No. 22-70

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**

## REPLY BRIEF FOR PETITIONERS


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## REPLY BRIEF

Respondents defend a decision the Eighth Circuit did not write. The Eighth Circuit held that Tyson is not entitled to a federal forum because Tyson "failed to show that it was performing a basic governmental task or operating pursuant to a federal directive" when it heeded the federal government's exhortations to continue operating its meat-processing plants in the early days of the COVID-19 pandemic. App.19-20. The court reached its first, no-government-task conclusion by reasoning that "it is not typically the 'dut[y]' or 'task[]' of the federal government to process meat for commercial consumption." App.16. And it reached the latter conclusion—that Tyson was not acting under a federal directive—by reasoning that the federal government was "encouraging Tyson—and other industries—to continue to operate normally" rather than commanding them to stay open or else. App.17. Respondents try to dismiss the first of those holdings as "dicta," but that is not a plausible reading of the opinion, which articulates at length the court's profoundly mistaken view that tasks not typically performed by the federal government cannot qualify for federal-officer removal, and then reiterates that holding in summing up its ruling. Respondents try to convert the second holding into a factbound analysis of the federal actions here. But the core problem is that the Eighth Circuit examined all those undisputed facts via a faulty analysis under which only Thou-Shalt commands matter.

It is little surprise that respondents are desperate to distract from the Eighth Circuit's actual holdings. A federal-officer removal statute confined to those who

assist with classically governmental tasks would be of little utility in our free-enterprise system where, absent emergencies, the government leaves many critical tasks to the private sector. And a federal-officer removal statute available only to those who refuse to aid the government voluntarily in times of need creates perverse incentives in times of crisis.

In reality, the federal-officer removal statute simply requires a private party to show that it was acting under federal "subjection, guidance, or control" to help the federal government accomplish something it otherwise would have to do "itself." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151 (2007). Cooperating with federal authorities to stay operational so that grocery store shelves would remain stocked during a pandemic readily meets that test. The Eighth Circuit's contrary conclusion—and the Fifth Circuit's subsequent decision holding that even an Executive Order accompanied by an explicit threat of "further action" should plants ignore federal exhortations to stay operational voluntarily is insufficient federal direction—is at odds with this Court's precedent and any sensible understanding of federal-officer removal. The Court should grant certiorari in both cases and reverse.

## 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 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 a private party was caught between the directives of the federal government and efforts by state and local authorities to countermand them. That was precisely the situation during the early days of the pandemic, when state and local efforts to restrict the operations of meat-processing plants were threatening 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). Tyson followed that guidance and furthered federal objectives, and it has now been sued in state court for its troubles.

That state-court suit seeks to impose on Tyson state-law duties and requirements retroactively that would have been even more antithetical to federal objectives than the real-time 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 elevating local interests above the national priorities that Tyson was enlisted to serve. Yet the Eighth Circuit denied Tyson that forum, reasoning that Tyson was neither "performing a basic governmental task" nor "operating pursuant to a federal directive" when it heeded the federal government's exhortations to keep its plants open in accordance with federal, not state or

local, guidance, rather than shut down its plants and 20 percent of the nation's supply of meat and poultry. App.19-20. Both of those conclusions are profoundly flawed as a matter of law. Pet.20-35.

In fact, the first conclusion is so flawed that respondents do not even really defend it. They instead try to dismiss the Eighth Circuit's "governmental task" discussion as "dicta" and deride Tyson's reading of it as an "unreasonable." BIO.24. But the decision speaks for itself and contains two holdings, not one: "Tyson has failed to show that it was performing a basic governmental task *or* operating pursuant to a federal directive." App.19-20 (emphasis added). And the court reached the first holding by reasoning that the aid Tyson provided cannot qualify for federal-officer removal because "it is not typically the 'dut[y]' or 'task[]' of the federal government to process meat for commercial consumption." App.16.

Respondents insist that what the court meant by "typically" was things the federal government does not have to do *frequently*. *See* BIO.23. But that just repeats the Eighth Circuit's error. The federal government needed help from Tyson because it *was* doing something that, while unquestionably its responsibility, is fortunately not something it "typically" needs to do: keep a global pandemic from spiraling into a national food shortage. Yet instead of recognizing that a national—indeed, global—emergency sometimes necessitates federal direction of tasks ordinarily left to private industry, the Eighth Circuit focused on whether the specific task with which the government needed help is "typically" done by the federal government. That gets matters

backward, as private parties in need of federal-officer removal will often be asked to do things that the government does *not* typically do itself; otherwise, the government would not need their help.

Respondents alternatively contend that all the Eighth Circuit really meant to hold is that "work that the federal government recognizes as important is not the same as work that 'helps officers fulfill … basic governmental tasks.'" BIO.24 (*Watson*, 551 U.S. at 152). But no one in this litigation has ever suggested otherwise. While the Eighth Circuit and respondents try to reduce Tyson's position to the notion that it was entitled to a federal forum just because the meat-processing industry was designated "critical," *see* App.16, BIO.23-24, that has never been Tyson's position. It was the federal government's extraordinary actions, beginning with close and informal direction and culminating in an Executive Order and exhortations from the Secretary of Agriculture backed by the Defense Production Act and threats of further action, that put the meat-processing industry on a fundamentally different footing from other critical infrastructure industries. Pet.9-18. When the argument is that A+B+C=X, it is no response to say that A alone does not equal X.[1]

[1] Respondents do not even try to defend the Eighth Circuit's suggestion that only tasks "imposed on the government by statute" count. App.14. And rightly so, as government contracts often justify federal-officer removal. Moreover, that logic would fail as a matter of fact, as the Critical Infrastructure Protection Act and DPA both underlay the federal government's actions here.

Respondents' defense of the Eighth Circuit's conclusion that there was no federal "direction" fares no better. Like the Eighth Circuit, respondents accuse Tyson of "fixati[ng] on formal versus informal directives" and insist that the Eighth Circuit "was *not* adopting any such rule." BIO.24. For one thing, respondents neglect to mention that Tyson focused on that distinction below because the *district* court adopted just such a rule; indeed, the district court implied that removal *was* appropriate for actions taken after Executive Order 13917 issued, but not for actions taken before. App.59-60, 97-99. While the Eighth Circuit may not have replicated that precise mistake, it (and the Fifth Circuit) replaced that distinction with an equally untenable one, concluding that even *formal* directives do not count if they "exhort" rather than command. App.19; *see also Glenn v. Tyson Foods, Inc.*, 40 F.4th 230, 232 (5th Cir. 2022), *petition for cert. filed*, No. 22-455 (Nov. 10, 2022) ("Tyson was never told that it *must* keep its facilities open.").

That distinction cannot be reconciled with this Court's cases or with the reality of how the Defense Production Act is supposed to work. First, there is "no authority for the suggestion that a voluntary relationship somehow voids the application of the removal statute." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 138 (2d Cir. 2008). 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. A strict coercion rule makes particularly little sense, moreover, when the federal government invokes the DPA, as the DPA is designed

to enlist private-sector cooperation during times of unusual need without resorting to nationalization or direct commands. As a consequence, nothing in the DPA "gives any indication that the Government may not seek compliance with its priorities policies by informal means." *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 993 (5th Cir. 1976). To the contrary, the act empowers the federal government to secure the help it needs through precisely the sort of informal "jawboning" that it repeatedly employed here. *See* Pet.32-34. By denying private entities that assist the federal government a federal forum unless they hold out for a Thou-Shalt command, the Eighth and Fifth Circuits' decisions will make it that much harder for the government to secure the help it needs when the next national crisis comes around.

## II. Together With *Glenn*, This Case Offers An Excellent Vehicle To Resolve These Exceptionally Important Issues.

Though Congress' chosen "words 'acting under' are broad" and this Court has instructed that they must be given full effect, *Watson*, 551 U.S. at 147, the Eighth Circuit whittled them down to virtually nothing, insisting on coercion and formality where the only sensible rule is one that encourages cooperation and flexibility. That decision cries out for review.

Respondents resist that conclusion, touting a purportedly "broad consensus" among lower courts in their favor. BIO.2. But while they are certainly right that the Fifth Circuit has replicated the Eighth Circuit's mistakes, they ignore all the district court decisions that went the other way. *See, e.g.*, *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); *Reed v. Tyson Foods, Inc.*, 2021 WL 5107725, at *3 (W.D. Tenn. Nov. 3, 2021). Instead, respondents fault Tyson for "not acknowledg[ing]" a string of inapposite cases involving nursing homes. BIO.20. That accusation is puzzling given their own acknowledgment that "Tyson conceded in the courts of appeals that these cases were correctly decided" and did not present the same issue as this one. BIO.20. Why Tyson would discuss in its petition cases that it has consistently maintained have nothing to do with this one is a mystery.

In all events, as Tyson explained below, those cases are readily distinguishable from this case and *Glenn*. While nursing homes have been designated critical infrastructure, again, 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). And "in the food-processing industry, in contrast to the nursing-home context, that designation did not stand alone." *Id.* It is "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, were not even arguing that they were enlisted to do something for the federal government; they were just arguing that the high degree of federal regulation they faced was enough to entitle them to removal, which is exactly the argument this Court rejected in *Watson*.

All of that underscores that Tyson is not asking this Court to hold "that any action the federal government deems important is federalized for jurisdictional purposes." BIO.2. The point is that when the federal government deems something important enough to issue an Executive Order that invokes the DPA as the culmination of its efforts to insist that private parties must remain operational in accordance with the federal government's guidance even if state and local authorities are telling them to stop, it crosses the line from merely regulating and encouraging private industry to enlisting it in accomplishing the federal government's own aims. The government did not do that for nursing homes, or for any of the many other industries that have been designated critical. But it did it for the meat-processing industry, and that makes all the difference.

Respondents' "broad consensus" thus ultimately reduces to a grand total of two cases, both of which are now the subject of petitions pending before this Court. All respondents have demonstrated, then, is that two courts have in quick succession embraced a cramped conception of federal-officer removal that finds no support in this Court's cases and produces profoundly perverse consequences—not just for Tyson, but for all private parties exhorted to assist the federal government going forward. After all, parties will certainly think twice about aiding the federal government voluntarily in contravention of state and local directions the next time a national crisis rolls around if the price of doing so is facing litigation under state law in state court. That regime makes little sense in a free-market society, where the proud tradition of private industry has been to assist the

federal government voluntarily in times of national peril, rather than turn every emergency into the next *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

Rather than allow two outlier decisions to distort federal-officer removal in a significant chunk of the country, the Court should grant certiorari in both this case and *Glenn* and nip the problem they have created in the bud. And while Tyson maintains that each of those decisions is equally wrong, granting both petitions would have the benefit of ensuring that the Court can consider to what extent Executive Order 13917 and the Secretary's stay-open-or-face-further-consequences letter may alter the analysis, as the principal allegations in this case pre-date their issuance, while *Glenn* involves substantial allegations post-dating it. *See Glenn* Pet.35. The case for removal is even more straightforward in the wake of those actions, as they eliminated any possible doubt that the federal government was calling the shots. Granting both petitions and consolidating the cases for review on the merits would thus ensure that the Court can fully consider the impact of those extraordinary measures on the federal-officer removal analysis.

Finally, respondents try to fend off review by invoking various "alternative bases for affirmance recognized by the district court." BIO.25. But the Eighth Circuit never reached any of those grounds—likely because they are even more obviously wrong than the ground it did resolve. *See* C.A.Opening Br.37-56. And the district court's secondary mistakes are certainly no reason not to correct the court of appeals' 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 *Glenn* 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 with federal actors when called upon to come to the country's aid. The 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 for certiorari.

Respectfully submitted,

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