APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-40622

ROLANDETTE GLENN; IDELL BELL; KERRY CARTWRIGHT; TAMMY FLETCHER; LAVEKA JENKINS; KIESHA JOHNSON; RONALD JOHNSON; DAISY WILLIAMS; DANICA WILSON; JOHN WYATT; CRYSTAL WYATT; CLIFFORD BELL, *Individually and as Personal Representative of* THE ESTATE OF BEVERLY WHITSEY,

Plaintiffs-Appellees,

v.

TYSON FOODS, INC.; JASON ORSAK; ERICA ANTHONY; MARIA CRUZ,

Defendants-Appellants.

No. 21-11110

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,

Plaintiffs-Appellees,

v.

TYSON FOODS, INC. DOING BUSINESS AS TYSON FOODS; TYSON FRESH MEATS, INC.,

Defendants-Appellants.

Filed: July 7, 2022

Before Willett, Engelhardt, and Wilson,
Circuit Judges.

OPINION

Don R. Willett, *Circuit Judge*:

Congress enacted the first "federal officer removal statute" during the War of 1812 to protect U.S. customs officials.[1] New England states were generally opposed to the war, and shipowners from the region took to suing federal agents charged with enforcing the trade embargo against England.[2] Congress responded by giving customs officials the right to remove state-court actions brought against them to federal court.[3] Since that time Congress has given the right of removal to more and more federal officers. Today all federal officers as well as "any person acting under that officer" are eligible.[4] While the scope of federal officer removal has broadened, its purpose remains the same: to give those who carry out federal

[1] *See* Elizabeth M. Johnson, *Removal of Suits Against Federal Officers: Does the Malfeasant Mailman Merit a Federal Forum?*, 88 Colum. L. Rev. 1098, 1099 (1988); *see also Watson v. Philip Morris Cos.*, 551 U.S. 142, 147-49 (2007) (discussing the history of the federal officer removal statute).

[2] *Watson*, 551 U.S. at 147-49.

[3] *Id.*

[4] 28 U.S.C. § 1442(a)(1).

policy a more favorable forum than they might find in state court.[5]

In this case, we must decide whether Tyson Foods, Inc. was "acting under" direction from the federal government when it chose to keep its poultry processing plants open during the early months of the COVID-19 pandemic. Tyson argues that it was, and that the district courts erred in remanding these cases back to state court. But the record simply does not bear out Tyson's theory. Tyson received, at most, strong encouragement from the federal government. But Tyson was never told that it *must* keep its facilities open. Try as it might, Tyson cannot transmogrify suggestion and concern into direction and control. We AFFIRM the district courts' orders remanding these cases to state court.

I

A

When the COVID-19 pandemic began, the federal government fretted that the nation's food supply might be at risk. The same week that President Trump declared a national emergency, he and other federal officials held calls with state officials and business executives to exchange information and discuss strategies. Dozens of businesses participated in these calls, including representatives from Tyson, Whole Foods, Target, General Mills, Costco, and

---

[5] *See Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 290 (5th Cir. 2020) (en banc) ("Congress authorized . . . federal officials . . . to seek a federal forum rather than face possibly prejudicial resolution of disputes in state courts.").

Walmart.[6] During these calls, the federal government exhorted companies designated as "critical infrastructure" to keep operating even as many other companies sent their employees home.[7] The federal government also issued guidance encouraging employees in critical infrastructure industries to keep working, and for everyone else to work from home if possible and to avoid discretionary travel.

This federal guidance was not binding. But the State of Texas apparently agreed with the federal government's preference that companies like Tyson should continue operating. With encouragement from Governor Abbott and federal officials, Tyson printed out "Essential Employee Verification" letters for its employees to show local law enforcement if stopped, demonstrating that they were allowed to go to work.

Meat and poultry processing was not the only industry designated as "critical infrastructure." Everything from banks and auto-repair shops to hotels and dentists received the same designation. But the federal government's coordination with the meatpacking industry was especially close. Employees of the Food Safety and Inspection Service (FSIS), a subsidiary of the United States Department of Agriculture (USDA), have long been tasked with inspecting meatpacking operations. These inspections are designed to ensure compliance with myriad federal

---

[6] *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, The White House: Trump White House Archives (Mar. 15, 2020), https://bit.ly/3FesI8H.

[7] Matt Noltemeyer, *Trump Meets with Food Company Leaders*, Food Bus. News (Mar. 16, 2020), https://bit.ly/3t2fiXQ.

laws and regulations including the Federal Meat Inspection Act (FMIA)[8] and the Poultry Products Inspection Act (PPIA).[9] FSIS inspections became more complicated during the pandemic because they had to be completed in person, often in close contact with Tyson employees. Tyson and the federal government negotiated a detailed set of protocols designed to allow inspections to continue, while ensuring the safety of FSIS and Tyson employees. The federal government also promised that it would try to procure protective equipment (like face masks and gloves) for Tyson.

President Trump and other federal officers issued public comments encouraging critical industries to keep operating and for their employees to go to work. The President tweeted that the "Defense Production Act is in full force, but [we] haven't had to use it because no one has said NO!"[10] Vice President Pence likewise encouraged food industry workers: "show up and do your job."[11]

The federal government's most overt act to keep meat and poultry processing plants open was Executive Order 13917.[12] That order delegated

---

[8] 21 U.S.C. § 603 *et seq.*

[9] *Id.* § 451 *et seq.*

[10] *See* Doina Chiacu, *Trump Administration Unclear over Emergency Production Measure to Combat Coronavirus*, Reuters (Mar. 24, 2020), http://reut.rs/3rS3MN5.

[11] *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, The White House: Trump White House Archives (Apr. 7, 2020), https://bit.ly/3pcdiZP.

[12] *Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National*

authority to the Secretary of Agriculture to "take all appropriate action" under Section 101 of the Defense Production Act (DPA) "to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA."[13] The USDA used this delegated authority to issue two letters, one to state governments and one to businesses. The letter to businesses said that "meat and poultry processing plants" "should utilize" guidance from the CDC and OSHA. It also said that closed meat processing plants "should" submit documentation of their health and safety protocols and reopen "as soon as they are able after implementing the CDC/OSHA guidance for the protection of workers." While this letter was nonbinding, it concluded by noting that "action under the Executive Order and the Defense Production Act is under consideration and will be taken if necessary." Similarly, a question-and-answer page posted on the USDA's website reiterated that the letter's guidance was not mandatory, but that the agency was leaving the door open to further action under the DPA if it became necessary. Apparently, it never was. The USDA did not issue a DPA order to Tyson or any other meatpacking company.

B

The plaintiffs in this case allege that they contracted COVID-19 while working at two Tyson

---

Emergency Caused by the Outbreak of COVID-19, 85 Fed. Reg. 26,313 (Apr. 28, 2020) (Executive Order 13917).

[13] *Id.* at 26,313-14. "CDC" is short for the "Centers for Disease Control and Prevention." "OSHA" is short for the "Occupational Safety and Health Administration."

facilities in Texas during the first few months of 2020. Some of them died as a result. They allege that Tyson failed to follow applicable COVID-19 guidance by directing employees to work in close quarters without proper protective equipment. They also allege that Tyson knew some of its employees were coming to work sick with COVID-19 but ignored the problem, and that Tyson implemented a "work while sick" policy to keep the plant open. For example, they allege that Tyson encouraged sick employees to come into work by offering a substantial cash bonus for three months of perfect attendance.

The plaintiffs in each action filed suit in Texas state courts. Tyson removed both cases to federal district court: *Glenn* to the Eastern District of Texas, and *Chavez* to the Northern District of Texas. Both district courts granted the plaintiffs' motions to remand. Tyson appealed only the district courts' holdings that the federal officer removal statute was inapplicable, forfeiting federal question jurisdiction. We consolidated the cases on appeal.

II

Defendants invoking the federal officer removal statute must show that: (1) they are a "person" within the meaning of the statute; (2) they acted "pursuant to a federal officer's directions"; (3) they assert a "colorable federal defense"; and (4) there is "'a causal nexus' between the defendant's acts under color of federal office and the plaintiff's claims."[14] The parties

[14] *Latiolais*, 951 F.3d at 291 (quoting *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 396-400 (5th Cir. 1998)).

agree that Tyson is a person within the meaning of the statute but disagree about the other three elements.

We start—and end—with the second element: whether Tyson was "acting under" a federal officer's directions. While "[t]he words 'acting under' are broad," they are "not limitless."[15] It is not enough for a private party to be "simply complying with the law."[16] A private party will only be "acting under" a federal official if their actions "involve an effort to assist, or to help carry out, the duties or tasks of the federal superior."[17] Such a relationship "typically involves 'subjection, guidance, or control.'"[18]

Tyson argues that it was "acting under" the directions of a federal superior because, from the earliest days of the pandemic, various federal officers directed it and other food suppliers to continue operations to avoid a nationwide food shortage. But the record does not support Tyson's position.

Tyson first relies on the federal government's designation of the food industry as "critical infrastructure." Early in the pandemic, even as the federal government was encouraging most people to work from home and avoid discretionary travel, it encouraged employees in "critical infrastructure industr[ies]" to keep working. This message was broadcast by various federal officials, including Vice President Pence and the Department of Agriculture.

---

[15] *Watson*, 551 U.S. at 147.

[16] *Id.* at 152.

[17] *Id.* (emphasis omitted).

[18] *Id.* at 151 (quoting Webster's New Int'l Dictionary 2765 (2d ed. 1953)).

For example, Tyson points to a statement from the Vice President telling food industry workers that the nation needed them "to show up and do [their] job," and promising that the government would work with their employers to keep workplaces as safe as possible.[19]

But the federal government's guidance to "critical infrastructure" industries was nonbinding. State and local authorities remained the ultimate decisionmakers on public safety matters. The list of critical infrastructure industries was created by the Cybersecurity and Infrastructure Security Agency (CISA), part of the Department of Homeland Security. CISA was clear that it created its "list of 'Essential Critical Infrastructure Workers' *to help State and local officials* as *they* work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security." Guidance from the White House was to the same effect, instructing Americans to "[l]isten to and follow the directions of your state and local authorities."

Indeed, the food processing industry was just one of many industries designated as "critical." That diverse list included "nursing homes, . . . doctors, weather forecasters, clergy, farmers, bus drivers, plumbers, dry cleaners, and many other workers."[20]

---

[19] *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, The White House: Trump White House Archives (Apr. 7, 2020), https://bit.ly/3pcdiZP.

[20] *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 406 (3d Cir. 2021) (holding that CISA's designation of nursing homes as

Surely, "Congress did not deputize all of these private-sector workers as federal officers."[21] Far from deputizing huge swaths of the economy, the federal government's critical infrastructure designations amounted to strong advice to business and state and local governments that certain industries should keep operating in spite of COVID-19 risks.

Tyson tries to differentiate itself from these other private-sector designations by arguing that its relationship with the federal government was special. While Tyson has long worked closely with on-site inspectors from the USDA's Food Safety and Inspection Service, this cooperation grew more complex during the pandemic. Tyson and the federal government worked together to ensure that on-site inspections could continue while mitigating the danger to Tyson employees and FSIS inspectors. The government also suggested that it would try to help Tyson procure protective equipment.

But this only shows that Tyson was subject to heavy regulation—not that it was an agent of the federal government. Being "subject to pervasive federal regulation alone is not sufficient to confer federal jurisdiction."[22] "And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and

---

critical infrastructure did meet § 1442(a)(1)'s "acting under" requirement); *Martin v. Petersen Health Operations, LLC*, No. 21-2959, 2022 WL 2154870, at *1 (7th Cir. June 15, 2022) (same).

[21] *Maglioli*, 16 F.4th at 406.

[22] *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 739 (8th Cir. 2021) (holding that Tyson Foods could not use § 1442(a)(2) to remove a suit against it to federal court).

monitored."[23] The Court's holding in *Watson* is instructive. In that case, the FTC had long conducted tests on the tar and nicotine content of cigarettes, but stopped for cost reasons.[24] The tobacco manufacturer Philip Morris started running the tests themselves "according to [Federal Trade Commission (FTC)] specifications and permitting the FTC to monitor the process closely."[25] Indeed, the FTC published the results of these tests in annual reports to Congress, just as it had when it ran the tests itself.[26] Philip Morris argued that because it carried out a task previously carried out by the government, it was "acting under" a federal official.[27] The Court disagreed. It distinguished prior cases by noting that in most of them, the defendant was "helping the Government to produce an item that it needs."[28] But Philip Morris had no contract with or payment from the federal government.[29] And while Philip Morris argued in earnest that it was exercising delegated authority, it produced no concrete evidence of a delegation.[30] "[N]either Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so."[31]

---

[23] *Watson*, 551 U.S. at 153.

[24] *Id.* at 154.

[25] *Id.*

[26] *Id.* at 154-56.

[27] *See id.*

[28] *Id.* at 153.

[29] *Id.*

[30] *See id.* at 156-57.

[31] *Id.* at 157.

If anything, Tyson has a much harder case to make than Philip Morris did. At least the actions that Philip Morris took had previously been carried out by the government. Not so with Tyson. Packaging and processing poultry has always been a private task—not a governmental one. But in other respects, Tyson is similarly situated to Philip Morris. While both were subject to close regulation and supervision, they acted in their own interests for profit. Neither acted as government contractors nor in a principal/agent arrangement with the government.[32]

While Tyson is right that a voluntary relationship isn't incompatible with delegated federal authority, the cases it cites are inapposite because they all involve defendants fulfilling government contracts. In *Isaacson v. Dow Chemical Co.*, the defendant was fulfilling a federal contract to produce "Agent Orange" for the military.[33] In *St. Charles Surgical Hospital LLC v. Louisiana Health Service & Indemnity Co.*, the defendant contracted to provide health care coverage to federal employees.[34] And *Betzner v. Boeing Co.* involved perhaps the quintessential example of private parties carrying out federal tasks: the defendant contracted to manufacture heavy bomber aircraft pursuant to detailed military guidelines and under careful monitoring and control.[35] Packaging poultry for private parties is far afield from assembling aircraft or manufacturing munitions for

---

[32] *See id.* at 156.

[33] 517 F.3d 129, 138 (2d Cir. 2008).

[34] 935 F.3d 352, 356 (5th Cir. 2019).

[35] 910 F.3d 1010, 1015 (7th Cir. 2018).

Uncle Sam. The problem is not that Tyson's relationship with the federal government was voluntary. The problem is the absence of any evidence of delegated authority or a principal/agent relationship at all.[36]

Tyson has one final argument: that various communications from federal officials made it clear that Tyson had to keep its plants open. But the record does not support Tyson's claim. Tyson points to a long list of communications from the federal government including President Trump's proclamation declaring a national emergency, a conference call held in early March between the President and dozens of companies, a presidential tweet, guidance from the CDC and OSHA, and the Vice President's statement encouraging food industry employees to do their jobs. But none of these communications constituted an "order" or a "directive." Like the designation of various industries as "critical infrastructure," these communications merely encouraged Tyson to stay open.

Tyson's best piece of evidence of a federal directive was President Trump's invocation of the DPA in Executive Order 13917. But Executive Order 13917 had no immediate legal effect. It merely delegated the President's DPA authority to the Secretary of Agriculture. And the Secretary never saw fit to use that delegated authority. The USDA sent two letters, one to state and local governments and one to private

---

[36] *See Watson*, 551 U.S. at 156 (noting the absence of "any contract, any payment, any employer/employee relationship, or any principal/agent arrangement" between Philip Morris and the government).

companies, that "encouraged" meat and poultry plants to follow preexisting CDC and OSHA guidance. The USDA's question and answers webpage only confirms that the letter was not an order. It stated that the Secretary would exercise delegated DPA authority in the future "if necessary," which it never was.

III

From the earliest days of the pandemic all the way through the issuance of Executive Order 13917, the federal government's actions followed the same playbook: encouragement to meat and poultry processers to continue operating, careful monitoring of the food supply, and support for state and local governments. Tyson was exhorted, but it was not directed. Because Tyson has not shown that it was "acting under" a federal officer's directions, we need not consider whether it meets the remaining elements of the federal officer removal statute. The district courts' judgments are AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21-40622

ROLANDETTE GLENN; IDELL BELL; KERRY CARTWRIGHT; TAMMY FLETCHER; LAVEKA JENKINS; KIESHA JOHNSON; RONALD JOHNSON; DAISY WILLIAMS; DANICA WILSON; JOHN WYATT; CRYSTAL WYATT; CLIFFORD BELL, *Individually and as Personal Representative of* THE ESTATE OF BEVERLY WHITSEY,

Plaintiffs-Appellees,

v.

TYSON FOODS, INC.; JASON ORSAK; ERICA ANTHONY; MARIA CRUZ,

Defendants-Appellants.

No. 21-11110

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,

Plaintiffs-Appellees,

v.

TYSON FOODS, INC. DOING BUSINESS AS TYSON FOODS; TYSON FRESH MEATS, INC.,

Defendants-Appellants.

Filed: Aug. 29, 2022

Before Willett, Engelhardt, and Wilson,
Circuit Judges.

ORDER

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5th Cir. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

Appendix C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

No. 9:20-cv-184

ROLANDETTE GLENN, et al.,
Plaintiffs,
v.
TYSON FOODS, INC., et al.,
Defendants.

Filed: Aug. 12, 2021

ORDER

Pending before the Court is Plaintiffs' Motion to Remand. (Doc. #13). Plaintiffs seek to have this case remanded to state court, alleging that the defendants, Tyson Foods, Inc. ("Tyson"), Jason Orsak, Erica Anthony, and Maria Cruz, have not carried their burden to establish federal officer or federal question jurisdiction. After considering the motion, arguments from the parties, and the applicable law, the Court grants Plaintiffs' Motion to Remand. (Doc. #13).

I. BACKGROUND

Plaintiffs are eleven past and present workers of Defendant Tyson who allege that they contracted COVID-19 while working at a Tyson poultry-

processing facility and a personal representative of a twelfth worker who allegedly died as a result of contracting the virus at work. (Doc. #3, at 3-4). More specifically, Plaintiffs allege that despite a stay-at-home order issued by Governor Abbott that went into effect on April 2, 2020, Plaintiffs were required to continue working at the Tyson meatpacking plant in Center, Texas ("Center Facility"). *Id.* at 5. They assert that both before and after the April 2 stay-at-home order, Tyson failed to take adequate precautions to protect the workers at its meatpacking facilities from COVID-19. *Id.*

At all relevant times during the events alleged the first amended petition, Defendant Jason Orsak was a complex safety manager for Tyson and Defendants Erica Anthony and Maria Cruz were safety coordinators for Tyson. *Id.* at 4. Plaintiffs allege those defendants were directly responsible for implementing and enforcing adequate safety measures to prevent the spread of COVID-19 but failed to do so. *Id.* at 5-6. More specifically, Plaintiffs allege that Orsak and Anthony failed to issue masks to employees, institute six feet barriers between employees, limit contact between employees, and create rideshare alternatives to the Center Facility's bus system. *Id.* at 6. Allegedly, as a direct result of the negligence and gross negligence of Defendants, Plaintiffs contracted COVID-19 at the Center Facility and have experienced significant injuries, including death. *Id.*

On July 23, 2020, Plaintiffs filed their first amended petition in the 273rd Judicial District of Shelby County, Texas. The petition asserts a

negligence and gross negligence claim against all Defendants, a premises liability claim against Tyson, and a wrongful death and survival claim against all Defendants by Plaintiff Clifford Bell, individually and as the personal representative for the estate of Beverly Whitsey. *Id.* at 6-9.

Tyson then removed the action to federal court asserting federal officer and federal question jurisdiction. (Doc. #1). It asserts that because Tyson was under an April 28, 2020, Executive Order to continue operations pursuant to the supervision of the federal government and pursuant to federal guidelines and directives, federal court is the proper forum for resolving the case. *Id.* at 3. Plaintiffs then filed the pending motion to remand alleging that Defendants had not met their burden to prove federal jurisdiction is proper. (Doc. #13).[1]

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction and may only hear a case when jurisdiction is both authorized by the United States Constitution and confirmed by statute. *Griffin v. Lee*, 621 F.3d 380, 388 (5th Cir. 2010). Removal to federal court is proper when the federal court would have had original jurisdiction over the action. 28 U.S.C. § 1441(a). The federal court has original federal question subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

---

[1] Although there are both corporate and individual defendants, all are represented by the same attorneys. For clarity purposes, the Court will refer to all defendants as Tyson.

Additionally, under Section 1442(a)(1), commonly referred to as the Federal Officer Removal Statute, "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof" may remove a civil action commenced in state court "for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue." 28 U.S.C. § 1442(a)(1).

Although usually "[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand," *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002), the federal officer removal statute must be liberally interpreted because of its broad language and unique purpose. *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 147 (2007). As with any motion to remand, the removing party bears the burden of showing that federal jurisdiction exists, and that removal was proper. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir. 1995); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397 (5th Cir. 1998).

III. DISCUSSION

To this Court's knowledge, there are currently three main judicial opinions that address virtually the same issue as the one in this case: *Fernandez v. Tyson Foods, Inc. et al.*, No. 20-CV-2079-LRR, 2020 WL

7867551 (N.D. Iowa Dec. 28, 2020),[2] *Fields et al. v. Brown et al.*, No. 6:20-CV-00475, 2021 WL 510620 (E.D. Tex. Feb. 11, 2021),[3] and *Wazelle, et al., v. Tyson Foods, Inc., et al.*, No. 2:20-CV-203-Z, 2021 WL 2637335 (N.D. Tex. June 25, 2021). *Fernandez* granted remand while *Fields* and *Wazelle* did not. For the reasons explained below, this Court agrees with *Fernandez* and Plaintiffs' motion to remand will be granted.

A. Federal Officer Jurisdiction

A defendant removing under section 1442(a)(1) must show "(1) it has asserted a colorable federal defense, (2) it is a 'person' within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020). Here, Tyson's status as a "person" is not disputed. However, elements one, three, and four are disputed.

1. Colorable Federal Defense

To be "colorable," the asserted federal defense need not be "clearly sustainable," as section 1442 does not require a federal official or person acting under him "to 'win his case before he can have it removed.'"

---

[2] This decision is currently on appeal before the Eighth Circuit. *Fernandez v. Tyson Foods, Inc. et al.*, No. 21-1010 (8th Cir. appeal docketed Jan. 4,2021).

[3] The district court in *Fields* gave the plaintiffs permission to apply for an interlocutory appeal of the order, but the Fifth Circuit denied the application without stating a reason. *Fields v. Brown*, No. 21-90021 (5th Cir. June 21, 2021).

Jefferson Cnty., Ala. v. Acker, 527 U.S. 423, 431 (1999) (internal citations omitted). Instead, if an asserted federal defense is plausible, it is colorable. *Latiolais*, 951 F.3d at 297. A defense is colorable unless it is "immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous." *Id*.

In its notice of removal, Tyson raised two federal defenses. First, it argues that the Poultry Products Inspection Act ("PPIA") expressly preempts Plaintiffs' state-law claims. (Doc. #1, at 9). Second, it claims that "Plaintiffs' claims are also preempted by the DPA ["Defense Production Act"] and the President's [April 28, 2020] Food Supply Chain Resources executive order and related federal directions." *Id.* at 10.

i. PPIA

After pointing out that the PPIA and the Federal Meat Inspection Act ("FMIA") have substantially identical preemption provisions, Tyson maintains that the FMIA "'sweeps widely' and 'prevents a State from imposing any additional or different—even if non-conflicting— requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations." (Doc. #1, at 9-10) (quoting *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459-60 (2012)). Specifically, Tyson argues that "the alleged failings Plaintiff pleads are 'in addition to, or different than,' the requirements that FSIS[4] [("Food Safety and

[4] The United States Department of Agriculture ("USDA") is responsible for enforcing the PPIA. FSIS is under the direction of USDA. The parties' briefing use FSIS and USDA somewhat interchangeably.

Inspection Service")] has imposed regarding employee hygiene and infectious disease—and therefore are preempted under the express terms of 21 U.S.C. § 467e." (Doc. #14, at 22). Tyson asserts that "[p]reemption applies wherever Plaintiffs seek to impose, as a matter of state law, different requirements for poultry-processing employees than those adopted by the Department of Agriculture." (Doc. #14, at 23).

The PPIA's express preemption clause (which includes a savings clause) is found at 21 U.S.C. § 467e and provides:

> Requirements within the scope of [the PPIA] with respect to premises, facilities and operations of any [meat-processing] establishment . . . which are in addition to, or different than those made under [the PPIA] may not be imposed by any State . . . .
>
> This chapter shall not preclude any State . . . from making requirement [sic] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Thus, for a state rule to be preempted by the PPIA, it must be within the scope of the Act. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (internal citations omitted). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

Tyson's preemption argument is premised on a misunderstanding of the PPIA's breadth. The purpose of the PPIA is "to provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of such articles . . . to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded." 21 U.S.C. § 452. According to Tyson, USDA (through FSIS) has promulgated hundreds of pages of federal regulations addressing infectious diseases. However, Tyson (and the *Fields* and *Wazelle* courts) do not address the fact that the PPIA's primary purpose is to protect consumers from unsafe meat, not to protect workers from disease. In fact, FSIS itself acknowledges that it "has neither the authority nor the expertise to regulate issues related to establishment worker safety." Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,305 (Oct. 1, 2019). Instead, "OSHA [Occupational Safety and Health Administration] is the Federal agency with statutory and regulatory authority to promote workplace safety and health." *Id.* Because FSIS, the agency that enforces the PPIA, does not have authority to regulate worker safety, it follows that no state common law negligence claims based on improper workplace safety could be within the scope of the PPIA. And there is no suggestion from Tyson that the provisions OSHA administers could preempt Plaintiffs' claims.

Further, Tyson points to no evidence that Congress intended the PPIA to displace state-law actions relating to workplace safety. On the contrary, the federal agency that does regulate workplace

safety, OSHA, expressly preserves a role for state-law regulation and common law claims, including those that relate to "injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). Federal law gives the states express authority to develop their own health and safety standards and recognizes that the states play the primary role in protecting their workers' health and safety. *See* 29 U.S.C. § 667. And in fact, many cities and states have implemented their own COVID-19 procedures, and nothing suggests that those procedures do not apply to facilities regulated by the PPIA.

According to Tyson, FSIS has promulgated hundreds of pages of federal regulations addressing infectious diseases. But the regulatory examples Tyson cites confirm that the PPIA's concern is with food safety, not worker safety. Tyson notes that "FSIS has promulgated a specific '[d]isease control' regulation providing that '[a]ny person who has or appears to have an infectious disease . . . must be excluded from any operations which could result in product adulteration and the creation of insanitary conditions.'" (Doc. #14, at 21) (alterations in original) (quoting 9 C.F.R. § 416.5(c)). This provision highlights the PPIA's specific concern with conditions leading to "product adulteration," not the spread of disease among workers. Likewise, in noting that regulations promulgated under the PPIA require worker protective equipment, Tyson omits the other portion of § 416.5(b) which states that "garments must be changed during the day as often as necessary to prevent *adulteration of product* and the *creation of insanitary conditions*. 9 C.F.R. § 416.5(b) (emphasis

added). This again demonstrates the PPIA's concern with the "adulteration of product." Because the PPIA does not govern worker safety, it does not preempt Plaintiffs' claims that Tyson negligently failed to protect workers.

The PPIA only preempts requirements within its scope—and for a duty to fall within that scope, there must be some evidence that Congress intended to preempt that duty. But Tyson has failed to point to a single provision of the PPIA that indicates any intent to preempt the common- law duty at issue here—the duty to maintain a reasonably safe workplace. And if the PPIA does not address a duty whatsoever, than the duty is not within its scope and therefore is not preempted. Taking Tyson's argument to its logical conclusion would mean that states could not implement workplace safety regulations in any facility subject to PPIA's regulations, which is illogical and would unduly interfere with the states' police power to protect the health and safety of their citizens. Because nothing in the statutory language or in the structure and purpose of the PPIA suggest an intent for the PPIA to preempt state common-law workplace safety claims such as this one, the PPIA does not provide a colorable federal defense.

ii. DPA and the President's Executive Order

Tyson's second defense is that Plaintiffs' claims are also preempted by the DPA and the President's April 28, 2020 Food Supply Chain Resources Executive Order and related federal directions. (Doc. #1, at 10). This argument fails. As Plaintiffs point out in the motion to remand, their claims arose before the

President issued his April 28 order invoking the DPA. In their petition, Plaintiffs allege that Tyson unnecessarily and recklessly exposed Plaintiffs to COVID-19 weeks before the April 28 order. Specifically, Plaintiffs state that Tyson "failed to take adequate precautions to protect the workers at its meatpacking facilities, including the Center, Texas meatpacking facility" by failing to take "significant precautions to prevent the spread of COVID- 19, prior to April 2, 2020." (Doc. #3, at 6). Clearly an executive order issued after Plaintiffs contracted COVID-19 cannot preempt their claims.

Tyson raises no argument in their response to the motion to remand to refute this. Instead, Tyson merely asserts that it need not prove it will prevail on their asserted defense. However, it is Tyson's burden to show it has a colorable federal defense and although it need not prove it will prevail on the defense, it at least has to show that it is entitled to raise it. Tyson has made no such showing under either the PPIA or the DPA. Further, it appears that Tyson's reliance on the PPIA and the DPA is made for the sole purpose of obtaining jurisdiction. *See Latiolais*, 951 F.3d at 297 ("[A]n asserted federal defense is colorable unless it is immaterial and made solely for the purpose of obtaining jurisdiction or wholly insubstantial and frivolous"). Thus, Tyson has no colorable federal defense, and federal officer removal is improper.

2. Acted Pursuant to a Federal Officer's Directions

As the Supreme Court has emphasized, the "acting under" requirement in 28 U.S.C. § 1442(a)(1) is broad and should be liberally construed. *Watson*,

551 U.S. at 147 (2007). The phrase contemplates a relationship between a private person and a federal officer that "typically involves subjection, guidance, or control" by the federal officer and, on the part of the private person, "an effort to assist, or help carry out, the duties or tasks of the federal superior." *Id.* at 151. In other words, the relationship involves a "delegation" of authority. *Id.* at 156-57. To invoke the protection of a federal forum under 28 U.S.C. § 1442(a)(1), the private person's relationship with a federal officer must implicate a "federal interest." *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998).

Tyson points to two possible sources of direction from a federal officer: Tyson's designation as "critical infrastructure" and the President's April 28, 2020 Executive Order. As explained above, the primary allegations in Plaintiffs' petition took place before April 28, 2020. At the time the events in the petition took place, there was no executive order in place. Thus, the executive order cannot satisfy the acting under prong of § 1442.

Tyson also argues it was acting under a federal officer's directions because it "operated its facilities—including the Center facility—as critical infrastructure of the United States pursuant to 'critical infrastructure' emergency plans growing out of Presidential Policy Directive 21 of the Obama Administration, which were followed upon declaration of a national emergency." (Doc. #14, at 16). As a preliminary matter, Tyson fails to point out that the food and agriculture sector has been designated as critical infrastructure since 2003; it is not something

that arose because of the pandemic. *See Food and Agriculture Sector-Specific Plan*, FDA, vi, https://www.cisa.gov/sites/default/files/publications/nipp-ssp-food-ag-2015-508.pdf (2015).

Even though the President declared a national emergency on March 13, 2020, and issued "Coronavirus Guidelines" on March 16, 2020, the Court is unpersuaded that such declarations constitute direction under a federal officer for purposes of removal. Although Tyson claims that it was "in constant contact with federal officials at the Department of Homeland Security [("DHS")] and the USDA regarding continued operations," the evidence it attached to its response to the motion to remand does not support that assertion. (Doc. #14, at 16). The evidence Tyson uses is a declaration of an employee, two emails that establish Tyson and DHS/FSIS had each other's contact information, an essential employee verification form Tyson itself created, general guidance on the critical infrastructure workforce, general guidance from USDA, emails of Tyson trying to obtain PPE from USDA, and a USDA sheet describing COVID-19 funding for FSIS employees. Tyson has produced no evidence that any federal official directed it to do something. Many of the documents Tyson cites to are titled "guidance" which are of course not mandatory or binding.

While Tyson may have been in regular contact with USDA regarding continued operations of its facilities at the early stages of the COVID-19 pandemic, such contact under the vague rubric of "critical infrastructure" does not constitute "subjection, guidance, or control" involving "an effort

to assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 151-52. Although Tyson, and the courts in *Wazelle* and *Fields*, all give great weight to the fact that USDA and FSIS closely monitored the plant and provided employees onsite during the pandemic, all three fail to note that Tyson, as an entity subject to federal regulation, is always closely monitored by FSIS and subject to its guidance and that FSIS always has employees onsite at the plant and were not there as a direct result of COVID-19. USDA statements about protocols for how FSIS inspectors would perform their regulatory functions during the pandemic do not show government control of Tyson's own operations. Tyson did not work with USDA and FSIS, nor did it receive any concrete, binding directives from them; Tyson merely received guidance from them. And close monitoring does not entitle it to federal officer removal. *See id.* at 153. Many industries are closely monitored by the federal government, but the vast majority of them cannot claim federal officer removal. *See id.* ("A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.' And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored. A contrary determination would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries). Tyson has not shown that its contact with USDA after the president declared a national emergency was different than its normal

communication with USDA or that it constituted a delegation of authority.

The Court finds the Supreme Court's decision in *Watson* particularly helpful. In *Watson*, the defendant alleged that the Federal Trade Commission ("FTC") had delegated to the tobacco industry authority to test the tar and nicotine content of cigarettes, and that the defendant was thus acting under the FTC in performing that testing function. 551 U.S. at 154. The testing at issue had at one point been performed by the FTC itself, and the agency published the test results periodically and sent them annually to Congress. *Id.* at 155. When the FTC eventually stopped performing such tests due to cost considerations, the industry assumed that responsibility, "running the tests according to FTC specifications and permitting the FTC to monitor the process closely." *Id.* "The FTC continue[d] to publish the testing results and to send them to Congress," just as it had done with the FTC's own test results. *Id.* Despite the close coordination alleged in that case, the Supreme Court unanimously held that the defendant was not "acting under" the FTC within the meaning of Section 1442(a)(1). Tyson attempts to distinguish this case from *Watson* by stating that the Supreme Court's decision was based on a finding that the defendant was simply complying with the law. However, the holding is more complex. The Court stressed that there was "no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf. Nor [wa]s there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." *Id.* at 156. Like Tyson

in this case, the defendant in *Watson* pointed to numerous documents and communications in support of its claim that it was working with the FTC and acting under its direction in a relevant sense. But the Supreme Court "examined all of the documents" and found them lacking because none "establish[ed]the type of formal delegation that might authorize the defendant to remove the case." *Id.*

Although Tyson asserts that it was carrying out the duties and task of the federal superior, like in *Watson*, here there is no evidence of any delegation of legal authority from USDA to Tyson. *See id.* Nor is there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement. *See id.* And although there may have been considerable regulatory detail and supervision, this Court can find nothing that warrants treating the USDA/Tyson relationship as distinct from the usual regulator/regulated relationship. While the Court agrees with the proposition from *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 994 (5th Cir. 1976), that the DPA can be exercised through informal methods, that case did not deal with federal officer removal. Tyson cites no case where a private entity without a contract with the federal government was able to satisfy the acting under requirement.[5] *But cf. Winters*,

[5] Tyson cites to *Maryland v. Soper (No. 1)*, a case involving federal agents directing a private person to drive a car in pursuit of bootleggers. *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926). While the Court there noted that the chauffeur and helper had the same right to the benefit of the removal provision as the federal agent, it ultimately rejected the removal efforts and thus,

149 F.3d at 398 (defendant with a detailed and specific contract with the defense department to produce a product with the specifications specifically dictated by the government satisfied acting under requirement)*; St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co.*, 935 F.3d 352, 356 (5th Cir. 2019) (because under the Federal Employees Health Benefits Act, the Office of Personnel Management was responsible for contracting with private insurance carriers to provide health benefits plans to federal employees, insurance carrier with such a contract satisfied the acting under requirement). Thus, the "acting under" requirement is not met.

3. Connected or Associated with an Act Pursuant to a Federal Officer's Directions

Finally, Tyson must show a connection or association between the federal officer's directions and Plaintiffs' claims. *Latiolais*, 951 F.3d at 296.

The parties dispute the applicable standard for this prong. Plaintiffs, citing the Fifth Circuit's decision in *Winters*, argue that there must be a "causal nexus" between plaintiffs' claims and the directions that defendants received from a federal officer. 149 F.3d at 387. But that standard no longer governs. In 2020, the Fifth Circuit, sitting en banc, reinterpreted the 2011 statutory amendments to § 1442 in *Latiolais v. Huntington Ingalls. Inc.* 951 F.3d 286. Those amendments "alter[ed] the requirement that a removable case be 'for' any act under color of federal

---

this comment is dicta. *Soper* also dealt with § 1442's predecessor statute, not § 1442 itself.

office and permitt[ed] removability of a case 'for or relating to' such acts." *Id.* at 291. That addition, the *Latiolais* court held, "broadened federal officer removal to actions, not just causally connected, but alternatively connected or associated, with acts under color of federal office." *Id.* at 292.

Historically, many courts considered the acting under and causation requirements together. *See, e.g. Winters*, 149 F.3d 387. Although it has now been established that they are distinct and should be considered separately, that is not possible when, as here, the court finds the defendant has not acted pursuant to a federal officer's directions. In other words, there can be no connection or association between the federal officer's directions and the plaintiffs' claims when, as here, the court has determined that there were no federal officer's directions. Thus, because the "acting under" requirement is not met, the connection or association element is also not met.

B. Federal Question Jurisdiction

Pursuant to 28 U.S.C. § 1331, federal courts have subject matter jurisdiction over civil actions "arising under" federal law. 28 U.S.C. § 1331. A federal question exists "only [in] those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 27-28 (1983). "[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which

a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

Upon review of the petition, the Court finds that the petition does not assert federal claims, but rather asserts common law tort claims for negligence, premises liability, and wrongful death. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (providing that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint"). Additionally, Plaintiffs' claims do not allege a cause of action created by a federal statute. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (providing that cases brought under federal question jurisdiction are generally cases where federal law creates the cause of action).

As to Tyson's reliance on interpretation of the DPA, the Court has already explained that its reliance on President's April 28, 2020 Executive Order invoking the DPA is misplaced because it was issued after the primary allegations in the petition had taken place. Further, Plaintiffs' generic passing references in the petition to federal regulations and guidance and their brief mention of CDC guidelines and OSHA standards do not confer federal question jurisdiction. *See Merrell Dow*, 478 U.S. at 813 (providing that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"); *Grable & Sons Metal Prod., Inc.*, 545 U.S. at 314 (providing that for federal courts to have jurisdiction, the state law claim must turn on an

"actually disputed and substantial" issue of federal law). Accordingly, the Court concludes that the petition does not contain a federal question and, therefore, the Court lacks subject matter jurisdiction over the case.

IV. CONCLUSION

The Court finds that Tyson has failed to demonstrate (1) that it has a colorable federal defense; (2) that it acted under the direction of a federal officer; and (3) that because it does not meet the "acting under" element it cannot meet the connection or association element. Accordingly, Tyson's removal based on the federal officer removal statute is improper. The Court also finds that the petition does not contain a federal question. Therefore, the Court lacks subject matter jurisdiction over this case.

It is accordingly **ORDERED** that Plaintiffs' Motion to Remand (Doc. #13) is **GRANTED**. The Clerk is directed to **CLOSE** this case and **REMAND** it to the 273rd Judicial District Court of Shelby County, Texas, from which it was removed in accordance with the procedures set forth by the Local Rules for the Eastern District of Texas. All remaining deadlines and trial settings are **TERMINATED**, and all pending motions are denied as **MOOT**, without prejudice to reassert as necessary in state court.

SIGNED this 12th day of August, 2021.

[handwritten: signature]

Michael J. Truncale

United States District Judge

Appendix D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

No. 3:21-CV-1184

MARIA YOLANDA CHAVEZ, et al.,
Plaintiffs,
v.
TYSON FOODS, INC., et al.,
Defendants.

Filed: Oct. 27, 2021

ORDER

For essentially the reasons argued therein, the Court ORDERS that Plaintiffs' Motion to Remand be GRANTED and that this civil action be REMANDED back to the County Court at Law No. 3, Dallas County, Texas.[1] Specifically the Court finds that Defendants have failed to carry their heavy burden in establishing that: (1) they were acting under the direction of a federal officer when they engaged in the alleged tortious conduct; (2) the alleged conduct is connected or associated with an act taken pursuant to federal

[1] The Court emphasizes that any doubts should be strictly construed in favor of remand. *African Methodist Episcopal Church v. Lucien,* 756 F.3 d 788, 793 (5th Cir. 2014).

officer's directions; or (3) a colorable federal defense is available.[2] *See Mumfrey v. CVS Pharm., Inc.*, 719 F.3d 392, 397 (5th Cir. 2013) (the party seeking to remove a case to federal court bears the burden of showing that federal jurisdiction exists and that removal was proper); *see also Glenn v. Tyson Foods, Inc.,* __ F. Supp. 3d __, 2021 WL 3614441 (E.D. Tex. Aug. 12, 2021); *Fernandez v. Tyson Foods, Inc.,* 509 F. Supp. 3d 1064 (N.D. Iowa 2020); *but see Wazelle v. Tyson Foods, Inc.,* 2021 WL 2637335 (N.D. Tex. June 25, 2021); *Fields v. Brown,* 519 F. Supp. 3d 388 (E.D. Tex. 2021).[3] Any and all pending Motions are DENIED AS MOOT

---

[2] Moreover, the removal of this civil action based upon federal question jurisdiction was not proper because Plaintiffs' common-law tort claims do not depend necessarily on a disputed or substantial question of federal law. *See Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.,* 545 U.S. 308, 314 (2005) ("the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."). Additionally, merely referencing federal regulations within the context of state law negligence claims does not confer federal question jurisdiction. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 813 (1986) ("the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.".

[3] The Court notes that the Uni ted States has filed an amicus brief in two consolidated and closely related appeals—currently pending before the Uni ted States Court of Appeals for the Eighth Circuit—in which the United States argues that "Tyson is not entitled to a federal forum because it was not performing a federal function under the direction of a federal officer during the relevant period, and federal law provides no defense to plaintiffs' claims." *See Buljic v. Tyson Foods, Inc.,* Nos. 21-1010 & 21-1012 (8th Cir.).

subject to being refiled in state court. The Clerk of Court shall mail a certified copy of this Order to the County Clerk of Dallas County, Texas.

SO ORDERED.

Dated October [handwritten: 27], 2021.

[handwritten: signature]

SAM R. CUMMINGS

SENIOR UNITED STATES DISTRICT JUDGE

Appendix E

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1442. Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> **(1)** The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> **(2)** A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.
>
> **(3)** Any officer of the courts of the United States, for or relating to any act under color of office or in the performance of his duties;
>
> **(4)** Any officer of either House of Congress, for or relating to any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer

of the United States and is a nonresident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

(c) Solely for purposes of determining the propriety of removal under subsection (a), a law enforcement officer, who is the defendant in a criminal prosecution, shall be deemed to have been acting under the color of his office if the officer--

(1) protected an individual in the presence of the officer from a crime of violence;

(2) provided immediate assistance to an individual who suffered, or who was threatened with, bodily harm; or

(3) prevented the escape of any individual who the officer reasonably believed to have committed, or was about to commit, in the presence of the officer, a crime of violence that resulted in, or was likely to result in, death or serious bodily injury.

(d) In this section, the following definitions apply:

(1) The terms "civil action" and "criminal prosecution" include any proceeding (whether or not ancillary to another proceeding) to the extent that in such proceeding a judicial order, including a subpoena for testimony or documents, is sought or issued. If removal is sought for a proceeding described in the previous sentence, and there is no other basis for removal, only that proceeding may be removed to the district court.

(2) The term "crime of violence" has the meaning given that term in section 16 of title 18.

(3) The term "law enforcement officer" means any employee described in subparagraph (A), (B), or (C) of section 8401(17) of title 5 and any special agent in the Diplomatic Security Service of the Department of State.

(4) The term "serious bodily injury" has the meaning given that term in section 1365 of title 18.

(5) The term "State" includes the District of Columbia, United States territories and insular possessions, and Indian country (as defined in section 1151 of title 18).

(6) The term "State court" includes the Superior Court of the District of Columbia, a court of a United States territory or insular possession, and a tribal court.