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

REPLY BRIEF

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REPLY BRIEF

Respondents can neither defend the actual reasoning of the Fifth Circuit's decision nor obscure the pressing need for further review. The Fifth Circuit denied Tyson a federal forum because Tyson was never expressly "told that it *must* keep its facilities open," and was instead merely "exhorted" and "encouraged" to do so via an Executive Order and threats of further action in the event of non-compliance. Pet.App.3, 13-14. That decision to limit federal-officer removal to cases of explicit government coercion cannot be squared with the statutory text or this Court's precedents and would create perverse incentives. If even an Executive Order and a written warning expressly threatening "further action" do not suffice to show federal direction, then private parties desiring the protection of a federal forum will have no choice in the next national emergency but to refuse voluntary cooperation. At the very point that the federal government needs all hands on deck and would welcome volunteers, the decision below promises non-cooperation unless and until formal compulsory orders are issued.

The Fifth Circuit compounded the problems by positing that Tyson is not entitled to removal because producing food "has always been a private task—not a governmental one," Pet.App.12. Confining federal-officer removal to those who assist with purely governmental tasks not only defies text and precedent, but eviscerates the statute's protections for private parties since our free-enterprise system rests on the premise that the government will normally leave most tasks—even critical ones—to the private sector.

Respondents have no meaningful answer to those problems. They make no attempt to defend the Fifth Circuit's explicit-coercion requirement, choosing instead to pretend that the court did not mean what it clearly said. And while they at least acknowledge the Fifth Circuit's governmental-task holding, they fail to reconcile it with this Court's precedent. Respondents instead focus their attention almost exclusively on the Fifth Circuit's factual analysis, ignoring the legal errors that skewed that analysis from start to finish. Moreover, respondents' efforts to dismiss this case as limited to its facts and seeking a "COVID-19 exception to federalism," BIO.1, are belied by the Fifth Circuit's subsequent dismissal of a removal effort involving the oil industry and World War II-era executive orders. Despite that wholly different context, the Fifth Circuit considered the decision below controlling, relying on it to hold in an unpublished opinion that the oil producers did not merit a federal forum.

The Fifth Circuit evidently views the decision below as its final word on federal-officer removal. But that final word is wrong. When private parties act at the behest of federal officers to discharge responsibilities the federal government would otherwise have to shoulder itself and are sued for their troubles, they are entitled to a federal forum. That is true whether they were impressed into service, exhorted via Executive Order, or volunteered. This Court should intervene and correct the decision below before its perverse incentives spread any further.

ARGUMENT

I. The Decision Below Is Clearly Wrong And Reflects Serious Confusion Over Federal-Officer Removal Doctrine.

The federal-officer removal statute "promises a federal forum" to those who take action at the federal government's behest and are then sued for their efforts. *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S.Ct. 1532, 1536 (2021). That federal forum is particularly vital when private parties are caught between directives from the federal government and cross-cutting instructions from state and local officials. That was precisely the dynamic in the early days of the pandemic, when state and local efforts to restrict the operations of meat- and poultry-processing plants threatened the national food supply. As the President explained in Executive Order 13917, "recent actions in some States [that] have led to the complete closure of some large [food] processing facilities … threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national [COVID-19] emergency." *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, 26,313 (Apr. 28, 2020). Caught between those conflicting federal and state impulses, Tyson followed federal directives and furthered federal objectives—and was then sued in state court as a result.

The suits at issue seek to retroactively impose on Tyson state-law duties that would have been even more antithetical to federal objectives than the state

and local restrictions that precipitated the President's Executive Order. That makes the promise of a federal forum especially crucial to guard against state courts retroactively elevating local interests above the national priorities Tyson was enlisted to serve in the midst of a national emergency. Yet the Fifth Circuit denied Tyson a federal forum, reasoning that the government never explicitly told Tyson "it *must* keep its facilities open" and that the meat- and poultry-processing work Tyson was performing "has always been a private task—not a governmental one." Pet.App.3, 12. As such, the court concluded, Tyson was not acting under federal direction when it heeded federal exhortations to keep its plants open in accordance with federal (rather than state or local) law. Both of those holdings are profoundly flawed as a matter of law. Pet.21-33.

1. The primary ground on which the Fifth Circuit relied—that the government never literally ordered Tyson to keep its plants open—is so flawed that respondents do not even really defend it. Instead, they pretend it never happened, claiming that "[n]o such requirement exists in the decision below." BIO.35. But the Fifth Circuit's decision could not be clearer: From beginning to end, it holds that Tyson was not "acting under" federal direction because Tyson "was never told that it *must* keep its facilities open." Pet.App.3; *see id.* (denying removal because Tyson received only "strong encouragement from the federal government" rather than an explicit order); Pet.App.14 ("Tyson was exhorted, but it was not directed."). That insistence on an express federal command cannot be reconciled with the "broad" and "liberally construed" language of the statute, which

requires only that a private party be "acting under" federal direction—not that the federal direction be explicit and mandatory. *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 147 (2007). Nor can it be reconciled with this Court's cases, which recognize that "acting under" just requires a relationship of "subjection, guidance, or control" in which the private party acts to "assist, or to help carry out, the duties or tasks of the federal superior"—without any need for a direct federal thou-shalt-or-else order. *Id.* at 151-52. A private driver who voluntarily assists the federal government in pursuing a fleeing suspect or locating an unlawful moonshine still is just as entitled to removal as one who is given no choice in the matter.

Respondents note that the Fifth Circuit purported to agree that private parties can be acting under federal direction even when their relationship with the government is "voluntary." BIO.2, 30 (quoting Pet.App.13). But the Fifth Circuit immediately cabined that view, limiting it to "defendants fulfilling government contracts." Pet.App.12; *see* Pet.29-30. Respondents likewise note that the Fifth Circuit claimed that it would have been satisfied with "evidence of delegated authority or a principal/agent relationship." BIO.35 (quoting Pet.App.13). But those caveats just underscore the court's error: The limited formal categories the court identified (government contracts, delegated authority, and principal/agent relationships) as acceptable without a mandatory order are found nowhere in the statutory text, and they come nowhere near exhausting the variety of forms federal direction can take. That is precisely why this Court has cited them only as illustrative examples of federal direction, not an exhaustive list. *Watson*,

551 U.S. at 156. The Fifth Circuit's insistence on a mandatory federal order in all other contexts cannot be sustained.

Indeed, this case strikingly illustrates the absurdity of the Fifth Circuit's rule. Despite an Executive Order explicitly invoking the DPA and a letter from the Secretary of Agriculture threatening future consequences if Tyson failed to comply, the Fifth Circuit concluded that there was no federal direction. Respondents make a strained attempt to defend that conclusion, casting those extraordinary executive actions as mere "encouragement" because the Secretary's letter told Tyson only what it "should" do and the Secretary never had to take "further action." BIO.27-29. But the use of "should" rather than "shall" hardly made the federal government's instructions any less clear, *see* Bryan Garner, *Garner's Dictionary of Legal Usage* (3d ed. 2011), 820 (noting that "*should*, like *may*, is sometimes used to create mandatory standards"), especially when that "should" exhortation was issued pursuant to an Executive Order and came paired with an unmistakable "or else." And the fact that no "further action" was taken just shows that Tyson *complied* with the federal direction it received, not that no federal direction ever existed. Pet.28-29.

2. Respondents fare no better in their attempts to defend the Fifth Circuit's assertion that Tyson could not claim federal-officer removal because processing food "has always been a private task—not a governmental one." Pet.App.12. As respondents recognize, when this Court used the term "basic governmental task" in *Watson*, it was using it to help

explain why government contractors generally *are* acting under federal direction, while private parties who merely comply with federal regulations generally are not—because contractors "help[] the Government to produce an item it needs" and so "go[] beyond simple compliance with the law and help[] officers fulfill other basic governmental tasks." BIO.31 (quoting *Watson*, 551 U.S. at 153). That language only confirms that Tyson was acting under federal direction here; while there was no contract governing its actions, Tyson emphatically *was* helping the government "produce an item it need[ed]" and "fulfill other basic governmental tasks" by producing meat and poultry to avoid widespread shortages in the midst of a pandemic. *Watson*, 551 U.S. at 153. That kind of effort at the federal government's behest, subject to federal guidance and supervision, to carry out a federal objective is precisely what *Watson* indicates the "acting under" standard should capture.[1]

The Fifth Circuit, however, took *Watson*'s "governmental tasks" language in an entirely new

[1] Respondents repeatedly and inaccurately minimize the stress the national food supply chain faced in the early days of the pandemic. *See, e.g.*, Laura Reiley, *In One Month, the Meat Industry's Supply Chain Broke*, Wash. Post. (Apr. 28, 2020), https://tinyurl.com/mr7h59yf; Michael Corkery & David Yaffe-Bellany, *U.S. Food Supply Chain Is Strained as Virus Spreads*, N.Y. Times (Apr. 13, 2020), https://tinyurl.com/562fvrar; *contra* BIO.14, 36, 37. They also misleadingly emphasize exports of pork to China in those early days without mentioning either the destructive impact of African swine flu on China's pork production or China's status as the world's largest pork consumer. *See, e.g.*, Evie Fordham, *US Pork Exports to China Skyrocketed Before Fears of Meat Shortage*, FOXBusiness (May 6, 2020), https://tinyurl.com/2p8exakf.

direction, asserting that Tyson's case for federal-officer removal was "much harder" because poultry processing is typically carried out by private firms rather than the government. Pet.App.12. That logic has no basis in the statute or *Watson*. And it makes no sense in a free-market system in which the government normally relies on private industry to satisfy even basic human needs—and thus needs to enlist the help of private industry to continue meeting those needs in times of emergency. Pet.30-33. By limiting federal-officer removal to cases in which the government asks private parties to do something *other than* their normal work, and encouraging those parties to refuse to cooperate until explicitly compelled, the decision below will make it that much harder for the government to secure the help it needs when the next national crisis occurs.

II. This Case Is An Excellent Vehicle To Resolve These Exceptionally Important Issues.

Although the words "acting under" that Congress chose "are broad," and this Court has commanded that they must be given full effect, *Watson*, 551 U.S. at 147, the Fifth Circuit whittled them down to virtually nothing, insisting on mandatory coercion when the only sensible rule is one that encourages cooperation and flexibility. That misguided approach cries out for review.

Respondents emphasize that there is "no split of authority" on this issue. BIO.18. But while they are correct that the Fifth Circuit and the Eighth Circuit have now both made the same error, that is hardly a reason to leave it uncorrected—especially when multiple district courts have reached the opposite

conclusion. *See, e.g.*, *Fields v. Tyson Foods, Inc.*, 561 F.Supp.3d 717, 719-20 (E.D. Tex. 2021), *vacated and remanded*, 2022 WL 4990258 (5th Cir. Oct. 3, 2022); *Wazelle v. Tyson Foods, Inc.*, 2021 WL 2637335, at *4 (N.D. Tex. June 25, 2021), *vacated and remanded*, 2022 WL 4990424 (5th Cir. Oct. 3, 2022); *Johnson v. Tyson Foods, Inc.*, 2021 WL 5107723, at *3 (W.D. Tenn. Nov. 3, 2021); *Reed v. Tyson Foods, Inc.*, 2021 WL 5107725, at *3 (W.D. Tenn. Nov. 3, 2021). Respondents attempt to draw support from the absence of an en banc poll here or in the Eighth Circuit, but that just underscores that those circuits view these decisions as the final word on a critically important issue.

Respondents likewise find no support in the nursing-home cases they cite. BIO.19-20. While nursing homes have also been designated critical infrastructure, Tyson's argument has never been that a "critical infrastructure designation standing alone … suffice[s] for removal." Appellants' Response to Rule 28(j) Letter, *Glenn v. Tyson*, No. 21-40622 (5th Cir. Mar. 23, 2022). But "in the food-processing industry, in contrast to the nursing-home context, that designation did not stand alone." *Id.* It was "just part of a much broader record of federal supervision and control, culminating in the issuance of a formal Executive Order, all focused on the federal objective of avoiding nationwide food shortages in the midst of an unprecedented pandemic." *Id.* The nursing homes, by contrast, never were subject to an Executive Order; they just argued that the extensive federal regulation they faced was enough to warrant removal, which is exactly the argument this Court rejected in *Watson*. Those cases accordingly have no bearing on this one,

other than to show that there is no floodgates concern in extending federal-officer removal to the rare circumstances in which competing state and local regulations prompted an Executive Order to promote the federal imperative to remain operational.

Respondents' effort to dismiss the decision below as factbound or limited to cases arising out of the pandemic has already been overtaken by events. The Fifth Circuit itself has disproved respondents' argument that the decision below "will have little bearing on future cases." BIO.37. A different Fifth Circuit panel has already relied on the decision below to hold in a completely unrelated context that various oil companies were not entitled to federal-officer removal to defend operations dating back to World-War-II-era executive orders. Tellingly, the Fifth Circuit considered the issue sufficiently settled under the decision below to resolve in an unpublished per curiam opinion. *Plaquemines Par. v. Chevron USA, Inc.*, 2022 WL 9914869, at *3 (5th Cir. Oct. 17, 2022) (per curiam), *pet. for cert. pending*, No. 22-___ (U.S. filed Jan. 30, 2023). As that ruling confirms, the decision below is anything but "a ticket for one ride only." *Contra* BIO.37. The Fifth Circuit evidently views the decision below as the final word on federal-officer removal, and it will continue to distort the doctrine and create perverse incentives unless and until this Court addresses it.[2]

[2] Respondents contend that if this case were really important, there would be amici involved. BIO.36-39. But, of course, no potential amicus knows in advance whether it is the one the government will be exhorting in the next crisis. And it is a fair

Rather than allow the decision below and *Buljic* to rework federal-officer removal across a significant chunk of the country, the Court should grant certiorari and nip the problems they have created before they spread further. While both decisions are wrong, and both merit review, the Court may wish to grant this case and hold *Buljic* given recent developments, as the state court on remand has now ordered judgment for Tyson in *Buljic*, raising mootness concerns should the plaintiffs decline to appeal. *See* Order for Judgment, *Buljic v. Tyson Foods, Inc.*, No. LACV140521 (Iowa Black Hawk Cty. Dist. Ct. Jan. 20, 2023); *Oviedo v. Hallbauer*, 655 F.3d 419, 423-24 (5th Cir. 2011) ("Removal is simply not possible after a final judgment and the time for direct appellate review has run."). Moreover, granting review here would obviate the need for state-court litigation in cases like *Fields* and *Wazelle*, *see supra* p.9, that were dismissed on the merits in federal court only to be reversed and remanded for state-court litigation on the strength of *Glenn*.

Finally, respondents try to fend off review by invoking various "alternative bases for affirmance" addressed by the district courts. BIO.39. But the Fifth Circuit never reached any of those grounds—likely because they are even more obviously wrong than the ground it did resolve. C.A.Opening.Br.44-61.

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inference that only the timing of the decision in *Plaquemines* accounts for the absence of an oil-industry amicus brief. Indeed, three oil companies have since filed their own petition for certiorari seeking review in *Plaquemines*. *See* Petition for Certiorari, *Chevron USA, Inc. v. Plaquemines Par.*, No. 22-___ (U.S. filed Jan. 30, 2023).

In any event, the district courts' secondary mistakes are no reason not to correct the Fifth Circuit's primary one. The better course is the normal one: to "deal with the case as it came here and affirm or reverse based on the ground relied on below." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). The actual holding in both this case and *Buljic* has the practical effect of demanding formal coercion where this Court has embraced a functional test, denying the federal government flexibility when it is needed most, and discouraging private parties from cooperating when called upon to come to the country's aid. This Court should grant certiorari and rectify the lower courts' mistakes before they hamstring the country's response to the next national emergency.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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