No. 22-455

IN THE
Supreme Court of the United States

TYSON FOODS, INC., ET AL.,
Petitioners,

v.

ROLANDETTE GLENN, ET AL.,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Contrary to the unanimous holdings of the courts of appeals, whether generic statements of encouragement and concern from federal officials, nonbinding guidance that explicitly defers to state and local authorities, increased regulation by and coordination with federal agencies, and never-exercised authority under the Defense Production Act transform private-market activity into acts taken "under" federal officers for purposes of the federal-officer-removal statute, 28 U.S.C. § 1442(a)(1).

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INTRODUCTION

Should this Court recognize a "COVID-19 exception to federalism"? *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 400 (3d Cir. 2021) (answering no). Two courts of appeals—the Fifth Circuit here, joined by the Eighth Circuit—have unanimously rejected Tyson Foods, Inc.'s quest to create a COVID-19 exception (or, to borrow an oft-repeated term from Tyson's petition, a "national emergency" exception) to the federal-officer-removal statute. So have the Third, Fifth, Seventh, and Ninth Circuits in similar failed attempts made by nursing homes. And in denying Tyson's petition, so should this Court.

Federal jurisdiction under the federal-officer-removal statute requires (among other things) a private entity to "act[] under" a federal officer. 28 U.S.C. § 1442(a)(1). As this Court unanimously held in *Watson v. Philip Morris Companies, Inc.*, a private entity "act[s] under" a federal officer where there exists a "special relationship" of "subjection, guidance, or control"—or some "delegation of authority"—as distinct from mere "*compliance* with the law" or even simple "*acquiescence* to an order." 551 U.S. 142, 151, 152, 157 (2007) (emphases in original). "A contrary determination[,]" the Court rightly understood, "would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated entities." *Id.* at 153.

Yet under Tyson's spin, the "critical question" is simply "whether the private party helped the federal government accomplish something it needed done[.]"

Pet. 27. And with that misframed question, Tyson argues that a flurry of communications and coordination between the Federal Government and the meatpacking industry—including conference calls with federal agencies, guidance from the CDC and OSHA, Executive Order 13917 (which solely assigned authority to the Secretary of Agriculture, which was never exercised), and a subsequent letter from the Secretary strongly encouraging continued operations—are enough to grant Tyson a federal forum.

The only party profoundly confused about the federal-officer-removal statute is Tyson. *Watson* squarely rejected Tyson's argument that a private entity's response to a governmental request is enough. Recognizing that fact, the Fifth Circuit (like the Eighth Circuit) carefully considered each federal communication that Tyson cites and correctly concluded that Tyson's problem was not its "voluntary" relationship with the Federal Government (as it again argues here). Rather, Tyson's problem was "the absence of any evidence of delegated authority or a principal/agent relationship at all." App.13. And in this Court, Tyson's problem is that it seeks certiorari from a decision that rests on a faithful application of the federal-officer-removal statute and cases like *Watson*.

Recognizing that there is no split to address and failing in its attempt to demonstrate any conflict with this Court's precedents, Tyson repeatedly—and badly—overexaggerates the supposed importance of this issue. Even Tyson concedes the exceptionally unique facts under which this case arises, proving that

any decision would be a ticket for one ride only. So it prophesizes (over and over) that the sky will fall during the next national crisis should this Court not intervene to judicially rewrite the federal-officer-removal statute. Were that true, one would expect much of the private sector to have joined Tyson's effort to gain this Court's review. Yet not a single amicus has come to Tyson's aid.

Ultimately, Tyson's petition is directed to the wrong body: not to this Court, but to Congress. And just as Tyson vigorously lobbied the President to issue what became Executive Order 13917—even writing an aggressive initial draft—Tyson is free to lobby Congress to amend the federal-officer-removal statute so that mere "strong encouragement" qualifies for a federal forum. But under the statute as currently written and this Court's well-established precedent, the Fifth Circuit (like the Eighth Circuit) properly applied the law.

The petition should be denied.

STATEMENT

I. Factual Background

A. As a result of Tyson's failure to institute protective measures, Plaintiffs contracted COVID-19 at Tyson's Texas plants and some later died.

These consolidated appeals involve state-law negligence claims stemming from the beginning days of COVID-19 in the United States. The *Chavez* plaintiffs are the survivors of two deceased workers from Tyson's meatpacking plants[1] in Center and Sherman, Texas, while the *Glenn* plaintiffs are eleven injured workers and a survivor of a deceased worker from Tyson's Center plant. Chavez.App.237–38; Glenn.App.106–08.[2]

All plaintiffs allege that as the coronavirus spread through Texas during the beginning of the pandemic, they or their deceased loved ones contracted COVID-19 while working at the plants—resulting in serious injury or death—because Tyson failed to take reasonable precautions to protect its workers from the virus. Chavez.App.268, 273–82; Glenn.App.106–12. Although Tyson's workers were required to work shoulder-to-shoulder or in close

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[1] For ease, this brief uses the term "meatpacking" to refer both to meatpacking and poultry processing.

[2] "Glenn.App" refers to the record on appeal in Fifth Circuit case No. 21-40622; "Chavez.App" refers to the record on appeal in Fifth Circuit case No. 21-11110.

quarters, Tyson failed to implement social-distancing guidelines, provide appropriate personal-protective equipment, or follow otherwise applicable COVID-19 guidance. Chavez.App.267, 273–82; Glenn.App.109–12.

Worse, although Tyson knew that its employees were showing symptoms of or infected with COVID-19 (or both), Tyson implemented a "'work while sick' policy[.]" Chavez.App.280; *see* Glenn.App.109–12. Tyson wanted its employees to come into work—healthy or not—even incentivizing them with a substantial cash bonus for three months' perfect attendance. Chavez.App.275; Glenn.App.110–12.

By April 2020, the Texas Department of State Health Services identified COVID-19 outbreaks at the Sherman and Center plants. Chavez.App.272–73. Despite these outbreaks, Tyson failed to take corrective measures, including by closing the plants. Chavez.App.279; Glenn.App.109–12.

Meanwhile, business boomed. In April 2020, Tyson placed full-page advertisements in prominent newspapers warning that "the food supply chain is breaking" but assuring that Tyson was both "Feeding the Nation and Keeping [its] Employees Healthy." Chavez.App.271. Yet that same month, Tyson exported 1,289 tons of pork to China—its largest single-month total in over three years. Chavez.App.271. And during the first quarter of 2020, Tyson's exports to China increased by 600 percent. Chavez.App.271.

B. Deferring to state and local governments, the Federal Government's response did not require Tyson to take any action beyond regulatory compliance.

1. Texas's orders required no action from Tyson.

The State of Texas recorded its first case of COVID-19 on March 4, 2020, and Governor Greg Abbott declared a statewide disaster the next week. C.A.Response.Br.8–9. That month, Texas (like States across the country) issued orders anticipating the advancing threat, including deploying the Texas National Guard to bolster the state's healthcare infrastructure, suspending nonessential medical procedures, and waiving regulations on telemedicine. *Id.* The Governor issued an executive order closing schools, limiting indoor gatherings, and prohibiting nursing-home visits. Tex. Governor Greg Abbott, Executive Order GA-14 2–3 (Mar. 31, 2020), https://bit.ly/3e5pTLt. Still, the order explained that businesses providing essential services could continue operating, advising those businesses to follow "Guidelines from the President and the CDC." *Id.* at 3.

2. The Federal Government's response merely required Tyson's compliance with existing regulations.

Meanwhile, the Federal Government mobilized to assist state and local governments and businesses in their COVID-19 responses. From the pandemic's earliest days, the U.S. Surgeon General emphasized

the Federal Government's subordinate role: It was "important for the American people to know that this response, and in all states, *is led by the states*, with consultation from federal partners." *Interview With U.S. Surgeon General Dr. Jerome Adams*, CNN (Mar. 8, 2020), https://cnn.it/3qgZCzw (emphasis added). In tandem with Governor Abbott, the President declared a national emergency on March 13. Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020), https://bit.ly/3H6YHrR.

Within a week, the President, Vice President, and other federal officers held numerous calls with state and business leaders. They spoke with governors and mayors, as well as a litany of corporate executives—including those from Tyson, General Mills, Walmart, Dollar General, McDonald's, and Target. *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, Trump White House Archives (Mar. 15, 17, and 19, 2020), https://bit.ly/3FesI8H; https://bit.ly/3sg7eoo; https://bit.ly/3GRjX4S. These calls involved expressions of gratitude, desire for cooperation, and encouragement to continue normal operations.

On March 16, the White House issued "The President's Coronavirus Guidelines for America." Glenn.App.385–86; Chavez.App.462–63. This two-page document, a version of which was later mailed to every American household, led with this instruction: "Listen to and follow the directions of your state and local authorities." Glenn.App.385; Chavez.App.462. It also contained generic advice like "If you feel sick, stay home" and "Avoid discretionary travel." *Id.*; *see* Kevin

Stankiewicz, *US households are being mailed 'President Trump's Coronavirus Guidelines for America*,' CNBC.com (Mar. 27, 2020), https://cnb.cx/32EgNmo. The document also advised that "[i]f you work in a critical infrastructure industry, … you have a special responsibility to maintain your normal work schedule." Glenn.App.386; Chavez.App.463.

On March 19, the Cybersecurity and Infrastructure Security Agency (CISA) issued guidance identifying the "critical infrastructure" workers referenced in the "Guidelines for America." ROA.Glenn.App.364–65; Chavez.App.441–42. Again recognizing the Federal Government's subordinate role, CISA provided this "initial 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." Glenn.App.364; Chavez.App.441 (emphasis added).

CISA's list of critical-infrastructure workers encompassed huge swaths of the private sector in hundreds of categories, such as auto-repair workers, hotel staff, dentists, restaurant-delivery employees, bank tellers, and—relevant here—meatpacking-plant employees. Glenn.App.368–74; Chavez.App.445–51.

CISA emphasized that its memo was merely "advisory." Glenn.App.365; Chavez.App.442. Instead, "State, local, tribal, and territorial governments are ultimately in charge of implementing and executing response activities in communities under their

jurisdiction[.]" *Id.* By contrast, the Federal Government was "in a supporting role." Glenn.App.365; Chavez.App.442.

Meanwhile, other federal agencies ranging from the Department of Housing and Urban Development to the Federal Aviation Administration issued COVID-19-related guidance to industries within their regulatory ambit. *See* C.A.Response.Br.13–14.

The Department of Agriculture (USDA)—long tasked with performing in-person inspections of meatpacking plants through its Food Safety and Inspection Service (FSIS) division—also issued a statement. Glenn.App.388; Chavez.App.465; 21 U.S.C. § 603 *et seq*. (Federal Meat Inspection Act (FMIA); 21 U.S.C. 455 *et seq*. (Poultry Products Inspection Act (PPIA)). There, USDA "assured" that it was committed to supporting food producers while "ensuring the health and safety of [FSIS] employees[.]" Glenn.App.388; Chavez.App.465. USDA stated that FSIS personnel would "work[] closely with establishment management and state and local health authorities to handle situations as they arise[.]" Glenn.App.388; Chavez.App.465. So "notwithstanding the pandemic[,]" FSIS inspectors continued their ordinary rounds. Glenn.App.341; Chavez.App.418.

FSIS also created a website entitled "Common Questions about Food Safety and COVID-19." USDA (Mar. 18, 2020), https://bit.ly/3srt2O4. There, FSIS confirmed that it would "follow and is encouraging establishments to follow the recommendations of local public health authorities regarding notification of potential contacts." *Id.* FSIS likewise confirmed that

"a county health department or state government [can] shut down an FSIS-regulated establishment" and that FSIS would "follow state and local health department decisions." *Id.* As of this filing, those answers remain unchanged. *Food Supply Chain*, USDA, https://bit.ly/3EjMKgE.

USDA separately requested information from Tyson and other food suppliers about their unfulfilled personal protective equipment (PPE) needs for the near future. Glenn.App.382–83; Chavez.App.459–60. It explained that it would share this information with FEMA "to better inform their understanding of supply needs in the meat and poultry industry." *Id.* But USDA emphasized that Tyson's providing this information was "completely voluntary[.]" Glenn.App.382; Chavez.App.459. It made clear that it did "*not* have access to critical equipment or supplies" and could not "guarantee that the equipment will be available or provided." Glenn.App.383; Chavez.App.460 (emphasis in original).

Meanwhile, keeping with its relentless efforts to keep its workers in its plants, Tyson printed boilerplate "Essential Employee Verification" letters on the "essential services" authorized by the Governor and encouraged by federal officials. Glenn.App.361; Chavez.App.438. Tyson instructed employees to show these letters to local law enforcement if stopped. Glenn.App.361; Chavez.App.438.

In March and early April, the Federal Government signaled it might exert more direct control over specific critical industries, including through the DPA. At a March 18 press briefing, for

example, President Trump forecasted, "We'll be invoking the Defense Production Act, just in case we need it." Monica Alba, *Administration's mixed messaging on Defense Production Act causes confusion*, NBCNews.com (Mar. 25, 2020), https://bit.ly/3FabVoj. But the President never mentioned the food industry, meat processing, or Tyson in his comments. *Id.* Six days later, President Trump tweeted, "The Defense Production Act is in full force, but haven't had to use it because no one has said NO! Millions of masks coming as back up to States." *Id.*; Glenn.App.369. Again, the tweet said nothing about the food-and-agriculture industry.

On April 26, the Occupational Safety and Health Administration (OSHA) and the Centers for Disease Control and Prevention (CDC) issued "interim guidance" for the meatpacking industry that "include[d] *recommended* actions employers can take to reduce the risk of exposure to the coronavirus." *U.S. Department of Labor's OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries*, OSHA Nat'l News Release (Apr. 26, 2020), https://bit.ly/3H6RLLl (emphasis added).

Two days later, President Trump issued Executive Order 13917 ("the Executive Order"), *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). Glenn.App.398–99; Chavez.App.475–76. The Executive Order delegated specific authority (*e.g.*, to require performance of government contracts) 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." *Id.* at 26,313–14.

After the Executive Order's issuance, USDA took two actions.

First, the Secretary of Agriculture sent two letters on May 5, 2020, one to governors and one to private "stakeholders." *See Secretary Perdue Issues Letters on Meat Packing Expectations*, USDA (May 6, 2020), https://bit.ly/3phv5C2. The stakeholder letter stated that "meat and poultry processing plants" "should utilize" the April 26 CDC/OSHA guidance. Letter from Sec'y Sonny Perdue, USDA (May 5, 2020), https://bit.ly/3smojNv.

The letter did not order plants considering reductions in operations or that had recently closed to remain open or reopen. *Id.* Instead, those plants "should submit written documentation of their operations and health and safety protocols" and "resume operations as soon as they are able after implementing the CDC/OSHA guidance for the protection of workers." *Id.*

The letter also reiterated that USDA would work with "state, tribal, and local officials to ensure facilities are implementing practices consistent with the guidance to keep employees safe and continue operations." *Id.* Instead of requiring any action, the Secretary "exhort[ed] [stakeholders] to do this[.]" *Id.* He explained that "further action under the Executive

Order and the Defense Production Act is under consideration and will be taken if necessary." *Id.*

Second, USDA provided questions-and-answers about the Executive Order on its website. As stated in the May 5 Perdue Letter, USDA did not require any action, but instead wrote: "If necessary, the Secretary may issue orders under the Executive Order and the Defense Production Act requiring meat and poultry establishments to fulfill their contracts." *Food Supply Chain*, USDA, https://bit.ly/3EjMKgE. USDA reemphasized that it "does not plan to issue an order to a facility unless necessary." *Id.* As of this filing, these statements remain unchanged. *Id.*

Similarly, a USDA memorandum issued two weeks later referenced only the "potential" or future "possible use of the DPA" under the Executive Order.[3] The United States likewise confirmed that the USDA never exercised its delegated DPA authority. C.A.U.S.Amicus.Br.20 ("the Secretary has not subsequently taken any [ ] action under the authority delegated by the Order").

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[3] USDA and FDA, Memorandum of Understanding Between FDA and USDA Regarding the Potential Use of the Defense Production Act with Regard to FDA-Regulated Food During the COVID-19 Pandemic 1, 3, 4 (May 18, 2020), https://bit.ly/3OHpoIn.

3. A congressional report reveals Tyson's efforts to lobby the President for an executive order immunizing it from liability.

Following the completion of briefing and argument below, a congressional investigation revealed three facts of special relevance here.

First, during the pandemic's first year, "infections and deaths among workers for five of the largest meatpacking companies" (including Tyson) "were significantly higher than previously estimated[.]" Staff Report, Subcomm. on the Coronavirus Crisis, 117th Cong. at 1 (May 12, 2022), https://bit.ly/3Meophb ("Staff Report"). The report found over 59,000 worker infections and "at least" 269 deaths. *Id.*

Second, although Tyson claimed "that reduced plant operations and worker absenteeism were making the food supply chain 'vulnerable,'"[4] this narrative "lacked any basis in fact" and "others in the industry believed it was false." *Id.* at 10 & n.69. Indeed, Tyson's contemporaneous record exports to China proved as much. Chavez.App.271.

Third, in early April, Tyson had vigorously lobbied the President to issue what became Executive Order 13917, even writing an aggressive initial draft

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[4] Tyson repeatedly (at 1, 3, 5, 8, 14, 15, 22, 24, 32) makes the same claim here.

that would have expressly ordered plants to remain open. Staff Report at 27–32.

II. Procedural History

A. Following removal, the district courts remand.

Plaintiffs sued Tyson in Texas state district courts, raising state-law claims including negligence, wrongful death, and survival. Glenn.App.57; Chavez.App.261. Tyson timely removed both cases to federal district court—*Glenn* to the Eastern District of Texas and *Chavez* to the Northern District of Texas. Glenn.App.13–31; Chavez.App.12–31. Tyson asserted similar grounds for removal in both cases: federal-officer removal, 28 U.S.C. § 1442(a)(1); and federal-question jurisdiction, *id.* § 1331. Glenn.App.19–26; Chavez.App.21–30.

The district courts in both cases granted the plaintiffs' motions to remand. Glenn.App.1087–1102; Chavez.App.623–24. The *Glenn* court explained, *first*, that Tyson lacked colorable federal defenses under the PPIA (which did not preempt state common-law workplace safety claims) and the Executive Order. Glenn.App.1090–95. *Second*, it rejected Tyson's arguments that it was "acting under" federal direction, concluding that the Federal Government's close supervision and extensive regulation of Tyson did not equate to "acting under" a federal officer. Glenn.App.1095–99. *Third*, the court held that Tyson could not satisfy "the connection or association element" because, as it had just explained, "there were no federal officer's directions." Glenn.App.1099–1100.

Finally, the court rejected Tyson's invocation of federal-question jurisdiction. Glenn.App.1100–01.

The *Chavez* court later granted remand for substantially similar reasons. Chavez.App.623–24.

B. After consolidating the appeals, the Fifth Circuit affirms and denies rehearing en banc.

Abandoning federal-question jurisdiction, Tyson timely appealed only the orders' federal-officer-removal holding. Glenn.App.1103–04; Chavez.App.626–27; C.A.Opening.Br.7. On Tyson's unopposed motion, the Fifth Circuit consolidated the appeals. Order, No. 21-40622 (Nov. 8, 2021).

After briefing and oral argument—including amicus briefing and argument from the United States in support of Plaintiffs—the Fifth Circuit affirmed. Closely applying this Court's decision in *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142 (2007), the Fifth Circuit addressed only the "acting under" element. It rejected Tyson's arguments on a single ground: "Tyson received, at most, strong encouragement[,]" "suggestion and concern" (App.3), "advice" (App.10) and "exhort[ation]" from the Federal Government, "but it was not directed." App.14. Agreeing with the Eighth Circuit's decision in *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730 (8th Cir. 2021), *pet. for cert. docketed*, No. 22-70, the court concluded that the Federal Government's communications from the beginning of the pandemic "all the way through the issuance of Executive Order 13917" consisted of nothing more than "encouragement to meat and poultry processors to continue operating, careful

monitoring of the food supply, and support for state and local governments." App.14; App.10 n.22 (citing *Buljic*, 22 F.4th at 739).

Tyson's subsequent petition for rehearing en banc was denied without a poll. App.15–16.

REASONS FOR DENYING THE PETITION

Under the federal-officer-removal statute, a private defendant may remove a civil action to federal court when four elements are met: (1) it is a person within the statute's meaning; (2) it has acted pursuant to a federal officer's directions; (3) that act is connected or associated with the alleged conduct; and (4) it has asserted a colorable federal defense. *See* 28 U.S.C. § 1441(a)(1); *see also, e.g.*, *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc); *Maglioli*, 16 F.4th at 404.

For several reasons, the Fifth Circuit's straightforward, unexceptional conclusion that Tyson failed to satisfy the "acting under" element—thus depriving the federal courts of federal-officer-removal jurisdiction—does not warrant review. To begin, far from a split of authority, the Fifth and Eighth Circuits have unanimously rejected Tyson's identical arguments (as have other circuits considering similar pandemic-regulation arguments). What is more, the decision below was correct, faithfully applying this Court's opinion in *Watson* and its antecedents. And Tyson's strained effort to gain this Court's attention badly overexaggerates the fact-intensive issue's importance and ignores the alternative bases for affirmance.

I. There is no split of authority.

Tyson cannot dispute that the decision below does not "conflict with the decision of another United States court of appeals[.]" Sup. Ct. R. 10(a). Two courts of appeals have independently considered Tyson's identical arguments on near-identical records and unanimously concluded that "the record simply does not bear out Tyson's theory" (App.3), but rather "tells a different story." *Buljic*, 22 F.4th at 739.

That story is that "none" of the federal-government communications Tyson cites (at 5–17, 24–33):

- The President's proclamation of a national emergency;
- calls and emails between federal officers and Tyson;
- the federal designation of meatpacking as "critical infrastructure";
- the President's tweet;
- guidance from the CDC and OSHA;
- the Vice President's statement encouraging food industry employees to do their jobs;
- Tyson's coordination with FSIS and other federal agencies;
- the Executive Order; or
- the USDA's May 5 letters—

"constituted an 'order' or a 'directive'" under this Court's precedents. App.13; *see* App.8–14, *Buljic*, 22 F.4th at 738–42.[5] Nor did the Federal Government

[5] Although the Eighth Circuit did not decide whether the Executive Order "contained a sufficient directive," it expressed

ever delegate authority to or exercise DPA authority over Tyson or its counterparts. App.13; *Buljic*, 22 F.4th at 739, 742 n.6. Rather, Tyson was only "subject to heavy regulation" in the context of an emergency—nothing more. App.10; *accord Buljic*, 22 F.4th at 739–40.

The consensus is not limited to two appellate panels. Tyson sought rehearing en banc from both the Fifth and the Eighth Circuits—some thirty active circuit-court judges—and drew not a single request for polling, much less a dissent. App.15–16; *Buljic*, 2022 WL 521355, at *1 (Feb. 22, 2022).

What is more, *Glenn* and *Buljic* are consistent with other COVID-19 federal-officer-removal opinions from the Third, Fifth, Seventh, and Ninth Circuits, which unanimously rejected similar claims brought by nursing homes who argued that various federal communications "deputize[d]" them as federal agents. *Maglioli*, 16 F.4th at 406 (3d Cir. 2021); *Mitchell v. Advanced HCS, LLC*, 28 F.4th 580, 589–91 (5th Cir. 2022); *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210, 1212–13 (7th Cir. 2022); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679 (9th Cir. 2022), *cert. denied*, 143 S. Ct. 444 (2022).

To create the specter of contrary judicial dispositions, Tyson points (at 24) to "multiple decisions" that came out the other way. Those "multiple decisions" are two opinions from a single district-court judge outside the Fifth and Eighth

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doubt that it did, given that "no evidence in the record" showed that USDA exercised its delegated authority. *Id.* at 741 n.6.

Circuits, issued before *Buljic* and *Glenn*: *Johnson v. Tyson Foods, Inc.*, No. 21-cv-01161, 2021 WL 5107723 (W.D. Tenn. Nov. 3, 2021), and *Reed v. Tyson Foods, Inc.*, No. 21-cv-01155, 2021 WL 5107725 (W.D. Tenn. Nov. 3, 2021)). And they expressly "adopt[ed] the reasoning of" two district-court opinions the Fifth Circuit later vacated under *Glenn*.[6]

The unanimous appellate consensus is not surprising, as courts have affirmed that the "judicial Power of the United States" may not be asserted over a matter "that belongs to the states" through an exercise of power "Congress ha[s] not given" in the federal-officer-removal statute. *Maglioli*, 16 F.4th at 400. COVID-19, after all, did not create an "exception to federalism." *Id.* Nor did the pandemic in of itself rewrite federal statutes, as this Court rightly understands. *E.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, — U.S. —, 142 S. Ct. 661, 665 (2022). Indeed, this Court recently declined the opportunity to upend its federal-officer-removal precedents in light of the pandemic by denying certiorari in *Saldana*. 143 S. Ct. 444 (2022).

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[6] *Johnson*, 2021 WL 5107723, at *4 (citing *Wazelle v. Tyson Foods, Inc.*, No. 2:20-CV-203-Z, 2021 WL 2637335, at *5 (N.D. Tex. June 25, 2021), *vacated & remanded*, No. 22-10061, 2022 WL 4990424 (5th Cir. Oct. 3, 2022); *Fields v. Brown*, 519 F. Supp. 3d 388, 393 (E.D. Tex. 2021), *vacated & remanded*, No. 21-40818, 2022 WL 4990258 (5th Cir. Oct. 3, 2022)); *Reed*, 2021 WL 5107725, at *4 (same).

II. Far from conflicting with this Court's federal-officer-removal jurisprudence, the opinion below faithfully applied *Watson*.

Nor does the decision below present a conflict with any decision from this Court. Sup. Ct. R. 10(c). To the contrary, the Fifth Circuit (like the Eighth) faithfully applied *Watson* in rejecting Tyson's argument (at 24) that its "relationship with the federal government" somehow "changed with the onset of COVID-19[.]" The only "profound confusion" (at 21) over the federal-officer-removal doctrine is in Tyson's misunderstanding of the statute and this Court's jurisprudence.

A. This Court's precedents require some order, directive, or delegation of authority to perform a governmental task.

In *Watson*, this Court rejected Philip Morris's argument that it acted under the Federal Trade Commission when—without contract, payment, or principal/agent arrangement—it assumed cigarette-testing activities previously performed by the FTC. App. 11 (citing *Watson*, 551 U.S. at 153–56). Reviewing the statute's 200-year history, the Court concluded that its purpose "is to protect the Federal Government from the interference with its operations" that would occur if "officers and agents of the Federal Government" acting "within the scope of their authority" were tried in state court. 551 U.S. at 150 (citation and quotation marks omitted). The statute thus equally applies to "private persons who lawfully

assist the federal officer in the performance of his official duty." *Id.* at 151 (same).

But a private entity is "acting under" a federal officer only if its actions "involve an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior" in a "special relationship" of "subjection, guidance, or control." *Id.* at 152, 157 (emphasis in original). The Court left no doubt on this point. To "help" or "assist" the Federal Government through mere "*compliance* with the law"—or simple "*acquiescence* to an order"—is not enough. *Id.* at 152 (same). Nor is it enough for an entity to be "highly supervised and monitored" by the Federal Government, even when the governing orders, laws, rules, and regulations are "highly complex" or "highly detailed." *Id.* at 152–53.

Rather, a private entity is "acting under" a federal officer where (1) there is an actual "delegation of authority"—as may be evidenced by a contract, payment, employer/employee relationship, or principal/agent arrangement (*id.* at 157)—and (2) the entity then assists in the officer's "performance of his official duty" (*id.* at 143) by performing the delegated "governmental task[]." *Id.* at 153. The Court explained that "neither Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so." *Id.* at 157.

Watson identified *Maryland v. Soper*, 270 U.S. 9 (1926), as illustrative. *Id.* at 149–50, 152. There, chauffeur William Trabing was a government contractor "employed by the federal prohibition director" to assist federal prohibition officers in the

pursuit of criminal suspects—a quintessential law-enforcement function. *Soper*, 270 U.S. at 24; *see also id.* at 27 (Trabing was "a chauffeur of the Reliable Transfer Company, *engaged and employed by Edmund Budnitz, federal prohibition director of the state of Maryland*, in the capacity of chauffeur for the prohibition agents" (emphasis added)); *contra* Pet.26 (inaccurately asserting that Trabing "worked for Reliance Transfer Company instead of the federal government"). As a private contractor performing a federally delegated governmental task, Mr. Trabing "had 'the same right to the benefit of' the removal provision as did the federal agents" when facing state indictment related to their pursuit of illegal distilleries. *Watson*, 551 U.S. at 150 (quoting *Soper*, 270 U.S. at 30).

By contrast, Philip Morris's voluntary cigarette-testing activities—though previously carried out by the FTC, and under highly detailed rules and extensive supervision—reflected mere "regulation, not delegation." *Id.* 157. Given the absence of delegated authority that might be shown by "any contract, any payment, any employer/employee relationship, or any principal/agent arrangement[,]" Philip Morris's relationship with the FTC was not "distinct from the usual regulator/regulated relationship." *Id.*

B. No federal communication to Tyson constituted an order, directive, or delegation of authority, but mere encouragement, suggestion, and concern.

So here. Closely applying *Watson* in a detailed opinion and finding no "delegated federal authority" (App.12), the Fifth Circuit correctly rejected each piece of evidence Tyson cites, beginning with its claim that the Federal Government's "critical infrastructure" designation alone satisfied the "acting under" element. App.8; *accord Buljic*, 22 F.4th at 739.

The Fifth Circuit properly explained that CISA's "critical infrastructure" guidance was "nonbinding" and, by its terms, deferred to state and local authorities, who "remained the ultimate decisionmakers on public safety matters." App.9; *see* Glenn.App.385; Chavez.App.462. Given that deference, the guidance amounted only to "strong advice" that "certain industries should keep operating in spite of COVID-19 risks," which did not establish the requisite subordinate relationship. App.10.[7] Every

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[7] In so ruling, the Fifth Circuit later reversed three other district courts that Tyson and another food producer wrongly persuaded with the "critical-infrastructure alone" argument. *Wazelle*, 2021 WL 2637335, at *5 (finding that "Defendants were 'acting under' the directions of federal officials when the federal government announced a national emergency on March 13, 2021 [*sic*] and designated Tyson Foods as 'critical infrastructure'"), *vacated & remanded*, 2022 WL 4990424 (citing *Glenn*); *Fields*, 519 F. Supp. 3d at 393 ("the court now finds that, based on the critical-infrastructure designation, defendants were 'acting under' the directions of federal officials when the federal

other circuit to consider Tyson's standalone "critical infrastructure" argument agrees, *see* App.9–10 & nn.20–21; *Buljic*, 22 F.4th at 739–40; *Maglioli*, 16 F.4th at 403; *Saldana*, 27 F.4th at 685—perhaps explaining why Tyson later sought to wish away the argument. C.A.Reply.Br.11.[8]

The Fifth Circuit also concluded that every other federal communication Tyson cited was insufficient to establish the requisite special relationship, 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

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government announced a national emergency on March 13, 2021 [*sic*]"), *vacated & remanded*, 2022 WL 4990258 (citing *Glenn*); *Garcia v. Swift Beef Co.*, No. 2:20-CV-263-Z, 2021 WL 2826791, at *5 (N.D. Tex. July 7, 2021) ("the Court finds Defendants were 'acting under' the directions of federal officials when the federal government announced a national emergency on March 13, 2021 and designated Swift Beef as 'critical infrastructure'"), *vacated & remanded*, No. 22-10050, 2022 WL 17492268 (5th Cir. Dec. 7, 2022) (citing *Glenn*).

[8] Tyson's language speaks for itself. *See* Glenn.App.19 ("Tyson's facilities—including the Center facility—were operating as critical infrastructure of the United States that had been instructed by the President to continue operations both before and after the Food Supply Chain Resources executive order and the Secretary of Agriculture's related orders. *As such, Tyson was 'acting under the direction of a federal officer*,' 28 U.S.C. § 1442(a)(1), and 'helping the Government to produce an item that it needs" for the national defense under the DPA'") (emphasis added); Chavez.App.21 (same); *see also Fernandez v. Tyson Foods, Inc.*, Joint Notice of Removal, 2020 WL 5894586 (N.D. Iowa Oct. 2, 2020) (same).

tweet, guidance from the CDC and OSHA, and the Vice President's statement encouraging food industry employees to do their jobs." App.13.

Rightly so: "these communications merely encouraged Tyson to stay open." App.13. Having considered precisely the same facts, the Eighth Circuit agreed, holding that the Federal Government "did not direct or enlist Tyson to fulfill a government function or even tell Tyson specifically what to do." *Buljic*, 22 F.4th at 741. Tyson thus had shown no evidence "at all" of delegated authority. App.13.

Arguing otherwise, Tyson claims (at 27; *see also* 23, 24, 30, 33) that the "critical question" is only "whether the private party helped the federal government accomplish something it needed done[.]" But *Watson* expressly rejected Tyson's formulation. Just as the Federal Government "needs" residents to pay taxes, passengers to refrain from smoking on airplanes, and prisoners to obey orders (each cited in *Watson*, 551 U.S. at 152)—and likewise "needed" food producers and other industries to continue business during a national emergency—mere compliance does not "help" or "assist" federal authorities in the manner the statute contemplates. *Id.* By omitting *Watson*'s requirement of a *delegatory* order or directive—a standard conspicuously absent from Tyson's petition—Tyson is no different from Philip Morris in its quest to "expand the scope of the statute considerably," wrongly "bringing within its scope state-court actions filed against private firms in many highly regulated industries." *Id.* at 153.

C. The Federal Government never delegated authority to or exercised authority over Tyson, including under the Executive Order.

1. The Executive Order solely delegated authority to the Secretary of Agriculture, who issued no directive.

The same is true for the Executive Order and the Secretary of Agriculture's May 5 letter. To begin—and as the Fifth Circuit correctly explained—the Order "had no immediate legal effect" because it "merely delegated the President's DPA authority to the Secretary of Agriculture." App.13; *accord Buljic*, 22 F.4th at 741 n.6; *see* Glenn.App.398–99 (Executive Order). Tyson tellingly ignores that the Order's effect was merely delegatory. *See* Pet.25–34.

With that authority, the Secretary then advised industry leaders that "meat and poultry processing plants" "*should* utilize" the April 26 CDC/OSHA guidance and, for plants that had closed, "*should* resume operations as soon as they are able after implementing the CDC/OSHA guidance[.]" Letter from Sec'y Sonny Perdue, USDA (May 5, 2020), https://bit.ly/3smojNv (emphasis added).

But the Secretary expressly did *not* order meatpacking plants to do anything. Rather, he merely "exhort[ed]" stakeholders to follow these instructions. *Id.* Although the Secretary also stated that "further action under the Executive Order and the Defense Production Act is under consideration[,]" that statement merely confirmed that neither the

Executive Order nor the May 5 Perdue Letter compelled Tyson to do anything at that moment. *Id.*; *see* App.13–14. And the mere threat of a future directive is insufficient to establish a delegation of authority such that a private person is "acting under" a federal officer. *Cf. Watson*, 551 U.S. at 153–57.

Apart from the letter's text, three additional facts confirm that the letter was (in the Fifth Circuit's words) "at most" (App.3) "nonbinding" (App.6) and "not an order." App.14. *First*, USDA's question-and-answers webpage referred only to potential future exercise of the DPA "'if necessary,' which it never was." App.14; *see Food Supply Chain*, USDA, https://bit.ly/3EjMKgE. *Second*, the USDA memorandum issued two weeks later referenced only the "potential" or future "possible use of the DPA" under the Executive Order.[9] *Third*, even the United States—speaking for the Federal Government in this litigation—agreed: "the Secretary has not subsequently taken any [ ] action under the authority delegated by the Order." C.A.U.S.Amicus.Br.21.

Even more, the United States confirmed the broader fact that there was no "order or directive—formal or otherwise—requiring Tyson to perform a federal task." *Id.* 20. As *Watson* noted, federal agencies do not "normally delegate legal authority to private

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[9] USDA and FDA, Memorandum of Understanding Between FDA and USDA Regarding the Potential Use of the Defense Production Act with Regard to FDA-Regulated Food During the COVID-19 Pandemic 1, 3, 4 (May 18, 2020), https://bit.ly/3OHpoIn.

entities without saying that they are doing so." 551 U.S. at 157.

Facing this irrefutable evidence, Tyson tries a public-policy argument (at 25, 28, 33): it should not be penalized (in its view) for following the Federal Government's encouragement, as opposed to some order or directive.[10] That effort is misdirected. Just as Tyson lobbied the Trump Administration, Tyson is free to lobby Congress to amend the federal-officer-removal statute so that mere "strong encouragement" (App.3) qualifies for a federal forum. It can even provide draft statutory text, again as it provided draft language for the proposed executive order. But under the *existing* statute that requires a private party to "*act under*" a federal officer, the Fifth Circuit's conclusion is correct.

2. Tyson's coordination with federal agencies amounted only to compliance with regulations.

Further applying *Watson*, the Fifth Circuit correctly rejected Tyson's argument that its "relationship with the federal government was special" as compared to other private entities because of its coordination with FSIS and other federal agencies. App.10; *see* Pet.24, 28. True, Tyson's coordination "grew more complex" in efforts to

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[10] Of course, Plaintiffs contend that Tyson did *not* follow the Federal Government's encouragement, which advised companies like Tyson to follow the CDC/OSHA guidance and predecessor CDC guidance. Chavez.App.279, 463; Glenn.App.111, 386.

mitigate danger to both its employees and FSIS inspectors. App.10. But that increased coordination "only shows that Tyson was subject to heavy regulation—not that it was an agent of the federal government." App.10; *see also* App.10–11 (citing *Watson*, 551 U.S. at 153).

Following a detailed comparison of these facts with those in *Watson* (App.10–13), the court accurately concluded that Tyson's case was even weaker than Philip Morris's: although Tyson was correct that "a voluntary relationship isn't incompatible with delegated federal authority," Tyson's problem was "not that Tyson's relationship with the federal government was voluntary." App.13. Rather, its "problem is the absence of any evidence of delegated authority or a principal/agent relationship at all." App.13. Speaking volumes, Tyson omits the court's conclusion from its petition.

Tyson thus is wrong (at 29): The court's analysis was indeed "a functional, not formal, inquiry" that nowhere required "private parties and the government sign[] on some dotted line." Rather, Tyson—like Philip Morris—had simply failed to provide evidence of "any delegation of legal authority" sufficient to establish the required relationship. *Watson*, 551 U.S. at 156. "Nor is there evidence" here (again as with Philip Morris) "of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." *Id.*

In the end, Tyson's dispute is not with the decision below. It is with *Watson* itself.

Indeed, there's a reason the "archetypal" acting-under case is "when a government contractor is sued" (*Mitchell*, 28 F.4th at 589): a contract is evidence of the "special relationship" required. *Watson*, 551 U.S. at 157. Given the relative paucity of federal-officer-removal cases outside that paradigmatic context, Tyson reaches back a century to *Soper* for support (at 2, 26, 30, 31). Yet even there, Tyson errs. In *Soper*, Mr. Trabing was a federal-government contractor employed to assist law-enforcement officers. 270 U.S. at 24, 27. But Tyson can point to no employer/employee (or comparable) relationship with the Federal Government.

Accordingly, *Soper* and *Watson* also weigh against Tyson's governmental-task argument (at 30–33), which faults the Fifth Circuit for observing that Tyson's case is harder than Philip Morris's. As the court explained, meatpacking "has always been a private task—not a governmental one"—while Philip Morris's cigarette-testing "had previously been performed by the government." App.12.

First, *Watson*'s "basic governmental task" language addressed why "close supervision is sufficient to turn a private *contractor* into a private firm 'acting under' a Government 'agency'" but does not "do the same when a company is subjected to intense regulation." 551 U.S. at 153 (emphasis added). The answer? "[T]he private *contractor* in such cases is helping the Government to produce an item it needs" and thus "goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.* (emphasis added). Thus, where the Federal Government has delegated authority—for example,

through a contract—its close supervision of the private entity may establish the "acting under" relationship. *See id.* But as explained, there was no such delegation here. App.13; *Buljic*, 22 F.4th at 739–42.

Second, even assuming such a delegation and that the pandemic expanded the definition of "basic governmental task" to include meatpacking as Tyson posits (at 30–33), how would the Federal Government direct a plant to carry out that task? Simply by "issu[ing] orders under the Executive Order and the Defense Production Act requiring meat and poultry establishments to fulfill their contracts." *Food Supply Chain*, USDA, https://bit.ly/3EjMKgE; *see* 50 U.S.C. § 4511(a). But it is undisputed that the Secretary issued no such order. *See* Pet.24–33; App.6, 14; *Buljic*, 22 F.4th at 741 n.6; C.A.U.S.Amicus.Br.20–21. The federal-officer-removal statute cannot now do what the Federal Government did not.

Were there any doubt that the Federal Government knows how to issue orders and exercise DPA authority to "accomplish something it need[s] done" (at 27), one need look no further than the very crisis here. The President exercised his DPA authority to order the production of ventilators, prefilled injectors for the COVID-19 vaccine, and the vaccine itself.[11] As those orders reflect, Congress indeed

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[11] HHS Announces Ventilator Contract with GM Under Defense Production Act, HHS (Apr. 8, 2020), https://bit.ly/3z8W7z6; DFC Approves $590 Million Loan to ApiJect to Expand Infrastructure and Deliver Critical Vaccines in Response to the COVID-19 Pandemic, U.S. Int'l Dev. Fin.

granted the President "flexibility" in the DPA, as Tyson claims (at 2, 28, 29). With that "flexibility," the Federal Government could have ordered Tyson to fulfill its contracts. It could have ordered Tyson to produce food for domestic consumption but not for export. Or when Tyson shut down various Iowa plants, it could have ordered Tyson to reopen.[12] But the Government did nothing of the sort.

Yet Tyson knows all this. Under its proposed executive order, the President himself would have unequivocally directed "that critical infrastructure food companies continue their operations to the fullest extent possible both during and after the COVID-19 crisis[.]" Staff Report 28. The actual Executive Order contained no such directive.

D. The Fifth Circuit did not require a party's refusal until coerced, but only what the statute requires: an actual order or directive.

Bereft of any such delegation or order, Tyson cites (at 2, 28, 29) the Fifth Circuit's almost-fifty-year-old decision in *Eastern Air Lines, Inc. v. McDonnell Douglas Corporation*, 532 F.2d 957 (5th Cir. 1976), to

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Corp., (Nov. 19, 2020), https://bit.ly/3FhtIJq; Biden Administration Announces Historic Manufacturing Collaboration Between Merck and Johnson & Johnson to Expand Production of COVID-19 Vaccines, HHS (Mar. 2, 2021), https://bit.ly/3vTmSqq.

[12] *See Buljic*, 22 F.4th at 737, 741; *Tyson to temporarily close Iowa pork plant after outbreak*, The Associated Press (May 29, 2020), http://bit.ly/3HaRxWH.

argue that the Federal Government's communications informally "jawbon[ed]" Tyson to continue operations.

Eastern Air Lines, of course, never addressed the federal-officer-removal statute. But even putting that aside, its facts are worlds away. There, the Federal Government first threatened "the entire aviation industry" that it would order DPA prioritization of existing military *contracts* for airplanes over all private contracts. 532 F.2d at 981–83. Then, "[a]s a quid pro quo" for not formally invoking the DPA, "the Defense Department insisted that particular military orders be given preference on an individual and informal basis"—an arrangement the industry accepted. *Id.* at 983. Based on the evidence, the Fifth Circuit concluded that "*where compulsion is actually present*, a vendor is justified in complying with a government request for priority, no matter how informally presented or politely phrased that demand may have been." *Id.* at 995 (emphasis added). But here, no comparable contract—let alone actual "compulsion"—was present, as underscored by the permissive language of the federal communications Tyson received. *See* App.5–6, 13–14; *Buljic*, 22 F.4th at 740–42.

Indeed, if the Federal Government had formally or informally invoked the DPA and coerced Tyson's conduct, Tyson should be able to show that its behavior changed as a result. *Eastern Air Lines* again provides an example, where the aviation industry was forced (to its economic detriment) to prioritize military contracts over civilian contracts. 532 F.2d at 983, 986. But at no point in this litigation has Tyson ever pointed to a time when its actions shifted as a result

of any "order." And if Tyson "remained operational . . . because the federal government told it to do so" (at 28), how could it unilaterally decide to close various Iowa plants? *Buljic* is right: Tyson's actions prove that it always "retained complete, independent discretion over the continuity of its operations." 22 F.4th at 741; *see also* App.3 (*Tyson* "chose to keep its poultry processing plants open"). Tyson's actions were its own.

Having shown no order (formal or informal), directive, contract, payment, "delegated authority[,] or a principal/agent relationship at all" (App.13), Tyson pervasively caricatures the decision below: it "permits removal only if the private party first refuses to heed the government's calls for help" (at 25) and thus "creates perverse incentives for the next national crisis" (at 21). *See also* Pet.4, 21, 26, 30, 33.

Hardly. No such requirement exists in the decision below or in *Buljic*. Nor does such a requirement extend from "the Fifth Circuit's logic" (at 25). Rather, consistent with *Watson* and its antecedents, the court simply required "*any* evidence of "delegated authority or a principal/agent relationship" (App.13) or of Tyson's being "directed" by the Federal Government through, for example, an exercise of DPA authority. App.14 (emphasis added); *Watson*, 552 U.S. at 157; *Buljic*, 22 F.4th at 741. But as explained, none exists.

So it is not the Fifth Circuit's decision that would "create[] perverse incentives that will come back to haunt the federal government in the next national emergency" (at 30). Instead, it is a contrary ruling that would ratify Tyson's conduct here: with

baseless claims that the food-supply chain was "vulnerable," *Tyson* lobbied the President to issue an executive order to immunize itself from liability under the DPA, wrote an initial draft, and now claims it continued operations by "acting under" the Executive Order and the Secretary's permissive letter. Staff Report at 27–32. Meanwhile, tens of thousands of meatpacking-plant workers contracted COVID-19 and hundreds died—Plaintiffs among them. Staff Report at 27–31. But Tyson achieved record exports. Chavez.App.271.

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Ultimately, there is no basis for review of an opinion that rests on a faithful application of the federal-officer-removal statute and this Court's precedents.

III. This Court's review otherwise is unwarranted.

Tyson also greatly overstates the importance of the issue presented, given the unusual facts and fact-bound conclusions here, the absence of any support for Tyson's petition, and Tyson's sole argument that the decision below was a misapplication of a properly stated rule of law. And the alternative bases for disposal also make this case an especially poor vehicle to revisit the "acting under" element.

A. Tyson vastly overstates the importance of this issue.

1. The decision below addresses exceptionally unique facts that will have little bearing on future cases.

Even Tyson concedes (at 28) the highly unusual combination of facts here. These unique facts consist of a once-in-a-century pandemic, a flurry of state and federal calls, emails, coordination, and intensified supervision responding to that once-in-a-lifetime event, baseless claims of an endangered food supply, and a private entity that now seeks federal jurisdiction under an order the entity itself drafted and requested.

These exceptionally unique facts are not only unlikely to recur, but also lent themselves to particularized, fact-sensitive conclusions from both the Fifth and Eighth Circuits. App.8–14; *Buljic*, 22 F.4th at 738–42. Were this Court to grant review, its decision would be a ticket for one ride only.

2. The total absence of any amici supporting Tyson's petition underscores its minimal importance.

As if sheer repetition could make it so (at 3–4, 21, 30, 33–34), Tyson wildly inflates the importance of this case as it relates to the next national emergency. Nobody disputes that there will be other national crises triggering adaptation, coordination, and responses from State and Federal Governments in

conjunction with the private sector. But if leaving these decisions 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" (as Tyson claims at 34 (emphasis in original)), one would expect much of the private sector—or at least *some* of it—to come to Tyson's aid in support of its petition.

Far from it, Tyson was unable to muster even a single amicus brief supporting its petition. That total absence of amicus support suggests either that the issue is not truly of any great importance to the next national crisis, or that no one who supports Tyson's position thinks this case is an appropriate vehicle for this Court's review (or both).

Below (at C.A.Reply.Br.2, 8 n.2), Tyson vaguely suggested that the United States perhaps shared its view under the prior Administration. But that unsupported claim is conclusively undermined by the current Administration's COVID-19 litigation positions, which have countenanced few (if any) limitations on federal authority, let alone "unduly cramped" readings of governing statutes (at 22). *See, e.g.*, *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665 (rejecting the United States' arguments construing Occupational Safety and Health Administration statutes to authorize vaccine mandate); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, — U.S. —, 141 S. Ct. 2485, 2486–87 (2021) (rejecting United States' arguments that Public Health Service Act authorized

CDC to impose a nationwide moratorium on evictions).

But again, if Tyson's spin on the federal-officer-removal doctrine is as "commonsense" and the courts of appeals' conclusions as "profound[ly] confus[ed]" as Tyson asserts (respectively at 26, 21), then one would expect its private-sector counterparts—at least someone from the meatpacking industry—to have appeared. So in its concocted parade of horribles, Tyson marches alone.

3. In the end, Tyson merely asks for garden-variety error correction under an unusually fact-intensive scenario.

Ultimately, Tyson's petition presents a garden-variety claim that the decision below was a "misapplication of a properly stated rule of law"—a claim for which a "petition for a writ of certiorari is rarely granted[.]" Sup. Ct. R. 10. Tyson makes no serious argument that the Fifth (or Eighth) Circuit incorrectly stated the rule of law. *Compare* Pet.22–24, *with* App.8, 10–11 *and Buljic*, 22 F.4th at 738–39. Tyson simply disagrees (at 24–33) with the courts' application of that rule. But that mere disagreement is not a reason for review.

B. The district courts' identified alternative bases for affirmance also counsel against review.

Although no more is necessary to deny review, Tyson's petition also ignores the independent bases for affirmance. In their orders of remand, the district

courts below correctly concluded that Tyson could not establish federal-officer-removal jurisdiction because two additional requirements are unmet: Tyson has no colorable federal preemption defense under the PPIA or the DPA, and Plaintiffs' claims have no "connection or association" with the federal officer's alleged directions. Glenn.App.1090–95; Chavez.App.623–24; *see Latiolais*, 951 F.3d at 296. Thus even if the Fifth Circuit somehow erred in its "acting under" analysis (and it did not), those separate conclusions still require remand.

As its title indicates, the Poultry Products Inspection Act is a poultry-*inspection* statute. 21 U.S.C. § 455 *et seq*. It aims solely to "protect consumers from unsafe meat, not to protect workers from disease." Glenn.App.1092. As a result, Tyson's claim that the PPIA preempts all state worker-safety tort claims within the four walls of a meatpacking establishment was "premised on a misunderstanding of the PPIA's breadth." *Id*. Try as it might, Tyson could point to "no evidence that Congress intended the PPIA to displace state-law actions relating to workplace safety." Glenn.App.1092. Because "nothing in the statutory language or in the structure and purpose of the PPIA suggest an intent" to preempt state-law workplace-safety negligence claims, the district courts correctly held that the PPIA provided no colorable federal defense. Glenn.App.1094; *accord* Chavez.App.623–24 (citing *Glenn* district-court opinion).

Tyson likewise failed to establish the DPA as a colorable federal defense. Glenn.App.1094; *see* Chavez.App.623. Rather, as the *Glenn* court rightly

noted, Tyson's DPA-preemption argument appeared to have been "made for the sole purpose of obtaining jurisdiction." Glenn.App.1094–95.

Finally, the district courts correctly concluded that Tyson failed to satisfy the "connection or association" element. "[T]here 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." Glenn.App.1100; *see also* Chavez.App.623–24. Moreover, nowhere in the Federal Government's communications, statements, or interactions was Tyson ordered or otherwise delegated federal authority obligating or requiring it to keep its plants open, make representations (fraudulent or otherwise) to its employees, refrain from providing PPE, or omit or fail to enforce social-distancing measures and reasonable safety measures to protect workers. So the alleged tortious conduct related to Tyson's decision not to close its plants was neither connected nor associated with a federal officer's directions.

For these independent reasons, the decisions below properly concluded that Plaintiffs' claims belong in state court. They provide yet another basis for denying Tyson's petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

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