasting critical time and creating an adverse relationship when the need for cooperation is paramount. This Court should grant certiorari to clarify the federal-officer removal doctrine and to restore sensible incentives before the next national crisis.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 40 F.4th 230 and reproduced at App.1-14. The Fifth Circuit's order denying rehearing *en banc* is reproduced at App.15-16. The district court's opinion granting plaintiffs' motion to remand in *Glenn* is reported at 554 F.Supp.3d 858 and reproduced at App.17-36. The district court's opinion granting plaintiffs' motion to remand in *Chavez* is unreported and reproduced at App.37-39.

JURISDICTION

The Fifth Circuit issued its opinion on July 7, 2022, and denied rehearing *en banc* on August 29, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal-officer removal statute, 28 U.S.C. §1442, is reproduced at App.40-42.

STATEMENT OF THE CASE

A. Factual Background

1. In early 2020, COVID-19 began its rapid spread across the United States, creating sudden and dramatic disruption, coupled with competing sources of information leading to competing dictates between federal and state authorities. On March 13, 2020, the President declared a state of emergency across the country in response to the COVID-19 outbreak—the first time in history that all 50 states have been subject to simultaneous disaster orders. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020). The federal government proceeded to devote significant effort to combating the pandemic and its potentially catastrophic effects, enlisting both public and private entities in its efforts to ensure that the rapid spread of the disease would not disrupt the nation's critical infrastructure.

Protecting the nation's food supply was a significant focus of that effort. As the gravity of the pandemic and the reality of lockdown orders began to take hold, consumers nationwide began to stockpile food supplies. That, in turn, produced empty grocery store shelves and meat cases, leading to photographs and media stories that prompted further stockpiling, threatening to create a vicious cycle endangering the nation's food supply. At the same time, state and local officials began issuing orders for companies including Tyson to curtail or completely shutter their local operations, directly contrary to the federal government's efforts to keep food-processing plants

operational. *See* Glenn.App.398.[1] The difference in state and local versus federal priorities was particularly evident in the food supply sector, as many state and local officials sought to shut down plants within their jurisdictions without regard to the effects that their actions might have on the food supply and supply chain nationwide.

In confronting that crisis-within-a-crisis, the federal government did not write on a blank slate. In the aftermath of the attacks on September 11, 2001, Congress enacted the Critical Infrastructure Protection Act, which instructed the federal government to develop plans to protect designated "critical infrastructure" in the event of future disasters. The Act defines critical infrastructure to include systems whose incapacity "would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." 42 U.S.C. §5195c(e). The federal government has identified 16 sectors of the national defense and economy deemed sufficiently vital to qualify as critical infrastructure—including, unsurprisingly, the "Food and Agriculture" sector. *See Presidential Policy Directive—Critical Infrastructure Security and Resilience*, The White House (Feb. 12, 2013), https://bit.ly/3t1vgRZ. Responsibility for coordinating protection of the "Food and Agriculture" sector is assigned to the Department of Agriculture and the Department of Health and Human Services,

[1] Because the Fifth Circuit consolidated two appeals, *Glenn* and *Chavez*, citations to "Glenn.App" refer to the record on appeal in Fifth Circuit Case No. 21-40622 and citations to "Chavez.App" refer to the record on appeal in Fifth Circuit Case No. 21-11110.

which have developed an extensive critical infrastructure plan to "protect against a disruption anywhere in the food system that would pose a serious threat to public health, safety, welfare, or to the national economy." Food & Drug Admin. et al., *Food and Agriculture Sector-Specific Plan* 13 (2015), https://bit.ly/2MyJ31q.

The DPA, 50 U.S.C. §4501 *et seq.*, provides the federal government with additional authority in times of national crisis. Among other things, the DPA grants the President authority to "control the general distribution of any material in the civilian market" that the President deems "a scarce and critical material essential to the national defense." *Id.* §4511(b). The Critical Infrastructure Protection Act expressly cross-references the DPA and characterizes the emergency preparedness activities that both statutes contemplate as part of the "national defense." *See* 42 U.S.C. §5195a(b). Together, the statutes vest the President with ample authority to direct the operation of critical infrastructure like the distribution of meat and poultry to protect the national food chain—a point that the President underscored shortly after declaring a national emergency. *See* Press Briefing, The White House (Mar. 18, 2020), https://bit.ly/2Nh91XZ ("We'll be invoking the Defense Production Act, just in case we need it.").

2. Tyson produces more than 20% of the nation's daily supply of meat and poultry—enough to feed 60 million Americans each day—and employs more than 120,000 workers at its domestic processing facilities. Glenn.App.314, 336. Securing ongoing operation of

Tyson's facilities was thus critical to ensuring that the COVID-19 pandemic would not interrupt the national food supply, particularly in light of the increased demand in the early days of the crisis as many Americans stockpiled food in response to public health guidance, mandatory stay-at-home orders, and expected shortages.

In keeping with their critical infrastructure designation, the federal government quickly and directly called upon Tyson and others in the food industry to assist the federal government in ensuring that the pandemic would not cause nationwide food shortages. On March 15, 2020—two days after declaring a retroactive national emergency—the President personally held a conference call with food and grocery industry leaders, including Tyson's CEO, to secure their commitment to keep the nation's food supply chain in operation. That conversation, in the President's words, confirmed that Tyson and other food companies would be "working hand-in-hand with the federal government as well as the state and local leaders to ensure food and essentials are constantly available," and that food suppliers would "work 24 hours around the clock, keeping their store stocked" to ensure that the national food supply would not be interrupted. Matt Noltemeyer, *Trump Meets with Food Company Leaders*, Food Business News (March 16, 2020), https://bit.ly/3t2fiXQ.

That obligation to aid the federal government in preventing a food shortage was reinforced to the public the next day. On March 16, 2020, the President issued "Coronavirus Guidelines for America" stating that workers "in a critical infrastructure industry, as

defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply," had "a special responsibility to maintain your normal work schedule," and that critical infrastructure employers and workers "should follow CDC guidance to protect [their] health at work." Glenn.App.386, Chavez.App.463. That emphasis on food producers' "special responsibility" to remain operational was in contradistinction to the federal government's suggestion that most employers allow and encourage workers to stay home. Glenn.App.386, Chavez.App.463.

Almost alone even among entities in critical infrastructure industries, food processors like Tyson cannot operate unless federal inspectors are physically present in their production facilities. That created an unprecedented challenge during the pandemic because those necessary federal inspectors were both susceptible to and potential carriers of the virus. That dynamic prompted the Department of Agriculture to issue a statement on March 16, 2020, committing to "maintain the movement of America's food supply from farm to fork" and to "utilize [its] authority and all administrative means and flexibilities to address staffing considerations." Glenn.App.388. The Department explained:

> We have all seen how consumers have reacted to the evolving coronavirus situation and how important access to food is to a sense of safety and wellbeing. It is more important than ever that we assure the American public that government and industry will take all steps

> necessary to ensure continued access to safe and wholesome USDA-inspected products.

Id. The Department emphasized that these federal imperatives would require "working closely with industry to fulfill our mission of ensuring the safety of the U.S. food supply," and that "early and frequent communication" between government and industry would be "key." *Id.*

Consistent with those directives and assurances, numerous federal agencies—including ones that would not have regular interactions with Tyson under normal conditions—immediately began coordinating directly with Tyson to ensure that it could meet its commitment to the President and other federal authorities to aid in carrying out the government's mission of preserving the national food supply. For instance, on March 13, 2020—the same day the President issued the national emergency declaration—the Cybersecurity and Infrastructure Security Agency ("CISA"), a division of the Department of Homeland Security, held a conference call with Tyson and others to coordinate procuring and delivering critical supplies such as personal protective equipment to food companies to enable them to continue to operate during the declared national emergency. Glenn.App.337, Chavez.App.414. Communication and coordination with CISA and its subsidiary National Risk Management Center ("NRMC")—agencies with which Tyson does not ordinarily communicate—continued over the following days and months. Glenn.App.337-38, Chavez.App.314-15; *see also, e.g.*, Glenn.App.344-47, Chavez.App.421-24 (email chain between Tyson and

NRMC to coordinate "prioritization of precautionary measures for critical infrastructure components").

The NRMC also communicated directly with Tyson to ensure that Tyson had critical infrastructure designations in place for all employees necessary for continued operations, all of whom received letters authorizing them to continue working and traveling in support of their critical functions notwithstanding state or local quarantine regulations. *See* Glenn.App.339-40; Chavez.App.416-17; Glenn.App.361, Chavez.App.438 (sample letter). Those employees were instructed to keep these letters on them at all times and be prepared to show them to local officials who might attempt to restrict their actions or movement. Glenn.App.339-40, Chavez.App.416-17. The Department of Transportation also provided special status for transportation workers, including Tyson truck drivers delivering meat and poultry, to continue operating during the pandemic to provide much-needed "food for emergency restocking of stores." Glenn.App.339, Chavez.App.416 (brackets omitted).

The Department of Agriculture and the Federal Emergency Management Agency ("FEMA") likewise worked to provide Tyson and federal inspectors at Tyson's sites with the necessary personal protective equipment and other critical supplies to continue to operate. Glenn.App.340, Chavez.App.417; *see* Glenn.App.378-79, Chavez.App.455-56 (email chain between Tyson and Department of Agriculture regarding personal protective equipment needs, noting that Department was "taking every action to inform FEMA of the need for [personal protective

equipment] in the food supply chain and build considerations for the food supply chain into their greater supply chain efforts"). Among other things, the Department instructed meat and poultry plant operators to provide assessments of the personal protective equipment they would need to remain in operation, which the federal government prioritized and provided to food companies (including Tyson) as relevant CDC guidance evolved. Glenn.App.340, Chavez.App.418; *see* Glenn.App.378-79, Chavez.App.455-56 (Tyson email informing Department that if, as expected, upcoming CDC guidance would require protective face coverings for critical infrastructure workers, Tyson would need such coverings for 116,000 workers a day to continue operating); Glenn.App.379, Chavez.App.459 (Department email requesting assessment of "unfulfilled [personal protective equipment] needs required to maintain operational continuity over the next 60 days" (emphasis omitted)).

Tyson's operations were also subject to continuous supervision through the Department of Agriculture's Food Safety and Inspection Service ("FSIS"). As noted, the presence of on-site FSIS inspectors has long been a prerequisite for Tyson and other food producers to operate, but the pandemic introduced unique concerns and unprecedented needs for coordination. Glenn.App.339-41, Chavez.App.416-18. The availability of sufficient FSIS inspectors was a critical constraint on maintaining operations, so the federal government had an obvious interest in ensuring that FSIS inspectors could be safely present in facilities. To that end, FSIS sought "a united effort with our industry partners in preventing the spread of COVID-

19 while continuing to produce safe food for consumers." Glenn.App.341, Chavez.App.418. In accordance with that mission, FSIS held regular calls with industry representatives from March 2020 onwards to distribute information and provide direction to ensure that plants could operate safely and that meat and poultry would remain available for sale. Glenn.App.341, Chavez.App.418.

As part of that coordinated effort, the Department of Agriculture provided detailed instructions to food producers setting appropriate COVID-19 precautions for FSIS inspectors to ensure that they would be available to help Tyson and other food companies meet their commitments to continue operating. For example, producers were permitted to "orally ask [FSIS] employees questions concerning COVID-19" and "measure a [FSIS] employee's temperature via a digital forehead thermometer" to determine whether an inspector might pose a risk of infecting others at the plant, but were instructed that inspectors "will only respond to questions orally and will not sign any attestations or submit any written questionnaires." Glenn.App.391, Chavez.App.468. Congress, for its part, recognized the critical and outsized role of FSIS inspectors during the crisis by allocating additional funding to support its efforts to ensure that meat and poultry processing facilities could continue to provide the nation a safe and secure food supply. Glenn.App.391, Chavez.App.468.

3. Although the federal government had more pressing priorities in the early days of the pandemic than formalizing the directives instructing meat-processing facilities to continue to operate, the Vice

President underscored that the obligation was a matter of federal necessity, not private choice, in public remarks on behalf of the Coronavirus Task Force that he led—a task force created by the President. He not only thanked food industry workers for their "great service to the people of the United States of America," but also emphasized that the United States needed those workers "to continue, as a part of what we call our critical infrastructure, to show up and do your job"; in exchange, he promised that the federal government would "continue to work tirelessly in working with all of your companies to make sure that that workplace is safe." Press Briefing, The White House (Apr. 7, 2020), https://bit.ly/3pcdiZP. And the President underscored that the heroic efforts to keep the food supply chain functioning were not optional, as the federal directions were issued in the shadow of the DPA: "The Defense Production Act is in full force, but haven't had to use it because no one has said NO!" Doina Chiacu, *Trump Administration Unclear over Emergency Production Measure to Combat Coronavirus*, Reuters (March 24, 2020), http://reut.rs/3rS3MN5.

Despite the clear federal mandate to the food industry to continue operating in accordance with federal guidance, however, state and local officials began imposing demanding, conflicting, and sometimes unworkable rules seeking to shut down local food-processing plants. *See* Glenn.App.398, Chavez.App.475. These real-time dictates were often in tension with and at times directly contrary to the federal government's own directions that food companies continue to operate if at all feasible. That tension (and sometimes outright conflict) reflected

divergent local and federal interests, as state and local officials focused on the risks to in-state workers of having local plants operating, while federal officials balanced the risks to workers and federal inspectors with the devastating effect that shuttering the plants would have on the national food supply.

In an effort to provide uniform federal direction, the federal government issued joint CDC/OSHA guidance specific to meat and poultry producers on April 26, 2020. *See* Interim Guidance, U.S. Dep't of Lab., https://bit.ly/3PJfF4S (Apr. 26, 2020). That guidance provided specific directions for operating plants in ways that balanced the risks of COVID-19 and the need to maintain operations. And the conflicting federal versus state and local directions led the President to formalize the federal directives to meat and poultry producers by issuing Executive Order 13917 on April 28, 2020. *Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19*, 85 Fed. Reg. 26,313 (Apr. 28, 2020).

Executive Order 13917 acknowledged that there had been "outbreaks of COVID-19 among workers at some processing facilities." *Id.* But it warned that "recent actions in some States [that] have led to the complete closure of some large [food] processing facilities … threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national [COVID-19] emergency." *Id.* The Executive Order therefore expressly invoked the President's powers under DPA §101(b), 50 U.S.C. §4511(b), to delegate authority to

the Secretary of Agriculture to "ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA," emphasizing the importance of ensuring that "processors of beef, pork, and poultry" would "continue operating and fulfilling orders to ensure a continued supply of protein for Americans." 85 Fed. Reg. at 26,313-14.

That same day, the Department of Agriculture announced that it would continue to "work with meat processing to affirm they will operate in accordance with [applicable] CDC and OSHA guidance," and would continue to work with federal, state, and local officials alike "to ensure that facilities implementing this guidance to keep employees safe can continue operating." *USDA to Implement President Trump's Executive Order on Meat and Poultry Processors*, U.S. Dep't of Agric. (Apr. 28, 2020), https://bit.ly/3tbmIrC. The announcement emphasized that meat and poultry producers play "an integral role in the continuity of our food supply chain," and it made clear that their continued operation was not just permissible, but a national imperative. *Id.*

The following week, acting under Executive Order 13917, the Secretary of Agriculture issued a letter to Tyson's CEO, Noel White, followed by another letter to industry stakeholders more broadly, instructing meat-processing plants to either remain open or submit written plans to reopen. *See* Letter from Sonny Perdue, Sec'y of Agric., *Re: Executive Order 13917 Delegating Authority Under the Defense Production Act with Respect to the Food Supply Chain Resources During the National Emergency Caused by the*

Outbreak of COVID-19 (May 5, 2020), https://bit.ly/3HyKu8J ("Perdue Letter"). The letter reiterated that meat and poultry producers play "an integral role in the continuity of our food supply chain," and instructed them "[e]ffective immediately" to "utilize the [April 26] guidance issued … by the CDC and OSHA specific to the meat and poultry processing industry" to "safeguard[] the health of the workers and the community while staying operational or resuming operations." *Id.* Meat and poultry processing plants that had been closed due to the COVID-19 pandemic, the Secretary instructed, "should resume operations as soon as they are able after implementing the CDC/OSHA guidance for the protection of workers." *Id.* The letter closed by warning what would happen if companies failed to comply: "Further action under the Executive Order and the Defense Production Act is under consideration and will be taken if necessary." *Id.*

B. Procedural Background

This petition arises out of a collection of lawsuits filed in Texas state courts alleging that, during the early months of the pandemic, plaintiffs or their decedents contracted COVID-19 while working at Tyson's facilities, and that some ultimately died of complications related to the disease. App.6-7; Glenn.App.81-83; Chavez.App.51-52. The *Glenn* plaintiffs' complaint focuses on Tyson's poultry-processing facility in Center, Texas, while the *Chavez* plaintiffs' complaint involves that facility and one in Sherman, Texas. Glenn.App.81-83; Chavez.App.51-52. Neither complaint says whether the plaintiffs allegedly contracted COVID-19 before or after the

Executive Order of April 28, 2020, and neither confines its allegations to events preceding the order. Glenn.App.81-84 (challenging Tyson's actions "[b]oth prior to ... and after April 2, 2020'); Chavez.App.72 (challenging Tyson's actions "prior to ... and after May 8, 2020" and including a timeline with allegations through June 2021). Both suits attempt to retroactively impose state-law duties even more antithetical to federal efforts to keep meat-processing plants operational than the real-time restrictions the President addressed in his Executive Order.

Tyson removed both cases to federal court—*Glenn* to the U.S. District Court of the Eastern District of Texas, and *Chavez* to the U.S. District Court for the Northern District of Texas. *See* Glenn.App.13-31, Chavez.App.12-31. Tyson asserted removal under the federal-officer removal statute, which allows removal of any civil action against "any officer (or any person acting under that officer) of the United States … for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). Tyson explained that it was "acting under" federal supervision and control in continuing to operate its plants as instructed by the federal government; that plaintiffs' claims relate to actions Tyson took under federal direction; and that Tyson has colorable federal defenses to plaintiffs' claims, as those claims are preempted by the Poultry Products Inspection Act ("PPIA"), the DPA, and the federal directives to which Tyson was subject. Glenn.App.13-22, Chavez.App.15-26.

The district court in *Glenn* granted plaintiffs' motion to remand the case to state court. App.17-36. As to federal-officer removal, the court asserted that

"[t]he primary allegations in Plaintiffs' [complaint] took place before April 28, 2020," when the President issued Executive Order 13917, App.28. The court reached that conclusion even though the plaintiffs' remand motion expressly acknowledged that "portions of Plaintiffs' claims ... arise after the April 28 Executive Order." Glenn.App.278. From that mistaken premise, the court determined that Tyson was not "acting under" the direction of federal officers at the relevant time, concluding that the federal government's extensive control and supervision of food producers before the Executive Order were not enough to entitle Tyson to a federal forum. App.36.

The district court in *Chavez* issued its ruling soon after and likewise granted the plaintiffs' remand motion. App.37-39. Its two-page order cited the *Glenn* remand order and again concluded that petitioners had not carried their purportedly "heavy burden" of showing they acted under federal officers' directions. App.37. Tyson appealed both decisions.

The Fifth Circuit consolidated the appeals and affirmed. The panel recognized that under the plain language of the statute, "any person acting under" a federal officer can invoke federal-officer removal and that federal-officer removal's *raison d'être* is "to give those who carry out federal policy a more favorable forum than they might find in state court." App.2-3. Likewise, the court granted that private entities act under federal direction "if their actions 'involve an effort to assist, or to help carry out, the duties or tasks of the federal superior,'" and that such a relationship "typically involves 'subjection, guidance, or control.'" App.8 (quoting *Watson v. Philip Morris Cos.*, 551 U.S.

142, 147 (2007)). And, with respect to Tyson, the panel noted that the federal government "issued guidance encouraging employees in critical infrastructure industries to keep working" and repeatedly "exhorted" Tyson to keep operations running. App.4.

But in the panel's view, none of that mattered because Tyson was never explicitly "told that it *must* keep its facilities open." App.3. The panel also posited that because "[p]ackaging and processing poultry has always been a private task—not a governmental one," App.12, carrying out that task at the federal government's behest does not constitute "acting under" a federal official, App.12-14. The court then emphasized that Tyson had no contract with the federal government, and thus distinguished cases involving arms manufacturers on the basis that Tyson's work was "far afield from assembling aircraft or manufacturing munitions for Uncle Sam." App.12-13. Finally, in addressing the President's Executive Order and the Secretary's subsequent letter, which warned industry that action under the DPA would "be taken if necessary," App.6, the panel emphasized that the executive branch never had to make good on its threat, and so dismissed the Executive Order as simply a form of "encouragement." App.12. In short, in the Fifth Circuit's view, Tyson is not entitled to federal-officer removal because the federal government never said "that [Tyson] *must* keep its facilities open." App.3.

REASONS FOR GRANTING THE PETITION

Congress has authorized the removal to federal court of any civil action against any "officer (or any person acting under that officer) of the United

States … for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). "The words 'acting under' are broad," and this Court has made clear that they must be "liberally construed" in accordance with the federal-officer removal statute's basic purpose: to provide federal officers, and those acting under their direction, with a federal forum in which to defend their actions. *Watson*, 551 U.S. at 147. The Fifth Circuit's conclusion that Tyson was not "acting under" federal officials in helping the federal government avert an impending national food shortage and severe supply chain disruption cannot be reconciled with decisions from this Court or from other lower courts properly applying them, and it paves the way for state-court litigation over efforts to retroactively impose state-law requirements wholly inconsistent with federal priorities. Worse still, by denying private parties a federal forum unless they withhold assistance in an emergency until formally coerced, the decision below creates perverse incentives for the next national crisis.

This Court should grant certiorari and reverse.

I. The Decision Below Is Seriously Wrong And Reflects Profound Confusion Over The Circumstances In Which Private Parties Are Entitled To Federal-Officer Removal.

The Fifth Circuit's conclusion that Tyson was not acting under federal direction in continuing to operate its plants in the early days of the pandemic, and so is not entitled to federal-officer removal, cannot be squared with this Court's precedents. In the early days of the pandemic, the federal government recognized that state and local restrictions on the operation of meat-packing plants were interfering

with the national imperative to protect the food supply. To combat that threat to its own mission, both the President and the Secretary of Agriculture made clear not only that plants should follow federal rather than state and local direction, but that plants had an obligation to continue operating in accordance with that federal direction or take whatever steps were necessary to enable them to resume operations if they had ceased. Having followed those federal directives during that unprecedented time of national emergency, Tyson is entitled to the protections of a federal forum. The Fifth Circuit's contrary conclusion rests on an unduly cramped view of both the federal-officer removal statute and the federal directives under which Tyson was operating.

1. The federal-officer removal statute authorizes removal to federal court of any civil action against "any officer (or any person acting under that officer) of the United States … for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). The statute exists "to protect the federal government from the interference with its 'operations'" by ensuring that federal officers, and private persons acting under their direction, can claim "a federal forum in which to assert federal immunity defenses." *Watson*, 551 U.S. at 150; *see Willingham v. Morgan*, 395 U.S. 402, 405 (1969) (federal-officer removal provides "a federal forum for cases where federal officials must raise defenses arising from their official duties"). The statute thus allows those who help the federal government achieve federal objectives to defend actions taken under federal direction in federal court, rather than in state courts that "may reflect 'local prejudice' against

unpopular federal laws or federal officials." *Watson*, 551 U.S. at 150.

In accordance with that overarching purpose, the statute explicitly extends its protection not only to formal federal officers, but also to "any person acting under" a federal officer. 28 U.S.C. §1442(a). That is, the statute ensures that the right to federal-officer removal reaches beyond formal federal officers to encompass private individuals enlisted to support federal efforts, as those who further federal objectives without the formal trappings of a federal badge may be the most in need of a federal forum. *See Watson*, 551 U.S. at 150. As this Court has recognized, "[t]he words 'acting under' are broad," and their scope in §1442(a) "must be 'liberally construed'" in accordance with the statute's basic purpose: to provide federal officers, and those acting under their direction, with a federal forum in which to defend their actions. *Id.* at 147.

This Court's most recent decision addressing the "acting under" inquiry came in *Watson*. While that decision rejected federal-officer removal, it underscored that removal extends to private parties assisting in the accomplishment of federal objectives. For a private party to be "acting under" a federal officer, the Court explained, the party must be engaged in an effort "to assist, or to help carry out, the duties or tasks of the federal superior," *id.* at 152, a relationship that "typically involves 'subjection, guidance, or control,'" *id.* at 151. Thus, when a private party is operating under federal supervision to serve federal ends, by helping federal officials carry out tasks that otherwise "the Government itself would

have had to perform," that person is acting under federal direction and entitled to seek federal-officer removal. *Id.* at 153-54. By contrast, mere compliance with federal regulation "does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official' … even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 153.

2. *Watson* makes clear that Tyson readily satisfies the "acting under" requirement here. While Tyson ordinarily operates its plants under pervasive federal regulation, it is not ordinarily operating at the behest of the federal government—which is why Tyson has never invoked federal-officer removal during normal times. But Tyson's relationship with the federal government changed with the onset of COVID-19, as the federal government enlisted Tyson in its own efforts to fulfill a paradigmatic governmental task: ensuring that the national food supply would not be disrupted during an unprecedented national crisis. *Id*. at 153. At that point, Tyson was no longer acting as an independent private entity whose only responsibility was mere "compliance with the law," *id.*; it was following the federal government's directives to help accomplish the federal objective of preserving the national food supply.

As multiple decisions have recognized, that suffices to show Tyson acted under federal direction in continuing to operate its plants, as it was "working with federal officers to fulfill a responsibility of the federal government ... [b]y assisting with and carrying out the federal government's directives to maintain the national food supply." *Reed v. Tyson Foods, Inc.*,

2021 WL 5107725, at *3 (W.D. Tenn. Nov. 3, 2021); *Johnson v. Tyson Foods*, 2021 WL 5107723, at *3 (W.D. Tenn. Nov. 3, 2021). As those decisions allowing removal correctly understood, the critical point is that Tyson remained operational at the direction of and to assist the federal government in supplying a basic necessity during a national crisis. To the extent there was any doubt about that, the Executive Order and the Secretary's letter that followed eliminated it, instructing private plants to maintain or resume operations or face the wrath of the federal government. That readily suffices to demonstrate that Tyson was "acting under" federal officers.

The Fifth Circuit's contrary conclusion rests on fundamentally flawed reasoning. According to the Fifth Circuit, Tyson cannot show that it was acting under federal direction because, while the federal government "exhorted" Tyson to continue operating its plants, it "never told [Tyson] that it *must* keep its facilities open." App.3, 14. But that is true only in the most literal and technical sense. The Secretary's May 5 letter did not just "exhort" plants to stay open; it explicitly warned that "[f]urther action under the Executive Order and the Defense Production Act is under consideration and will be taken if necessary" should they fail to do so. Perdue Letter, *supra*. To dismiss that as mere "encouragement," App.14, blinks reality; there was no "further action" only because Tyson and others *followed* the federal government's directions. By the Fifth Circuit's logic, then, the federal-officer removal statute permits removal only if the private party first refuses to heed the government's calls for help.

Nothing in the text of the federal-officer removal statute requires a private party seeking removal to make such an extraordinary showing—and with good reason, as to do so would create incredibly perverse incentives that discourage cooperation between private parties and the federal government precisely when it is needed most: during national crises. Instead, by its terms, the statute extends the right to federal-officer removal to "any person acting under" a federal officer. 28 U.S.C. §1442(a). While it should go without saying that the words "acting under" are "not limitless," App.8 (quoting *Watson*, 551 U.S. at 147), it should also go without saying that they do not confine federal-officer removal to private parties that follow a federal officer's directions only after refusing to the point of prompting the most explicit of coercion. Duress can certainly be sufficient, but the statute offers no reason to conclude that it is necessary.

This Court's decisions back that commonsense conclusion. The fountainhead of acting-under federal-officer removal is *Maryland v. Soper*, 270 U.S. 9 (1926), in which this Court recognized that a private chauffer, one William Trabing, was similarly situated for removal purposes as federal prohibition officers even though he worked for Reliance Transfer Company instead of the federal government. *Id.* at 30. While this Court "ultimately rejected their removal efforts … in doing so it pointed out that the private person acting as a chauffeur and helper to the four officers under their orders and direction had the same right to the benefit of the removal provision as did the federal agents." *Watson*, 551 U.S. at 150 (quotation marks omitted). The *Soper* Court reached that conclusion without any suggestion, let alone

requirement, that Trabing or his company had been commandeered, rather than voluntarily providing driving services for his prevailing rate. The reason for the omission is obvious: Coercion is irrelevant.

Watson underscores the point. The critical question is whether the private party helped the federal government accomplish something it needed done, not whether the private party rendered that aid voluntarily, under threat-backed "exhortation," or under outright compulsion. In *Watson*, this Court explained that removal extends to cases in which the private party engages in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior" in a relationship that "typically involves 'subjection, guidance, or control.'" 551 U.S. at 151-52 (quoting Webster's New International Dictionary 2765 (2d ed. 1953)). "[S]imply *complying* with the law" is not enough, as "[n]either language, nor history, nor purpose" suggest that Congress meant to make a federal forum available to every law-abiding entity. *Id.* at 152-53. But federal-officer removal very much "applies to private persons 'who lawfully assist' the federal officer 'in the performance of his official duty,'" *id.* at 151, regardless of how willingly that assistance is provided.

That does not mean, as the Fifth Circuit feared, that every private entity that is designated "critical infrastructure" is necessarily entitled to a federal forum for all actions taken during the pandemic. App.9-10. To be sure, that designation is certainly relevant to understanding the nature of the federal government's actions vis-à-vis the food-processing industry. But it hardly stood alone. Not only was the

food-processing industry subject to pervasive direction and oversight that simply was not replicated in other industries (in part because of the unique need for FSIS inspectors on the ground); it is the only industry that was the subject of an extraordinary Executive Order overriding state and local law, followed by letters from a cabinet-level official exhorting plants to remain operational so long they could do so consistent with federal guidance. That the President and the Secretary chose to use words like "should" instead of "shall" hardly rendered those instructions any less directive. And that they never had to make good on the threat of "further action" should facilities fail to comply with their exhortations in no way negates the reality that Tyson remained operational in Texas despite some of the state-law stay-at-home orders respondents invoked in their complaints, Glenn.App.36, Chavez.App.59, because the federal government told it to do so.

Ultimately, the Fifth Circuit faulted Tyson for its inability to point to some communication spelling out what would happen if it did not comply. But nothing in federal-officer removal doctrine or the DPA "gives any indication that the Government may not seek compliance with its priorities policies by informal means." *E. Air Lines*, 532 F.2d at 993. To the contrary, the DPA is designed "to accord the Executive Branch great flexibility in molding its priorities policies to the frequently unanticipated exigencies of national defense." *Id.* By giving the President "broad authority" to command private parties as necessary should they refuse to cooperate, the DPA ensures that federal officials can accomplish critical objectives as effectively through informal "jawboning" as they can

through formal orders, using "the threat of mandatory powers … as a 'big stick' to induce voluntary cooperation." *Id.* at 980, 998. It thus makes no sense to punish parties for providing that aid willingly, rather than forcing the government's hand. Indeed, informal measures and cooperation are especially appropriate in times of national crisis, when "a cumbersome and inflexible administrative process is antithetical to the pressing necessities." *Id.* at 998.

The Fifth Circuit tried to distinguish other removal cases involving a "voluntary relationship" by emphasizing that they involved "defendants fulfilling government contracts." App.12. But that just substitutes an equally flawed demand for formality for a demand for coercion. In reality, a government contract has never been the *sine qua non* of federal-officer removal. *Cnty. Bd. of Arlington Cnty. v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 254 (4th Cir. 2021) ("[T]he absence of a direct *contractual relationship* with the federal government is not a bar to removing an action under §1442(a)(1)."). The "acting under" analysis is a functional, not formal, inquiry, so it makes little sense for it to hinge on whether the private parties and the government have signed on some dotted line. Narrowly construing "acting under" to require that kind of formality both flouts this Court's directions, *Watson*, 551 U.S. at 147, and works at cross-purposes with the flexibility Congress granted the executive in the DPA, *see E. Air Lines*, 532 F.2d at 992-93. Simply put, there is "no authority for the suggestion that a voluntary relationship"—whether voluntary in fact or merely in law—"somehow voids the application of the removal statute." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129,

138 (2d Cir. 2008). The driver enlisted to assist federal officers in hot pursuit need neither demand formal authorization from the FBI Director nor go through a refuse-in-order-to-be-compelled charade to qualify for federal-officer removal. The Fifth Circuit's contrary view "makes little sense in light of the statute's purpose." *Id.* And it contravenes this Court's precedent and creates perverse incentives that will come back to haunt the federal government in the next national emergency.

3. The Fifth Circuit strayed equally far afield in positing that Tyson was not helping "fulfill [a] basic governmental task[]." *Watson*, 551 U.S. at 153. According to the Fifth Circuit, because "[p]ackaging and processing poultry has" traditionally "been a private task," a party who performs it at the federal government's direction nonetheless is not aiding in the fulfillment of a governmental task. App.12. That makes no sense. The "governmental task" analysis does not turn on whether what a private party is directed to do is uniquely "governmental." If it did, then the chauffer in *Soper* would not have had "'the same right to the benefit of' the removal provision as did the federal agents," *Watson*, 551 U.S. at 150, as the government certainly has not cornered the market on chauffer services. The only question that matters is whether the private party is enlisted to aid with a task that "the Government itself would have had to perform" *if no one else did*. *Id.* at 154.

The Fifth Circuit's contrary rule produces absurd results. In our system of free enterprise, the federal government routinely relies on private industry to help satisfy basic needs. A removal test that turns on

what the government usually does itself versus what it ordinarily leaves to industry would thus be virtually impossible for private parties to satisfy. It would be especially problematic in a crisis, moreover, when activities that normally are left to market forces and state law in untroubled times may become a federal priority necessitating extraordinary federal action. And the need for federal-officer removal may be especially acute in suits arising in times of national crisis, as national emergencies can expose fissures between national and state regulatory priorities, especially when it comes to state tort-law applied by juries after the worst of the crisis has passed. A federal-officer removal statute that excludes virtually all private industry thus would be toothless against the very concerns the statute is supposed to alleviate.

For largely the same reasons, the Fifth Circuit missed the mark in holding against Tyson that it provided its services "for profit." App.12. By all indications, William Trabing and the Reliance Transfer Company provided their driving services for a fee, but that made them no less eligible for removal than the prohibition officers in *Soper*. And the government contractors that successfully removed in the cases the Fifth Circuit distinguished were not providing their service *gratis*. In a free-market system, the government will often enlist private companies to assist federal officers. Courts, including the Fifth Circuit, thus routinely have recognized that private parties can be acting under federal direction even if they perform a task that they ordinarily perform for private profit. For example, a private company providing health benefits to federal employees is entitled to federal-officer removal, even

though the company engages in that business for private profit and even though the provision of health benefits is generally left to the private sector. *St. Charles Surgical Hosp., L.L.C. v. La. Health Serv. & Indem. Co.*, 935 F.3d 352, 355-56 (5th Cir. 2019). So too for private companies that contract with the federal government to provide it with herbicides. *See, e.g.*, *Isaacson*, 517 F.3d at 137. Even if those activities are carried out for private profit, they are still being carried out at the behest of the federal government to accomplish federal aims. The acting-under requirement demands nothing more.

The relevant question, then, is not whether Tyson carried out a "governmental" function, or whether it provided its services for free. It is whether "the Government itself would have had to perform" the task of securing the national food supply if private industry were unable or unwilling to do so. *Watson*, 551 U.S. at 154. The answer is plainly yes, as no one can seriously think that the federal government would have sat idly by if private industry had not provided the aid it demanded. Indeed, even in ordinary times, ensuring that a basic need like food is met is a federal obligation through programs like the Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. §2013(a), and the Special Supplemental Nutrition Assistance Program for Women, Infants, and Children (WIC), 42 U.S.C. §1786(c)(1). As the USDA has recognized, that obligation is only heightened during a crisis. *See* USDA Strategic Plan, 2018-2022, at 56, https://bit.ly/3AizFnv (noting USDA's objective of "ensuring that in difficult times, food is available to all people in need."). And the federal government eliminated any doubt about whether it would have

been willing to let a national food crisis compound a national public-health crisis when it threatened "further action" under the DPA should private industry fail to abide by its "exhortations" to help prevent that untenable outcome.

* * *

In sum, the federal-officer removal statute demands neither explicit coercion nor some formalization of the government's relationship with the private party. It simply requires a showing that the private party engaged in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior" in a relationship that "involves 'subjection, guidance, or control.'" *Watson*, 551 U.S. at 151-52. The Fifth Circuit's seeming view that Tyson had to refuse aid and await a formal and explicitly coercive directive before it could meet that standard finds no support in this Court's cases or common sense, and it creates perverse incentives for the next national crisis.

II. This Is An Excellent Vehicle To Resolve This Exceptionally Important Question.

Unfortunately, the Fifth Circuit's misguided decision does not stand alone. While several district courts have properly followed this Court's precedent and found Tyson entitled to federal-officer removal on materially identical facts, *see, e.g.*, *Fields v. Tyson Foods, Inc.*, 561 F.Supp.3d 717, 719-20 (E.D. Tex. 2021), *vacated and remanded*, 2022 WL 4990258 (5th Cir. Oct. 3, 2022); *Johnson*, 2021 WL 5107723, at *3; *Reed*, 2021 WL 5107725, at *3, the Eighth Circuit has embraced the same crabbed view of the statute as the Fifth Circuit, *see Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 738 (8th Cir. 2021) (pet. for certiorari filed July

22, 2022, No. 22-70). Left standing, those decisions will force Tyson to face litigation in state court of state-law tort claims that seek to impose retroactive state-law requirements even more stringent than those that state and local authorities espoused at the time—despite a clear determination by the federal government, embodied in a formal Executive Order, that even those less intrusive state-law requirements conflicted with federal needs. *See* 85 Fed. Reg. at 26,313 (recognizing that "recent actions in some States … threaten the continued functioning of the national meat and poultry supply chain"). Indeed, Tyson will be forced to relitigate in state court even cases that have already have already been dismissed on the merits, effecting an enormous waste of judicial resources. *See, e.g.*, *Fields*, 561 F.Supp.3d at 719-20, *vacated and remanded*, 2022 WL 4990258 (5th Cir. Oct. 3, 2022).

And it is not just Tyson that stands to suffer the harms the federal-officer statute is supposed to guard against on account of those decisions. Leaving them on the books will deny *all* private parties who assist the federal government willingly in times of emergency their right to a federal forum, discouraging voluntary cooperation and hindering the federal government's ability to respond to a future national crisis. Especially in times of a declared national emergency, a rule that requires both formal federal authorization and explicit compulsion for a private party to later seek federal-officer removal is neither realistic nor remotely in the federal government's best interests.

Tyson has filed a petition for certiorari in *Buljic* that remains pending, and it continues to maintain that the Court should grant that petition once it is fully briefed. But the best course would be to grant both that petition and this one and consolidate them, as there is an important factual distinction that could be relevant to the Court's analysis—namely, whereas the principal allegations in *Buljic* pre-date the issuance of the Executive Order and the Secretary's May 5 letter, these cases involve substantial allegations that post-date those events as well. To be sure, Tyson maintains that the federal government's actions before the order and the letter were sufficient to demonstrate that it was acting under federal direction. But the case for removal is even more straightforward in the wake of those actions, as they eliminate all doubt that the federal government was calling the shots. Accordingly, granting both petitions would ensure that the Court can fully consider the impact of those extraordinary measures on the federal-officer removal analysis.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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