No. _____

In the
Supreme Court of the United States

TYSON FOODS, INC., et al.,

Petitioners,

v.

HUS HARI BULJIC, OSCAR FERNANDEZ, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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July 22, 2022

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QUESTION PRESENTED

In the early days of the COVID-19 pandemic, disruptions in supply and high consumer demand threatened to create national food shortages. The federal government responded by enlisting private industry to combat that threat by directing meat-processing facilities to remain open in accordance with CDC and OSHA guidance if at all possible. That federal direction was eventually formalized in an Executive Order instructing meat-processing facilities to continue or resume operations consistent with federal guidance, notwithstanding contrary state or local direction.

In accord with that federal direction, petitioner Tyson Foods, Inc., ("Tyson") continued to operate its facilities under federal supervision during the early days of the pandemic. Plaintiffs, who represent the estates of four Tyson employees, sued petitioners in Iowa state court, alleging that Tyson violated state-law duties by continuing to operate its plants and exposing employees to COVID-19. Petitioners removed those suits to federal court under the federal-officer removal statute, explaining that Tyson had acted under federal direction. The Eighth Circuit, however, ordered the cases remanded to state court, asserting that the federal direction and supervision here was insufficient to warrant a federal forum.

The question presented is:

Whether a private actor that assists the federal government in securing the national food supply during a national emergency, under extensive federal supervision, is entitled to removal under the federal-officer removal statute.

PARTIES TO THE PROCEEDING

Petitioners Tyson Foods, Inc., Tyson Fresh Meats, Inc., John H. Tyson, Noel W. White, Dean Banks, Stephen R. Stouffer, Tom Brower, Tom Hart, Cody Brustkern, John Casey, Bret Taken, and James Hook were defendants in the district court and appellants in the Eighth Circuit. Mary Oleksiuk, Elizabeth Croston, Hamdija Beganovic, James Cook, Ramiz Muheljic, Gustavo Cabarea, Pum Pisng, Alex Bluff, Walter Cifuentes, Muwi Hlawnceu, Mark Smith, and Missia Abad Bernal were also defendants in the district court but not involved in the proceedings before the Eighth Circuit.

Respondents Hus Hari Buljic, individually and as administrator of the estate of Sedika Buljic, Honario Garcia, individually and as administrator of the estate of Reberiano Leno Garcia, Arturo De Jesus Hernandez, as co-administrator of the estate of Miguel Angel Hernandez, as co-administrator of the estate of Jose Luis Ayala, Jr., and Oscar Fernandez, individually and as administrator of the estate of Isidro Fernandez, were plaintiffs in the district court and appellees in the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner Tyson Foods, Inc. certifies that as of July 22, 2022, it has no parent company and no publicly held corporation owns 10% or more of its stock. Petitioner Tyson Fresh Meats, Inc. hereby certifies that it is a wholly owned subsidiary of Tyson Foods, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case is directly related to the following proceedings:

Buljic v. Tyson Foods, Inc., No. 21-1010 (8th Cir.), consolidated with *Fernandez v. Tyson Foods, Inc.*, No. 21-1012 (8th. Cir.) (judgment entered Dec. 30, 2021; petition for rehearing denied Feb. 22, 2022).

Buljic v. Tyson Foods, Inc., No. 6:20-cv-2055-LRR-KEM (N.D. Iowa) (remand order entered Dec. 28, 2020).

Fernandez v. Tyson Foods, Inc., No 6:20-cv-2079-LRR-KEM (N.D. Iowa) (remand order entered Dec. 28, 2020).

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In the throes of the greatest national health crisis in a century, ensuring that the nation's food supply remained secure ranked high among the federal government's priorities. In our system of free enterprise and federalism, the federal government could not accomplish that critical task alone; it depended instead on the cooperation of private companies, including food-processing companies like petitioner Tyson Foods, Inc. ("Tyson"). But, in the early days of the COVID-19 national emergency, Tyson was receiving contrary directions from competing authorities. While the federal government was directing Tyson to continue to produce food to keep grocery stores nationwide stocked, state and local authorities were demanding that Tyson shutter its facilities. Tyson followed the directives of the federal government and has now been sued for its efforts under state law.

The federal direction under which Tyson acted took various forms, from initial close but informal coordination in the pandemic's earliest days to eventual formalization in an Executive Order once federal guidelines specific to the meat-packing industry had been issued and contrary state and local interference had proven problematic. That federal direction, in both its informal and formal iterations, entitles Tyson to a federal forum under the federal-officer removal statute, 28 U.S.C. §1442(a). Tyson should not have to defend actions taken at the behest of the federal government against the contrary requirements of state tort-law in state court.

The Eighth Circuit's contrary conclusion cannot be reconciled with the decisions of this Court and other lower courts correctly following it. The panel insisted that Tyson cannot have been "acting under" a federal officer because the federal government does not "typically" produce meat for public consumption itself. But federal-officer removal is routinely available in government contracting cases where the government contracts precisely because it needs goods or service it does not typically supply itself. And this Court's decision in *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142 (2007), makes clear that it does not matter whether the task at hand is one that is typically conducted by the federal government, by state and local officials, or by private industry. What matters is whether the private party acts at the behest of the federal government in accomplishing a task that, without that aid, the government would have had to perform itself. The reason for that is clear: The federal government produces very few of the goods and services necessary to fulfill its obligations and objectives. This Court thus has never required those seeking federal-officer removal to demonstrate that they displaced a role "typically" undertaken by the federal government. By the Eighth Circuit's logic, federal-officer removal would be unavailable to all manner of private parties, including those who produce missiles or aircraft for national defense, those who supply medicine or medical equipment to respond to crises, or private insurance companies who provide necessary health benefits to federal employees.

No one can seriously think that the federal government would have stood idly by if private industry were not up to the task of maintaining the

food supply, especially when the President issued an Executive Order designed to shield private industry's efforts from state and local regulations. In fact, the federal government has some statutory obligations to ensure the availability of food—obligations that it fulfills almost exclusively by relying on private parties to produce the necessary food.

The Eighth Circuit also faulted Tyson for its inability to point to a federal officer's coercive demand: "Keep your plants operating or else." But neither the federal-officer removal doctrine nor the Defense Production Act ("DPA"), which the President invoked in his Executive Order, demands actual coercion. Nothing in this Court's fountainhead case for "acting under" federal-officer removal, *see Maryland v. Soper*, 270 U.S. 9 (1926), that suggests that the chauffeur was commandeered, and for good reason. Coercion is immaterial. A private driver who volunteers to assist federal officers is just as entitled to removal as one who is pressed into service. And the DPA does not require formal orders and is equally satisfied by informal "jawboning," because the DPA is designed to "accord the Executive Branch great flexibility in molding its priorities and policies to the frequently unanticipated exigencies of national defense." *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992-93 (5th Cir. 1976). Nothing in the law or common sense requires private entities to resist government entreaties for assistance in the height of a crisis and to insist on a formal, coercive order. The Eighth Circuit's contrary conclusion not only conflicts with decisions from this Court and other lower courts, but creates perverse incentives for the next crisis.

The issue here is profoundly important. In the midst of a national crisis, the federal government demanded the assistance of companies like Tyson to maintain the food supply. When state and local regulations began to interfere with that national imperative, the President issued an Executive Order exhorting continued operations in conformity with federal guidance, despite contrary state and local direction. If companies like Tyson now face liability in state court based on the retroactive imposition of state-law requirements that would have frustrated federal objectives, the promise of the Executive Order and the informal directions that preceded it will have proven illusory. And the incentives for the next crisis will be perverse. The message of the decision below, and a recent Fifth Circuit decision to the same effect, is that companies should resist federal exhortations to cooperate and should insist on a formal coercive order—indeed, even more than an Executive Order and subsequent government action implementing it—before they help the federal government achieve a critical federal goal at a time of national crisis. If these decisions are allowed to stand, the message will be clear: When asked by the federal government to take immediate action in an emergency, private parties are best served by waiting to act until formal, express orders are issued, wasting critical time and withholding aid when needed most. This Court should grant certiorari to clarify federal-officer removal doctrine and to restore sensible incentives before the next national crisis.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 22 F.4th 730 and reproduced at App.1-21. The Eighth Circuit's order denying rehearing is reproduced at App.22-24. The district court's opinion granting plaintiff's motion to remand in *Fernandez* is reported at 509 F.Supp.3d 1064 and reproduced at App.66-103. The district court's opinion granting plaintiffs' motion to remand in *Buljic* is unreported and reproduced at App.25-66.

JURISDICTION

The Eighth Circuit issued its opinion on December 30, 2021, and denied rehearing *en banc* on February 22, 2022. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The federal-officer removal statute, 28 U.S.C. §1442, is reproduced at App.104.

STATEMENT OF THE CASE

This petition arises from two suits seeking to hold Tyson and certain Tyson executives and supervisors liable for actions they took at the federal government's behest to assist the government in preserving the national food supply by keeping Tyson's food-processing facilities operating in accordance with federal guidance during the COVID-19 pandemic.

A. Factual Background

In early 2020, COVID-19 began its rapid spread across the United States, creating sudden and dramatic disruption, coupled with competing sources of information leading to competing dictates between

federal and state authorities. On March 13, 2020, the President declared a state of emergency across the country in response to the COVID-19 outbreak—the first time in history that all 50 states have been subject to simultaneous disaster orders. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020). The federal government proceeded to devote significant effort to combating the pandemic and its potentially catastrophic effects, enlisting both public and private entities in its efforts to ensure that the rapid spread of the disease would not disrupt the nation's critical infrastructure. Protecting the nation's food supply was a significant focus of that effort. As the gravity of the pandemic and the reality of lockdown orders began to take hold, consumers nationwide began to stockpile food supplies. That, in turn, produced empty grocery store shelves and meat cases, leading to photographs and media stories that prompted further stockpiling, threatening to create a vicious cycle endangering the nation's food supply. At the same time, state and local officials began issuing orders for companies including Tyson to curtail or completely shutter their operations, directly contrary to the federal government's efforts to keep food-processing plants operational. *See* C.A.App.48, C.A.App.279. The difference in state and local versus federal priorities was particularly evident in the food supply sector, as state and local officials sought to shut down plants within their jurisdictions without considering the effects that their actions might have on the food supply and supply chain nationwide.

In confronting that crisis-within-a-crisis, the federal government did not write on a blank slate. In the aftermath of the September 11 attacks of 2001, Congress enacted the Critical Infrastructure Protection Act, which instructed the federal government to develop plans to protect designated "critical infrastructure" in the event of future disasters. The Act defines critical infrastructure to include systems whose incapacity "would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." 42 U.S.C. §5195c(e). The federal government has identified 16 sectors of the national defense and economy deemed sufficiently vital to qualify as critical infrastructure—including, unsurprisingly, the "Food and Agriculture" sector. *See Presidential Policy Directive—Critical Infrastructure Security and Resilience*, The White House (Feb. 12, 2013), https://bit.ly/3t1vgRZ. Responsibility for coordinating protection of the "Food and Agriculture" sector is assigned to the Department of Agriculture and the Department of Health and Human Services, which have developed an extensive critical infrastructure plan to "protect against a disruption anywhere in the food system that would pose a serious threat to public health, safety, welfare, or to the national economy." Food & Drug Admin. et al., *Food and Agriculture Sector-Specific Plan* 13 (2015), https://bit.ly/2MyJ31q.

The DPA, 50 U.S.C. §4501 *et seq.*, provides the federal government with additional authority. The DPA grants the President authority to "control the general distribution of any material in the civilian market" that the President deems "a scarce and

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

Tyson produces more than 20% of the nation's daily supply of meat and poultry—enough to feed 60 million Americans each day—and employs more than 120,000 workers at its domestic processing facilities. C.A.App.136, C.A.App.313. Securing ongoing operation of Tyson's facilities was thus critical to ensuring that the COVID-19 pandemic would not interrupt the national food supply, particularly in light of the increased demand in the early days of the crisis as many Americans increased their grocery purchases and stockpiled food in response to public health guidance, mandatory stay-at-home orders, and expected shortages.

In keeping with their critical infrastructure designation, the federal government quickly and directly called upon Tyson and others in the food industry to assist the federal government in ensuring that the pandemic would not cause nationwide food shortages. On March 15, 2020—two days after

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

That obligation to aid the federal government in preventing a food shortage was reinforced to the public the next day. On March 16, 2020, the President issued "Coronavirus Guidelines for America" stating that workers "in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply," had "a special responsibility to maintain your normal work schedule," and that critical infrastructure employers and workers "should follow CDC guidance to protect [their] health at work." C.A.App.179, C.A.App.363. That emphasis on food producers' "special responsibility" to remain operational was in contradistinction to the federal government's suggestion that most employers allow workers to stay home. C.A.App.179, C.A.App.363.

Almost alone even among entities in critical infrastructure industries, food processors like Tyson

cannot operate unless federal inspectors are physically present in the production facilities. That created an unprecedented challenge during the pandemic because those necessary federal inspectors could be both susceptible to and potential carriers of the virus as a result of community spread. That dynamic prompted the Department of Agriculture to issue a statement on March 16, 2020, committing to "maintain the movement of America's food supply from farm to fork" and to "utilize [its] authority and all administrative means and flexibilities to address staffing considerations," further underscoring the importance the federal government placed upon keeping food production operational—not only to feed the nation, but to make sure that the millions of animals being raised by farmers, growers, and ranchers could be processed. C.A.App.180, C.A.App.365. The Department explained:

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

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

Consistent with those directives and assurances, numerous federal agencies—including ones that would not have regular interactions with Tyson under normal conditions—immediately began coordinating directly with Tyson to ensure it could meet its commitment to the President and other federal authorities in carrying out the government's mission of preserving the national food supply. For instance, on March 13, 2020—the same day the President issued the national emergency declaration—the Cybersecurity and Infrastructure Security Agency ("CISA"), a division of the Department of Homeland Security, held a conference call with Tyson and others to coordinate procuring and delivering critical supplies, such as personal protective equipment, to food companies to enable them to continue to operate during the declared national emergency. C.A.App.137, C.A.App.314. Communication and coordination with CISA and its subsidiary National Risk Management Center ("NRMC")—agencies with which Tyson does not ordinarily communicate—continued over the following days and months. C.A.App.137, C.A.App.314-15; *see* C.A.App.145, C.A.App.323 (email chain between Tyson and NRMC to coordinate on "prioritization of precautionary measures for critical infrastructure components").

The NRMC also communicated directly with Tyson to ensure that Tyson had critical infrastructure designations in place for all employees necessary for continued operations, all of whom received letters authorizing them to continue working and traveling in support of their critical functions notwithstanding state or local quarantine regulations. C.A.App.139-40, C.A.App.316-17; *see* C.A.App.157, C.A.App.338

(sample letter). Those employees were instructed to keep these letters on them at all times and be prepared to show them to local officials who might attempt to restrict their actions or movement. C.A.App.140-41, C.A.App.317-18. The Department of Transportation also provided special status for transportation workers, including Tyson truck drivers delivering meat and poultry, to continue operating during the pandemic to provide much-needed "food for emergency restocking of stores." C.A.App.139, C.A.App.316 (brackets omitted).

The Department of Agriculture and the Federal Emergency Management Agency ("FEMA") likewise worked to provide Tyson and federal inspectors at Tyson's sites with the necessary personal protective equipment and other critical supplies to continue to operate. C.A.App.140, C.A.App.317; *see* C.A.App.173-74, C.A.App.355-56 (email chain between Tyson and Department of Agriculture regarding personal protective equipment needs, noting that Department was "taking every action to inform FEMA of the need for [personal protective equipment] in the food supply chain and build considerations for the food supply chain into their greater supply chain efforts"). Among other things, the Department instructed meat and poultry plant operators to provide assessments of the personal protective equipment they would need to remain in operation, which the federal government prioritized and provided to food companies (including Tyson) as relevant CDC guidance evolved. C.A.App.140, C.A.App.317; *see* C.A.App.173-74, C.A.App.355-56 (Tyson email informing Department that if, as expected, upcoming CDC guidance would require protective face coverings for critical

infrastructure workers, Tyson would need such coverings for 116,000 workers a day to continue operating); C.A.App.176, C.A.App.359 (Department email requesting assessment of "unfulfilled [personal protective equipment] needs required to maintain operational continuity over the next 60 days" (emphasis omitted)).

As noted, Tyson's operations were subject to continuous supervision through the Department of Agriculture's Food Safety and Inspection Service ("FSIS"). The presence of on-site FSIS inspectors has long been a prerequisite for Tyson and other food producers to operate, but the pandemic introduced unique concerns and unprecedented needs for coordination. C.A.App.140-41, C.A.App.317-18. The availability of sufficient FSIS inspectors was a critical constraint on maintaining operations. The federal government had an obvious interest in ensuring that FSIS inspectors could be safely present in facilities, which is why FSIS inspectors were directed to go to work consistent with applicable guidance while other federal employees were encouraged to stay home. As a result, FSIS sought "a united effort with our industry partners in preventing the spread of COVID-19 while continuing to produce safe food for consumers." C.A.App.182, C.A.App.368. In accordance with that mission, FSIS held regular calls with industry representatives from March 2020 onwards to distribute information and provide direction to ensure that plants could operate safely and meat and poultry would remain available for sale. C.A.App.141, C.A.App.318.

The Department of Agriculture also provided detailed instructions to food producers setting appropriate COVID-19 precautions for FSIS inspectors to ensure that they would be available to help Tyson and other food companies meet their commitments to continue operating. For instance, producers were permitted to "orally ask [FSIS] employees questions concerning COVID-19" and "measure a [FSIS] employee's temperature via a digital forehead thermometer" to determine whether an inspector might pose a risk of infecting others at the plant, but were also instructed that inspectors "will only respond to questions orally and will not sign any attestations or submit any written questionnaires." C.A.App.182, C.A.App.368. Congress, for its part, recognized the critical and outsized role of FSIS inspectors during the crisis by allocating additional funding to support its efforts to ensure that meat and poultry processing facilities could continue to provide the nation a safe and secure food supply. C.A.App.141, C.A.App.318.

Although the federal government had more pressing priorities in the early days of the pandemic than formalizing the directives instructing meat-processing facilities to continue to operate, the Vice President underscored that the obligation was a matter of federal necessity, not private choice, in public remarks on behalf of the Coronavirus Task Force that he led—a task force created by the President. He not only thanked food industry workers for their "great service to the people of the United States of America," but also expressly emphasized that the United States needed those workers "to continue, as a part of what we call our critical

infrastructure, to show up and do your job"; in exchange, he promised that the federal government would "continue to work tirelessly in working with all of your companies to make sure that that workplace is safe." Press Briefing, The White House (Apr. 7, 2020), https://bit.ly/3pcdiZP. And the President underscored that the heroic efforts to keep the food supply chain functioning were not optional, as the federal directions were issued in the shadow of the DPA: "The Defense Production Act is in full force, but haven't had to use it because no one has said NO!" Doina Chiacu, *Trump Administration Unclear over Emergency Production Measure to Combat Coronavirus*, Reuters (March 24, 2020), http://reut.rs/3rS3MN5.

Despite the clear federal mandate to the food industry to continue operating in accordance with federal guidance, state and local officials began imposing demanding, conflicting, and in some cases unworkable rules seeking to shut down local food-processing plants. *See* C.A.App.48, C.A.App.279. These real-time dictates were often in tension and at times directly contrary to the federal government's own dictates for food companies to continue to operate. That tension (and sometimes outright conflict) reflected the divergent interests of state and local officials as compared to the federal government, as state and local officers sought to shut down plants in their locales without contemplating the effects that shuttering those plants would have on the national food supply and supply chain during a national emergency. In an effort to provide uniform, federal direction, the federal government issued joint CDC/OSHA guidance specific to meat and poultry producers on April 26, 2020. *See* Interim Guidance,

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

Executive Order 13917 acknowledged that there had been "outbreaks of COVID-19 among workers at some processing facilities." *Id.* But it warned that "recent actions in some States [that] have led to the complete closure of some large [food] processing facilities … threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national [COVID-19] emergency." *Id.* The Executive Order therefore invoked the President's powers under DPA §101(b), 50 U.S.C. §4511(b), to delegate authority to the Secretary of Agriculture to "ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA," emphasizing the importance of ensuring that "processors of beef, pork, and poultry" would "continue operating and fulfilling orders to ensure a continued supply of protein for Americans." 85 Fed. Reg. at 26,313.

That same day, the Department of Agriculture announced that it would continue to "work with meat

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

The following week, acting under Executive Order 13917, the Secretary of Agriculture issued a letter to Tyson's CEO, Noel White, followed by another letter to industry stakeholders broadly, instructing meat-processing plants to either remain open or submit written plans to reopen. *See* Letter from Sonny Perdue, Sec'y of Agric., *Re: Executive Order 13917 Delegating Authority Under the Defense Production Act with Respect to the Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* (May 5, 2020), https://bit.ly/3HyKu8J ("Perdue Letter"). That letter reiterated that meat and poultry producers play "an integral role in the continuity of our food supply chain," and instructed them "[e]ffective immediately" to "utilize the [April 26] guidance issued … by the CDC and OSHA specific to the meat and poultry processing industry" to "safeguard[] the health of the workers and the community while staying operational or resuming operations." *Id.* Meat and poultry processing plants that had been closed due to the

COVID-19 pandemic, the Secretary instructed, "should resume operations as soon as they are able after implementing the CDC/OSHA guidance for the protection of workers." *Id.* The letter also warned that if companies failed to comply, "[f]urther action under the Executive Order and the Defense Production Act is under consideration and will be taken if necessary." *Id.*

B. Procedural Background

Plaintiffs represent the estates of four former employees at Tyson's meat-processing facility in Waterloo, Iowa, who contracted COVID-19 and ultimately died in April and May 2020 of complications related to the disease. C.A.App.42, C.A.App.273-74. Plaintiffs filed two materially identical suits in Iowa state court, naming Tyson and certain individual Tyson executives and supervisors as defendants. C.A.App.42-44, C.A.App.274-75. These suits attempt to retroactively impose state-law duties even more antithetical to federal efforts to keep meat-processing plants operational than the real-time restrictions the President addressed in his Executive Order.

Plaintiffs allege that the individual Tyson executives and supervisors failed to take adequate precautions and abide by federal guidance to ensure that Tyson employees at the Waterloo plant would not become infected with COVID-19. C.A.App.56-66, C.A.App.286-97. Plaintiffs also allege that the individual defendants made various fraudulent misrepresentations about the presence of COVID-19 at the Waterloo plant, the efficacy of the safety measures Tyson had implemented, and the need to

keep the plant open to avoid national meat shortages. C.A.App.53-54, C.A.App.283-84; C.A.App.59, C.A.App.289; C.A.App.63-66, C.A.App.294-96. Plaintiffs allege that Tyson made the same fraudulent misrepresentations, and that Tyson is vicariously liable for the individual defendants' actions. C.A.App.53-56, C.A.App.283-86.

Tyson removed the cases to the U.S. District Court for the Northern District of Iowa. C.A.App.22-37, C.A.App.211-28. As relevant here, Tyson asserted removal under the federal-officer removal statute, which allows removal of any civil action against "any officer (or any person acting under that officer) of the United States … for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). Tyson explained that it was "acting under" federal supervision and control in continuing to operate its plants as instructed by the federal government; that plaintiffs' claims related to actions Tyson took under federal direction; and that Tyson had colorable federal defenses to plaintiffs' claims, as those claims are preempted by the Federal Meat Inspection Act ("FMIA") and by the federal orders Tyson received. C.A.App.25-33, C.A.App.214-22.

The district court granted plaintiffs' motions to remand the cases to state court. App.25-103. As to federal-officer removal, the court focused on the fact that "[t]he primary allegations in [Plaintiffs' complaints] all took place prior to April 28, 2020," when the President issued Executive Order 13917. App.57, 96. While the court acknowledged that Tyson was "in regular contact with [the federal government] regarding continued operations of its facilities at the

early stages of the COVID-19 pandemic," App.58, 96, it viewed the federal control and supervision that predated Executive Order 13917 as insufficient to entitle Tyson to a federal forum. The court also held that there was an insufficient "causal connection" between the federal exercise of authority over Tyson and the actions plaintiffs challenge because (again) the "primary allegations in the [complaints]" focused on the period before Executive Order 13917 issued, and because "[n]o federal officer directed Tyson to keep its Waterloo facility open in a negligent manner … or make fraudulent misrepresentations to employees." App.59-60, 97-99. The court further held that Tyson had not raised a colorable federal defense because (once again) the "primary allegations in the [complaints]" focus on the period before Executive Order 13917, and because in the court's view the FMIA does not preempt plaintiffs' claims. App.60-62, 99-100.

Tyson appealed those decisions, and a panel of the Eighth Circuit affirmed, concluding that Tyson failed to establish that it was acting under the direction of federal officers. The court recognized that, to satisfy the requirements for federal-officer removal, Tyson must "establish that (1) it acted under the direction of a federal officer, (2) there is a causal connection between Tyson's actions and the official authority, (3) Tyson has a colorable federal defense to the plaintiffs' claims, and (4) Tyson is a 'person,' within the meaning of the statute." App.12. According to the Eighth Circuit, Tyson failed to meet the first of these elements because (the court concluded) Tyson had not shown that it acted under federal direction in

continuing to operate its meat-processing plants in the early days of the pandemic.

The court acknowledged that a private entity acts under federal direction, and is therefore entitled to federal-officer removal, when its actions "involve an effort to *assist*, or to help *carry out*" a "basic governmental task[]." App.12-13 (quoting *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012), and *Watson*, 551 U.S. at 153). And the court further acknowledged that this requirement is satisfied "where a private contractor provided the government with a product that it needed or performed a job that the government would otherwise have to perform." App.14. But according to the Eighth Circuit, Tyson's actions to assist the government in preserving the national food supply in the midst of a crisis did not qualify as carrying out a "basic government task." App.15-16. In the Eighth Circuit's view, because "it is not typically the 'dut[y]' or 'task[]' of the federal government to process meat for commercial consumption," carrying out that task at the federal government's behest does not constitute "acting under" a federal official. App.16. The court further posited that Tyson was not acting under federal direction because the government was able to secure Tyson's aid using a "cooperative approach" that obviated the need to explicitly "direct[]" Tyson what to do. App.19. In light of its conclusion that Tyson was not acting under federal direction, the court affirmed the district court's remand orders without addressing the remaining prongs of the federal-officer removal inquiry. App.19-20.

REASONS FOR GRANTING THE PETITION

Congress has authorized the removal to federal court of any civil action against any "officer (or any person acting under that officer) of the United States … for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). "The words 'acting under' are broad," and this Court has made clear that they must be "liberally construed" in accordance with the federal-officer removal statute's basic purpose: to provide federal officers, and those acting under their direction, with a federal forum in which to defend their actions. *Watson v. Phillip Morris Cos.*, 551 U.S. 142, 147 (2007). The Eighth Circuit's conclusion that Tyson was not "acting under" federal officials in helping the federal government avert an impending national food shortage and severe supply chain disruption cannot be reconciled with decisions from this Court or from other lower courts, and paves the way for state-court litigation over efforts to retroactively impose state-law requirements wholly inconsistent with federal priorities. Worse still, by denying private parties a federal forum unless they withhold assistance in an emergency until formally coerced, the decision below creates perverse incentives for the next national crisis. This Court should grant certiorari and reverse.

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

The Eighth Circuit's conclusion that Tyson was not acting under federal direction in continuing to operate its plants in the early days of the pandemic,

and so is not entitled to federal-officer removal, cannot be squared with this Court's precedents. The President recognized that state and local restrictions on the operation of meat-packing plants imposed in real time interfered with the national imperative to protect the food supply. Yet the decision below allows state courts to fashion retroactive state-law requirements that would dwarf those contemporaneous restrictions in terms of their interference with federal priorities. Having followed federal directives during an emergency, Tyson is entitled to the protections of a federal forum.

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

In accordance with that overarching purpose, the statute explicitly extends its protection not only to formal federal officers, but also to "any person acting under" a federal officer. 28 U.S.C. §1442(a). That is, the statute ensures that the right to federal-officer removal reaches beyond formal federal officers to encompass private individuals enlisted to support federal efforts, as those who further federal objectives without the formal trappings of a federal badge may be the most in need of a federal forum. *See Watson*, 551 U.S. at 150. As this Court has recognized, "[t]he words 'acting under' are broad," and their scope in §1442(a) "must be 'liberally construed'" in accordance with the statute's basic purpose: to provide federal officers, and those acting under their direction, with a federal forum in which to defend their actions. *Watson*, 551 U.S. at 147. Indeed, one of this Court's seminal federal-officer removal cases recognized that a private chauffeur who assisted federal agents in pursuing suspects had "the same right" to federal-officer removal as the agents themselves. *Soper*, 270 U.S. at 30.

2. This Court's most recent decision addressing the "acting under" inquiry came in *Watson*. There, Philip Morris and other cigarette companies sought to invoke federal-officer removal to defend against claims that they had advertised certain cigarette brands as "light" by manipulating testing results to register lower levels of nicotine and tar than a smoker would actually inhale. *Watson*, 551 U.S. at 146. Philip Morris argued that it had "acted under" the Federal Trade Commission ("FTC") in testing its cigarettes because the FTC engaged in "detailed supervision of the cigarette testing process." *Id.* at 147.

This Court rejected that argument. For a private party to be "acting under" a federal officer, the Court explained, the party must be engaged in an effort "to *assist*, or to help *carry out*, the duties or tasks of the federal superior," *id.* at 152, in a relationship that "typically involves subjection, guidance, or control," *id.* at 151. That is, the private party must provide the federal government with assistance that "goes beyond simple compliance with the law and helps officers fulfill other basic governmental tasks." *Id.* at 153. Where a private party is operating under federal supervision to serve federal ends, by helping federal officials carry out tasks that otherwise "the Government itself would have had to perform," that person is acting under federal direction and entitled to seek federal-officer removal. *Id.* at 153-54.

By contrast, mere compliance with federal regulation "does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official' … even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 153; *see id.* at 153-54. Because Philip Morris was not performing a task for the government *itself* in testing its cigarettes, but instead was simply abiding by the requirements the government imposed on all cigarette manufacturers, the mere fact that the government conducted close regulatory supervision of Philip Morris's testing activities did not justify federal-officer removal. *Id.* at 154-57.

3. *Watson* makes clear that Tyson readily satisfies the "acting under" requirement here. As multiple decisions have recognized, Tyson acted under federal

direction in the early days of the pandemic in continuing to operate its plants at the urging and direction of the federal government to avoid a national food shortage, as it was "working with federal officers to fulfill a responsibility of the federal government" by assisting with and carrying out the federal government's directives to maintain the national food supply." *Reed v. Tyson Foods, Inc.*, 2021 WL 5107725, at *3 (W.D. Tenn. Nov. 3, 2021); *Johnson v. Tyson Foods*, 2021 WL 5107723, at *3 (W.D. Tenn. Nov. 3, 2021); *see Fields v. Brown*, 519 F.Supp.3d 388, 393 (E.D. Tex. 2021); *Wazelle v. Tyson Foods, Inc.*, 2021 WL 2637335, at *4 (N.D. Tex. June 25, 2021). As those decisions allowing removal have correctly understood, the critical point is that Tyson remained operational at the *direction* of and to *assist* the federal government in supplying a basic necessity in the midst of a national crisis. Under *Watson*, that suffices to demonstrate that Tyson was acting under federal officers for purposes of the federal-officer removal statute.

Other courts have read *Watson* to require something akin to a direct order before finding a private party acted under a federal officer. In *Glenn v. Tyson Foods, Inc.*, 2022 WL 2525724 (5th Cir. July 7, 2022) (pet. for reh'g filed July 21, 2022), for example, despite recognizing that the government "exhorted" and "strong[ly] encourage[d]" Tyson to continue operating its plants, the Fifth Circuit held Tyson was not acting under federal direction because "Tyson was never told that it *must* keep its facilities open." *Id.* at *1, *5. That decision, like the decision below, misreads *Watson*.

To be sure, in the ordinary course, Tyson certainly operates its plants under pervasive federal regulation. But it is not ordinarily operating at the *behest* of the federal government—which is why Tyson has never invoked federal-officer removal during normal times. Tyson's relationship with the federal government changed, however, with the onset of COVID-19, as the federal government enlisted Tyson in its efforts to fulfill a paradigmatic "basic governmental task[]": ensuring that the national food supply would not be disrupted during an unprecedented national crisis. *Watson*, 551 U.S. at 153. At that point, Tyson was no longer acting as an independent private entity whose only responsibility was mere "compliance with the law," *Watson*, 551 U.S. at 153; it was acting under federal direction and supervision to achieve the *federal* aim of preserving the national food supply. Indeed, in following the dictates of the federal government, Tyson prioritized those federal commands over competing dictates from state and local authorities. And once the federal government issued guidance specific to the food-processing industry, the President issued an Executive Order invoking the DPA and prioritizing compliance with that federal guidance over conflicting state and local regulations. Under §1442(a) and *Watson*, Tyson's assistance in achieving federal ends under the direction of federal authorities entitles Tyson to defend its actions in federal court.

4. The Eighth Circuit's contrary reasoning is deeply flawed. The panel emphasized that Tyson could not have been "helping" the federal government "fulfill [a] basic governmental task[]," *Watson*, 551 U.S. at 153, because, "while the federal government

may have an interest in ensuring a stable food supply, it is not typically the 'dut[y]' or 'task[]' of the federal government to process meat for commercial consumption." App.16. But the "acting under" test does not require the task in which a private party was enlisted to be one the federal government "typically" performs itself; it simply requires the private party to have been operating under federal "subjection, guidance, or control." *Watson*, 551 U.S. at 151. As *Watson* makes clear, the relevant question is not whether the task is one that "typically" falls to the government, but whether the task is one "the Government itself would have had to perform" *if no one else did*. *Watson*, 551 U.S. at 154.

By focusing on what the federal government "typically" does, the Eighth Circuit's misguided analysis has the perverse effect of denying federal-officer removal when it is needed most: during a national emergency. It is precisely in a crisis—whether a war creating steel shortages, a hurricane forcing FEMA to ensure provision of food and shelter, or an unprecedented pandemic threatening mass food shortages and heightening fear and panic—that the federal government undertakes responsibilities normally left to the private sector. It is precisely in an emergency that state law—especially tort law applied retroactively and with the benefit of hindsight—can threaten national priorities. And it is precisely in an emergency that the federal government needs unusual degrees of support from private industry, not demands for formal orders before they lend a hand.

It is little surprise, then, that courts have routinely recognized that private parties can be acting

under federal direction even if they perform at the *behest* of the federal government a task that they ordinarily perform for private profit. For example, a private company providing health benefits to federal employees is entitled to federal-officer removal, even though the company engages in that business for private profit and even though the provision of health benefits is generally left to the private sector. *St. Charles Surgical Hosp., L.L.C. v. La. Health Serv. & Indem. Co.*, 935 F.3d 352, 355-56 (5th Cir. 2019); *Jacks*, 701 F.3d at 1231-35. So too for private companies that contract with the federal government to provide it with herbicides, *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008). Even if those activities are typically the work of private enterprise rather than the government, and even if they are carried out for private profit, they are being carried out at the request of the federal government under federal supervision to serve federal aims. That is sufficient to satisfy the acting-under requirement for federal-officer removal.

The Eighth Circuit's contrary rule not only conflicts with this Court's precedent, but produces absurd results. In our system of free enterprise, the government routinely relies on private industry to help satisfy basic needs. A removal test that turned on what the government does itself versus leaving to private industry would thus be virtually impossible for private parties to satisfy. And the panel's reasoning would be especially problematic in a crisis, when activities that normally are left to market forces and state law in untroubled times may become a federal priority necessitating extraordinary federal action.

If someone assists federal officers in pursuing a suspect in an emergency, or FEMA directs private industry to provide emergency food and shelter in the wake of a hurricane, it is irrelevant that those matters may be left to market forces or local governments in ordinary times. It is enough that the private party was enlisted to help federal officials achieve their objective (and then sued in state court for its efforts). Indeed, the need for federal-officer removal may be especially acute in suits arising in times of national crisis; not only do national emergencies prompt the federal government to undertake activities normally left to market forces, but those same exigencies can expose fissures between national and state regulatory priorities, especially when it comes to state tort-law applied by juries after the worst of the crisis has passed. The Eighth Circuit's focus on whether the federal government *typically* undertakes a task thus has the effect of denying removal when the need for a federal forum is greatest.

The Eighth Circuit also considered it relevant that preserving the national food supply is not "a task that was imposed on the government by statute." App.14. That is doubly wrong. For one thing, there are numerous programs through which the federal government ensures the provision of food, including the Supplemental Nutrition Assistance Program (SNAP), 7 U.S.C. §2013(a), and the Special Supplemental Nutrition Assistance Program for Women, Infants, and Children (WIC), 42 U.S.C. §1786(c)(1). Even in ordinary times, then, ensuring that a basic need like food is met is a federal obligation. And that obligation is only heightened during a crisis, as the USDA has recognized. *See*

USDA Strategic Plan, 2018-2022, at 56, https://bit.ly/3AizFnv (noting USDA's objective of "ensuring that in difficult times, food is available to all people in need.").

Moreover, the federal government undertakes many tasks that are necessary and proper to its constitutional and statutory duties but not strictly required by statute. There is no plausible reason to limit the scope of federal-officer removal to private parties who assist the government in carrying out tasks that happen to be statutorily required rather than merely permitted. The "acting under" analysis is a functional, not formal, inquiry, and it would make little sense for that functional inquiry to turn on whether the government has a formal *obligation* to enlist private help. Indeed, if that were the rule, a private party ordered to aid a federal officer would lose its right to a federal forum whenever that federal officer turned out to have been acting outside the scope of its authority, which may well be when the protection of a federal forum is most valuable.

5. The Eighth Circuit strayed equally far afield in concluding that the federal government's actions did not rise to the level of "subjection, guidance, or control" cooperate-or-else command. The panel insisted that the federal government's extraordinary actions and statements "[a]t most … indicate that the federal government was encouraging Tyson—and other industries—to continue to operate normally." App.17. The Fifth Circuit, for its part, recognized that the federal government "exhorted" Tyson to keep its plants operational in conformity with federal guidance and despite contrary state and local regulation, but

found that insufficient. *Glenn*, 2022 WL 2525724, at *5.

Ultimately, the Eighth and Fifth Circuits faulted Tyson for its inability to point to a communication in which a federal official said: "You must stay open or else." But nothing in federal-officer removal doctrine or the DPA "gives any indication that the Government may not seek compliance with its priorities policies by informal means." *E. Air Lines*, 532 F.2d at 993. When a private driver assists federal officers and is sued for her troubles, nothing turns on whether she was compelled to drive, exhorted to do her part, or paid for her services. And through the DPA, "Congress intended to accord the Executive Branch great flexibility in molding its priorities policies to the frequently unanticipated exigencies of national defense." *Id.* By giving the President "broad authority" to command private parties as necessary should they refuse to cooperate, the DPA ensures that federal officials can accomplish critical objectives as effectively through informal "jawboning" as they can through formal orders, using "the threat of mandatory powers … as a 'big stick' to induce voluntary cooperation." *Id.* at 980, 998. Such informal measures are not only permissible, but especially appropriate in times of national crisis, when "a cumbersome and inflexible administrative process is antithetical to the pressing necessities." *Id.* at 998.

The Eighth Circuit protested that the President did not single out "meat-processing or food supply" when he made clear that the DPA was "in full force." App.6-7, 18. But that statement did not stand alone. It was part of a series of communications from a wide

variety of government officials that culminated in CDC/OSHA guidance and an Executive Order that were specific to the meat-packing industry. Given that the federal government *in fact* ultimately took the extraordinary step of overriding state and local efforts to shut down meat-processing facilities, there can be little doubt that similar formal exercises of coercive DPA authority would have come earlier had facilities refused to continue operating or states imposed in real-time the kind of conflicting duties plaintiffs would retroactively impose.

The Eighth Circuit suggested that even Executive Order 13917 and the Secretary's May 5 letter did not suffice because they did not invoke the DPA's contract prioritization provisions. App.19-20 & n.6. That is a non-sequitur. Tyson has never claimed that the President invoked the DPA to require Tyson to alter its contracting priorities. The President invoked the DPA to get Tyson and other meat processors to "continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA." 85 Fed. Reg. at 26,313. That the President and the Secretary did not issue *additional* directives available to them under the DPA in no way negates the force of the ones they did issue. And the fact that they chose to use words like "should" instead of "shall" hardly rendered their directives any less directive—as the Secretary underscored when he threatened that if the meat and poultry companies did not comply, he would take"[f]urther action under the Executive Order and the Defense Production Act … if necessary." Perdue Letter, *supra*.

In short, there is "no authority for the suggestion that a voluntary relationship"—whether voluntary in fact or merely in law—"somehow voids the application of the removal statute." *Isaacson*, 517 F.3d at 138. The driver enlisted to assist federal officers in hot pursuit need neither demand formal authorization from the FBI Director nor go through a refuse-in-order-to-be-compelled charade to qualify for federal-officer removal. The Eighth Circuit's contrary view "makes little sense in light of the statute's purpose." *Id.* Private actors who willingly come to the federal government's aid during a national emergency should be applauded, not told they should have protested until a formal compulsive command issued. The panel's contrary conclusion contravenes well-settled legal principles and this Court's precedent and creates perverse incentives that will come back to haunt the federal government in the next national emergency.

6. The recent Fifth Circuit panel decision in *Glenn* repeats the Eighth Circuit's errors, and if anything is even more problematic. The Fifth Circuit explicitly recognized that the federal government "exhorted" Tyson and gave it "strong encouragement" to keep its plants operating, but nevertheless concluded that those clear government demands were insufficient to warrant federal-officer removal because Tyson was never explicitly "told that it *must* keep its facilities open." 2022 WL 2525724 at *1, *5. Still worse, by rejecting federal-officer removal even after multiple district courts have already considered and dismissed near-identical claims on the merits as preempted by federal law, the Fifth Circuit's decision (if it survives further review) will require relitigating claims from scratch in state court that have already been fully

litigated and found precluded by federal law in federal court. *See Fields v. Tyson Foods, Inc.*, 561 F.Supp.3d 71, 719-20 (E.D. Tex. 2021); *Wazelle v. Tyson Foods, Inc.*, 2021 WL 6142402 (N.D. Tex. Dec. 17, 2021); *see also Johnson v. Tyson Foods, Inc.*, 2022 WL 456897, at *3-4 (N.D. Tex. Jan. 20, 2022).

II. This Exceptionally Important Question Is Frequently Recurring And A Source Of Disarray In The Lower Courts.

The Eighth Circuit's decision not only is plainly wrong, it contributes to ongoing confusion in the lower courts and will have severe negative consequences. As already noted, the decision below conflicts with decisions from several other courts that have properly followed this Court's precedent and found Tyson entitled to federal-officer removal on materially identical facts. *See Johnson*, 2021 WL 5107723, at *3; *Reed*, 2021 WL 5107725, at *3; *see also Fields*, 519 F.Supp.3d at 393; *Wazelle*, 2021 WL 2637335, at *5. *But see Glenn*, 2022 WL 2525724 (implicitly rejecting *Fields* and *Wazelle*). If permitted to stand, the decision below (and the Fifth Circuit's decision to the same effect) will force Tyson to face litigation in state court on state-law tort claims that seek to impose retroactive state-law requirements even more stringent than those that state and local authorities espoused at the time—despite a clear determination by the federal government, embodied in a formal Executive Order, that even those less intrusive state-law requirements conflicted with federal needs. 85 Fed. Reg. at 26,313 (recognizing that "recent actions in some States … threaten the continued functioning of the national meat and poultry supply chain,

undermining critical infrastructure during the national [COVID-19] emergency").

This case also provides an excellent vehicle for resolving the question presented. This same issue has been litigated in several courts with widely varying outcomes. Moreover, some courts that exercised federal jurisdiction have dismissed the claims entirely on the merits. If this Court does not grant review and reverse the misguided approach of the Eighth and Fifth Circuits, those cases, dismissed in federal court, will need to be litigated in state court from the beginning. Review at this juncture could prevent an enormous waste of judicial resources.

Immediate review is particularly critical given the exceptional importance of the question presented. Allowing the Eighth Circuit's decision to remain on the books will deny private parties like Tyson who assist the federal government in times of emergency their right to a federal forum in which to defend their actions, discouraging voluntary cooperation and hindering the federal government's ability to respond to a future national crisis. If private actors who voluntarily cooperate with the federal government during a national emergency are rewarded by losing their right to a federal forum in which to defend the actions they took at the federal government's behest, the government will quickly find itself forced to compel cooperation even from private actors that should be its willing partners. Especially in times of a declared national emergency, a rule that requires formal federal authorization or compulsion (or both) in order for a private party to later seek federal-officer removal is neither realistic nor remotely in the government's

best interests. This Court should not allow the Eighth Circuit's dangerous decision to stand.

CONCLUSION

This Court should grant the petition for certiorari and reverse.

Respectfully submitted,

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