No. 21-40622

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

v.

TYSON FOODS, INCORPORATED; JASON ORSAK; ERICA ANTHONY; MARIA CRUZ,
Defendants-Appellants.

(*caption continued on inside cover*)

On Appeal from the United States District Court
for the Eastern District of Texas, Nos. 20-cv-184 & 21-cv-1184

BRIEF OF AMICI CURIAE PUBLIC CITIZEN, INC., NATIONAL EMPLOYMENT LAW PROJECT, and EQUAL JUSTICE CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES

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January 3, 2022

consolidated with

No. 21-11110

MARIA YOLANDA CHAVEZ, Individually and on behalf of MINOR LC AND ESTATE OF JOSE ANGEL CHAVEZ; ANGEL CHAVEZ; RITA ELAINE COWAN, Individually and on behalf of the ESTATE OF THOMAS DAVID COWAN,

Plaintiffs-Appellees,

v.

TYSON FOODS, INCORPORATED, doing business as TYSON FOODS; TYSON FRESH MEATS, INCORPORATED,

Defendants-Appellants.

AMICI CURIAE'S SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS PURSUANT TO FIFTH CIRCUIT RULE 29.2

No. 21-40622

ROLANDETTE GLENN; IDELL BELL; KERRY CARTWRIGHT; TAMMY FLETCHER; LAVEKA JENKINS; KIESHA JOHNSON; RONALD JOHNSON; DAISY WILLIAMS; DANICA WILSON; JOHN WYATT; CRYSTAL WYATT; CLIFFORD BELL, Individually and as Personal Representative of the ESTATE OF BEVERLY WHITSEY,
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TYSON FOODS, INCORPORATED, doing business as TYSON FOODS; TYSON FRESH MEATS, INCORPORATED,
Defendants-Appellants.

Pursuant to this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, amici curiae Public Citizen, Inc.; National Employment

Law Project; and Equal Justice Center submit this supplemental certificate of interested persons to fully disclose all those with an interest in the amicus brief.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to those listed in the briefs of the parties. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. The amici curiae joining this brief, and their corporate status and affiliations, are as follows:

1. Amicus curiae Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

2. Amicus curiae National Employment Law Project is a nonprofit, nonstock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

3. Amicus curiae Equal Justice Center is a nonprofit, nonstock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

B. Amici curiae are represented by **Adam R. Pulver**, **Scott L. Nelson**, and **Allison M. Zieve** of **Public Citizen Litigation Group**, which is a non-profit, public interest law firm that is part of **Public Citizen Foundation, Inc.**, a non-profit, non-stock corporation that has no parent corporation and in which no publicly traded corporation has an ownership interest of any kind.

/s/ Adam R. Pulver
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January 3, 2022

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INTEREST OF AMICI CURIAE[1]

Amicus curiae Public Citizen, Inc. is a non-profit advocacy organization with members in all 50 states. Public Citizen appears before Congress, agencies, and courts on a wide range of issues, and works for enactment and enforcement of laws to protect workers, consumers, and the public. Among other things, Public Citizen works to support individuals' ability to access the civil justice system to hold corporations and the government accountable for wrongdoing, and it often appears as amicus curiae to address issues, such as those presented in this case, that affect that access.

Amicus curiae National Employment Law Project ("NELP") is a non-profit legal organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP's areas of expertise include workplace health and safety. NELP has collaborated closely with state and federal agencies, community-based worker centers, unions, and state policy groups, including in Fifth

[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amici curiae, their members, or their counsel contributed money intended to fund the brief's preparation or submission.

Circuit states, and has litigated and participated as *amicus* in numerous cases addressing workers' health and safety rights under federal and state laws. NELP has submitted testimony to the U.S. Congress and state legislatures on numerous occasions on workplace health and safety.

Amicus curiae Equal Justice Center is a non-profit law firm and advocacy organization with four offices across the state of Texas. In addition to providing legal representation that enables low-wage working people, including poultry processing workers, to recover unpaid wages and combat other basic injustices they encounter in their work, Equal Justice Center advocates for systemic reforms that strengthen employment rights and expands access to the justice system for all working people, both in Texas and nationally.

Amici submit this brief because they believe that Appellants' erroneous arguments regarding the federal-officer removal statute and preemption under the Critical Infrastructures Protection Act of 2001 and

the Defense Production Act, if accepted, would pose a substantial risk of depriving injured plaintiffs of access to meaningful remedies.

INTRODUCTION

The federal government is one of limited powers, particularly with respect to matters of public health and safety. And "[t]here is no COVID-19 exception to federalism." *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 400 (3d Cir. 2021). Similarly, there is no COVID-19 exception to the rule that the Executive Branch may exercise power over private businesses only where authorized to do so by "either [] an act of Congress or [] the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Here, however, Tyson's argument depends on the creation of such exceptions. First, Tyson asks the Court to find that a series of government guidance documents, tweets, and off-hand comments, along with Tyson's requests for government assistance, converted its private poultry-processing facilities into instrumentalities of the United States. Second, Tyson asks the Court to find that, in enacting the Defense Production Act (DPA) and Critical Infrastructures Protection Act of 2001 (CIPA), Congress provided the Executive Branch authority to take control over private business. Accepting Tyson's

theories would radically expand the scope of the federal officer removal statute and recognize limitless federal executive authority that would usurp both the States' and Congress's powers.

Despite Tyson's claim that the meatpacking industry is unique, its arguments could be made by tens of thousands of other businesses in the sixteen sectors designated as "critical infrastructure" by President Obama and who, like Tyson, requested government assistance, communicated with federal regulators, and received federal guidance at the start of the pandemic. Neither the facts of what actually happened in the early days of the pandemic, nor the two statutory schemes Tyson points to—those of CIPA and the DPA—provide support for its view.

As explained below, neither statute nor any action taken pursuant to those statutes indicates the pandemic changed the nature of the relationship between the federal government and Tyson into one of subjugation or control, as required under the Supreme Court's precedent on federal officer removal. Tyson remained subject to Texas tort law, and to the jurisdiction of the Texas state courts.

ARGUMENT

The federal officer removal statute allows removal from state court to federal court of cases brought against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). To invoke the statute, a defendant must show that "(1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (*en banc*). These elements must be supported by "candid, specific and positive" allegations. *Willingham v. Morgan*, 395 U.S. 402, 408 (1969) (quoting *Maryland v. Soper (No. 1)*, 270 U.S. 9, 35 (1926)).

In these cases, the district court correctly held that, under the Supreme Court's decision in *Watson v. Philip Morris Cos.*, 551 U.S. 153 (2007), the operation of Tyson's business in the early days of the COVID-19 pandemic did not constitute action under the direction of federal

officers for purposes of section 1442(a)(1). *See also Buljic v. Tyson Foods Inc.*, No. 21-1010, 2021 WL 6143549 (8th Cir. Dec. 30, 2021) (reaching same conclusion). In particular, no action taken under CIPA or the DPA brought Tyson under federal control.

I. A private entity may remove a case under section 1442(a)(1) only when it is acting in the stead of the federal government.

Recognizing that the federal government "can act only through its officers and agents, and [that] they must act within the States," *Tennessee v. Davis*, 100 U.S. 257, 263 (1880), section 1442(a) provides federal officers and agents with a federal forum to "protect the Federal Government from the interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Government acting within the scope of their authority." *Watson*, 551 U.S. at 150 (quoting *Willingham*, 395 U.S. at 406) (cleaned up). The statute applies not only to federal officers themselves but also to "any person acting under [an] officer," 28 U.S.C. § 1442(a)(1)—including "[p]rivate persons 'who lawfully assist' the federal officer 'in the performance of his official duty.'" *Watson*, 551 U.S. at 151 (quoting *Davis*

v. South Carolina, 107 U.S. 597, 600 (1883)). Subsection (a)(1) supports the statute's predominant concern: protecting vulnerable officers and employees of the federal government against prosecution or suit in state courts for the performance of their official duties. The paradigmatic application of the statute to a private person is *Soper (No. 1)*, where the Court acknowledged that a private individual hired to drive and assist federal revenue officers in busting up a still "had 'the same right to the benefit of' the removal provision as did the federal agents." *Watson*, 551 U.S. at 150 (quoting *Soper (No. 1)*, 270 U.S. at 30).

Although the federal officer removal statute is "liberally construed," *Colorado v. Symes*, 286 U.S. 510, 517 (1932), section 1442(a)(1)'s authorization of removal by those "acting under" federal officials is "not limitless." *Watson*, 551 U.S. at 147. Accordingly, the Supreme Court has rejected defendants' efforts to stretch the scope of the "acting under" provision. *See id.* at 152–57; *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 79–87 (1991); *Mesa v. California*, 489 U.S. 121, 129–39 (1989).

For example, in *Watson*, the plaintiffs sued cigarette manufacturers for fraudulently marketing cigarettes as "light" to deceive smokers into

believing that smoking them would deliver lower levels of tar and nicotine than other cigarettes and present less danger of disease. The manufacturers, citing section 1442(a)(1), removed the action, claiming that they were "acting under" a federal officer because the Federal Trade Commission regulated the way they tested their cigarettes' tar and nicotine levels. *Watson,* 551 U.S. at 154–56. The Eighth Circuit held that the FTC's "comprehensive, detailed regulation," "ongoing monitoring," and use of its "coercive power" to persuade the tobacco industry to enter into a voluntary agreement regarding advertising disclosures, as well as a record "filled with FTC announcements of its policy as well as communications between the FTC and the cigarette industry," were sufficient to show "that Philip Morris acted under the direction of a federal officer" in selling cigarettes. *Watson v. Philip Morris Cos.,* 420 F.3d 852, 859–61 (8th Cir. 2005).

The Supreme Court unanimously reversed. The Court explained that, as used in section 1442(a)(1), the term "under" refers to a relationship of subservience, and, therefore, the statute applies only where a private person undertakes "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." 551 U.S. at 151–52.

Importantly, "the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law." *Id.* at 152. The statutory purpose would not be furthered by allowing "a company subject to a regulatory order (even a highly complex order)" to have claims against it heard in federal, not state, court. *Id.* Such a scenario "does not ordinarily create a significant risk of state-court 'prejudice,'" and a state-court lawsuit would be "[un]likely to disable federal officials from taking necessary action designed to enforce federal law" or "deny a federal forum to an individual entitled to assert a federal claim of immunity." *Id.* (citations omitted). Accordingly, the Court held, a private company's "compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.' And that is so even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 153.

As this Court has recognized, "the Supreme Court's decision in *Watson* instructs that even onerous and specifically enforced regulations do not suffice to show the firm was 'acting under' a federal officer." *City of Walker v. Louisiana through Dep't of Transp. & Dev.*, 877 F.3d 563,

571 (5th Cir. 2017). To take advantage of the federal officer removal statutes, defendants must show that they were more than "merely regulated entities," but were acting as "instrumentalities of the United States." *Butler v. Coast Elec. Power Ass'n*, 926 F.3d 190, 201 (5th Cir. 2019) (citing *Watson*, 551 U.S. at 151–57; quoting *Ala. Power Co. v. Ala. Elec. Coop.*, 394 F.2d 672, 677 (5th Cir. 1968)).

II. No government officer exercised control of Tyson as a result of Tyson's role in a "critical infrastructure" sector.

As explained above, to be "acting under" a federal officer, a private entity must be providing assistance *to* a federal officer in the performance of that officer's task and in a subordinate role. *See Watson*, 551 U.S. at 151–52. In this case, Tyson argues that it had such a relationship with the government because its business is part of sixteen sectors of the economy designated by President Obama as "critical infrastructure" pursuant to CIPA, and it received guidance and assistance as a result of that designation. Appellants' Br. 8, 37–41. As the Eighth Circuit stated in *Buljic*, however, "the fact that an industry is considered critical does not necessarily mean that every entity within it fulfills a basic governmental task or that workers within that industry are acting under the direction of federal officers." 2021 WL 6143549, at *5. "Although

important, these professions do not typically undertake work that would otherwise fall to the federal government." *Id.* Indeed, "doctors, weather forecasters, clergy, farmers, bus drivers, plumbers, dry cleaners, and many other workers" all work in "critical infrastructure," but "Congress did not deputize all of these private-sector workers as federal officers." *Maglioli*, 16 F.4th at 406 (rejecting argument that a nursing home was acting as a federal officer because its industry was designated critical infrastructure).

A. In CIPA, Congress provided a mechanism for the federal government to support and assist states, localities, and private actors, in continuing their essential functions. Rather than placing states, localities, and private actors in a subordinate role to the federal government, CIPA gives the federal government a supporting role—the opposite of what the "acting under" element of section 1142(a)(1) requires. Consistent with CIPA, "[e]ven Tyson seems to acknowledge that its designation as 'critical infrastructure' meant that the federal government provided *it* assistance, rather than the other way around." *Buljic*, 2021 WL 6143549, at *5 n.4.

CIPA is a short statute, with only two operative provisions. First, the statute sets out "the policy of the United States," 42 U.S.C. § 5195c(c), that "any physical or virtual disruption of the critical infrastructures of the United States" should be limited, and "that actions necessary to achieve" this goal "be carried out in a public-private *partnership* involving corporate and non-governmental organizations." *Id.* § 5195c(c)(1)–(2) (emphasis added). Second, it establishes the National Infrastructure Simulation and Analysis Center (NISAC) "to serve as a source of national competence to address critical infrastructure protection and continuity," via a range of "modeling, simulation, and analysis." *Id.* § 5195c(d)(1)–(2). Nothing in the statute provides any federal agency (or the President) the authority to assert control over private industry. And the federal government has *not* suggested the statute granted it any such authority, or anything remotely like it.

Across presidential administrations, the Executive has regarded CIPA as providing authority and responsibility to coordinate and support other actors to protect critical infrastructure—not to regulate them, much less control them to the extent necessary to establish an "acting under" relationship. For example, the 2013 policy planning document

that designated sixteen broad "critical infrastructure" sectors, including, for example, "food and agriculture," "financial services," and "information technology," simply delegated authority to specific federal agencies to develop plans to mitigate the impact of disasters on those sectors. Presidential Policy Directive/PPD-21, Critical Infrastructure Security and Resilience (Feb. 12, 2013), https://bit.ly/3t1vgRZ. It did not impose on entities within those sectors any obligations to support the federal government in the event of a national emergency; to the contrary, it expressly stated that "critical infrastructure security and resilience … is a *shared responsibility* among the Federal, state, local, tribal, and territorial (SLTT) entities, and public and private owners and operators of critical infrastructure." *Id.* (emphasis added). *See also* Homeland Security Presidential Directive 7: Critical Infrastructure Identification, Prioritization, and Protection (Dec. 17, 2003), https://www.cisa.gov/homeland-security-presidential-directive-7 (noting that the federal government "will *collaborate* with appropriate private sector entities") (emphasis added). Plans specific to the food and agriculture sector reflect the same narrow federal role. *See*, *e.g.*, FDA, et al., *Food and Agriculture Sector-Specific Plan* 1 (2015), https://bit.ly/2MyJ31q, *cited*

in Appellants' Br. 8 (identifying nonbinding "priorities" to "guide security and resilience efforts, inform partner decisions, reflect activities to enhance security and resilience, and improve risk management practices").

Not only do CIPA and its implementing guidance provide no authority for the federal government to exercise control over privately owned critical infrastructure, but the language used in the statute and guidance—"partnership," "shared responsibility," and "collaborate"—is inconsistent with the "subservient" relationship necessary to satisfy the "acting under" element. *Cf. Mays v. City of Flint, Mich.*, 871 F.3d 437, 447 (6th Cir. 2017) (noting models of cooperative federalism show states were "working alongside" federal government, "not under it").

B. No government statements about critical infrastructure after the onset of the COVID-19 pandemic show a departure from CIPA's policy of collaboration, not subordination. Indeed, a Presidential statement that Tyson partially quotes (at 10, 36) echoes the concept of partnership among the federal government, state and local governments, and the private sector. In a conference call with leaders "in the food and retail sectors," including "the chief executive officers of General Mills,

Tyson Foods, Target, Cargill, Costco and Walmart," the President stated: "All of them are working hand-in-hand with the federal government as well as the state and local leaders to ensure food and essentials are constantly available." Matt Noltemeyer, Trump Meets with Food Company Leaders, Food Business News (Mar. 16, 2020), https://bit.ly/3t2fiXQ. A "hand-in-hand" relationship is not a subservient one; it is a cooperative one, just as the nation's critical infrastructure policy contemplates.

"[P]articipation in a collaborative process *with* a federal officer is not the same" as acting *under* that officer for purposes of section 1442(a)(1). *Featherstone v. Kennedy Krieger Inst. Inc.*, No. CV WMN-07-1120, 2007 WL 9780512, at *7 (D. Md. Nov. 6, 2007); *see also MobilizeGreen, Inc. v. Cmty. Found. for Nat'l Capital Region*, 101 F. Supp. 3d 36, 41–44 (D.D.C. 2015) (relationship of "cooperation" did not satisfy § 1442(a)(1)); *L-3 Commc'ns Corp. v. Serco Inc.*, 39 F. Supp. 3d 740, 750–51 (E.D. Va. 2014) (remanding action despite contractor's claim to have been working "hand-in-hand" with the Air Force). "At most, these statements indicate that the federal government was encouraging Tyson—and other industries—to continue to operate normally. But they

did not direct or enlist Tyson to fulfill a government function or even tell Tyson specifically what to do." *Buljic*, 2021 WL 6143549 at *6.

Other documents confirm the federal government played a role of aid and assistance to states and private critical infrastructure during the pandemic. In March 2020, for example, the Cybersecurity and Infrastructure Security Agency (CISA) published guidance regarding "essential workers," "to support State, Local, and industry partners." Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response at 1 (Mar. 19, 2020) (CISA Memo), https://www.cisa.gov/sites/default/files/publications/CISA-Guidance-on-Essential-Critical-Infrastructure-Workers-1-20-508c.pdf. The memorandum was explicitly *not* a directive, and it made clear that "State, local, tribal, and territorial governments are ultimately in charge of implementing and executing response activities in communities under their jurisdiction, while the Federal Government is in a supporting role." *Id.* at 2.

The specific interactions that Tyson had with federal emergency management agencies evidenced the government's supporting role. For example, Tyson has produced emails showing that it reached out to the

federal government seeking assistance in procuring materials, ROA.21-11110.421–24, and that CISA encouraged Tyson to "Reach out any time!", ROA.21-11110.422. These emails in no way demonstrate Tyson's subservience to any federal officers. And while Tyson notes that it participated in a conference call with CISA on March 13, 2020, there is no indication that CISA provided any direction to Tyson in that call; rather, CISA "asked what the agency needed to do to assist" the industry. ROA.21-11110.414. CISA's request for input from industry does not show federal control. *Cf. County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 602 (9th Cir. 2020), *judgment vacated on other grounds*, 141 S. Ct. 2666 (2021) (agreement that allowed company and government "to coordinate … in a way that would benefit both parties" did not show requisite "acting under" relationship).[2]

[2] To the extent that Tyson relies on its interactions with USDA regulators, such as those relating to Food Safety Inspection Service (FSIS) access to its plants, those interactions do not suffice under *Watson*. As explained by the district court in *Glenn*, "Tyson, as an entity subject to federal regulation, is always closely monitored by FSIS and subject to its guidance," and "FSIS always has employees onsite at the plant and [those employees] were not there as a direct result of COVID-19. … Tyson has not shown that its contact with USDA after the president declared a national emergency was different than its normal communication with USDA or that it constituted a delegation of authority." ROA.21-40622.1097.

Similarly, like thousands of other businesses across America, Tyson sought assistance from the federal government during the pandemic. Tyson, because of its size and connections, was able to get the contact information of federal employees, including high-ranking ones, to lobby FEMA and the Department of Agriculture (USDA) to help procure personal protective equipment (PPE) and other supplies, *see* ROA.21-11110.414; ROA.21-11110.453–56; ROA.21-11110.458–60. In this way, Tyson sought the government's assistance, not vice versa. *Cf. L-3 Commc'ns*, 39 F. Supp. 3d at 751 (agency's responses to company's request for recommendations did not constitute direction). At the time, Tyson said that the government's response indicated that Tyson was "being heard." ROA.21-11110.453. That the government listened to Tyson's requests for "advice and assistance" is "not enough to establish the acting under relationship that § 1442(a)(1) requires." *Buljic*, 2021 WL 6143549, at *5 n.4 (quoting *Graves v. 3M Co.*, 17 F.4th 764, 770 (8th Cir. 2021) (cleaned up).

Tyson also suggests that the federal government played some role in its employees having "received letters authorizing them to continue working and traveling in support of their critical functions

notwithstanding state or local quarantine regulations." Appellants' Br. 12–13. The cited material does not support this suggestion. The "letters" referenced were drafted and signed by Tyson. ROA.21-11110.438. Tyson instructed its employees to carry them, *id.*, and the letters did not entitle any worker to an exemption as a matter of federal law. Exemptions from stay-at-home and other restrictions, like the restrictions themselves, were at the discretion of state and local officials—not federal officers acting under color of federal law. CISA explicitly stated that the decision whether to use its list of critical infrastructure entities to determine which businesses and workers should be subject to exemptions was left to state and local officials' "own judgment." CISA Memo at 2. Some states, like Texas, chose to use CISA guidance in determining which workers those *states* would exempt from stay-at-home orders. *See* Tex. Exec. Order GA-18, Apr. 27, 2020, at 3.[3] Some states created their own lists of essential employees who would be exempt from state rules. *See*, *e.g.*, Kansas Exec. Order No. 20-16, Mar. 28, 2020.[4] And some states used a

[3] https://gov.texas.gov/uploads/files/press/EO-GA-18_expanded_reopening_of_services_COVID-19.pdf

[4] https://governor.kansas.gov/wp-content/uploads/2020/03/EO20-16.pdf.

hybrid approach. *See* Miss. Exec. Order No. 1463, Mar. 14, 2020 (deeming businesses essential if they were reflected in CISA guidance or in separate Mississippi-specific categories).[5] Regardless of whether they used the CISA guidance, the states were exercising their own authority, not the federal government's.

In short, the federal government lacked any authority to assert control over Tyson, notwithstanding its role in an industry designated "critical infrastructure." Moreover, the federal government did not purport to exercise any such control here. The critical infrastructure designation and the related assistance that the government provided *to Tyson* is not a basis to find that Tyson was acting under a federal officer at the onset of the pandemic.

III. The Defense Production Act has no application to these cases.

Tyson repeatedly invokes the DPA in its brief, arguing both that executive action pursuant to the DPA constituted federal officer direction and that the DPA provides a colorable defense to the plaintiffs' claims. Tyson's arguments vastly overstate the scope of the DPA, which provides

[5] https://www.sos.ms.gov/content/executiveorders/ExecutiveOrders/1463.pdf.

the President with one narrow way to regulate private means of production: the "prioritization" of contracts. Here, neither the President nor the Secretary of Agriculture required Tyson to prioritize certain contracts over others—even "informally." Tyson was no more subject to federal officer direction via the DPA than was any other company doing work that the federal government recognized as important. Moreover, under this Court's precedent, even when the DPA's prioritization scheme is triggered, the narrow immunity provided by the statute is limited to claims based on a contractor's performance of some contracts instead of others. That defense does not apply here, and there is no colorable basis to expand it to include workplace safety claims like those brought here.

A. The DPA's prioritization scheme was not triggered as to Tyson.

The DPA provides the President with authority to "control the general distribution of any material in the civilian market" when he finds "that such material is a scarce and critical material to the national defense." 50 U.S.C. § 4511(b). That authority is limited to the specific mechanism created by Title I of the DPA, which allows the President to require firms to prioritize certain contracts or orders over others, and to allocate scarce materials in certain ways. *Id.* § 4511(a). Designed as a

"vehicle by which military orders gained precedence over civilian production," the statutory provision was adopted as a response "to conflicts between already scheduled commercial production and sudden, unexpectedly-large military needs." *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 981–82 (5th Cir. 1976)).

The President has delegated his prioritization and allocation authority to designated officials, and has required them to make specific findings and submit them for Presidential approval before invoking the DPA. *See* Executive Order 13603, National Defense Resources Preparedness, § 201, 77 Fed. Reg. 16,651, 16,652 (Mar. 22, 2012). As to "food resources" and "food resource facilities," the President delegated that authority to the Secretary of Agriculture, *id.*, and USDA has adopted detailed regulations to guide its exercise of that authority. *See*, *e.g.*, 7 C.F.R. §§ 789.1–789.73 (establishing the Agriculture Priorities and Allocations System (APAS)).

Although APAS was not triggered during the pandemic, Tyson claims that its operations came under federal officer control taken pursuant to the DPA both "informally" prior to April 28, 2020, and "formally" with the issuance of Executive Order 13817. The evidence on

which Tyson relies, however, demonstrates only that (1) the President exercised authority under the DPA as to *other* industries, and (2) the President directed the Secretary of Agriculture to exercise DPA authority *if* he thought it necessary to do so. Tyson's burden is not to show that it *could* have been subject to federal officer control, but that it actually was. As the federal government has stated consistently, no DPA orders were issued to any meatpacking company—formally or informally—during the pandemic.

1. The government did not informally trigger the DPA as to Tyson.

Tyson repeatedly criticizes the district court for not recognizing that the DPA can be triggered "informally." *See*, *e.g.*, Appellants' Br. 41, 59–60. In so doing, Tyson overstates this Court's holding in *Eastern Air Line*s. At issue in that case was a "voluntary agreement between the Department of Defense and the aircraft manufacturers" by which the manufacturers would "produce military orders ahead of all civil air-carrier aircraft although both have equal priority rating," referred to as the "jawboning" policy. 532 F.2d at 983 (quoting government official letter). This Court held that although this policy was not embodied in a prioritization order with respect to a specific contract, it fell within the

powers granted to the Executive under the DPA, as an "informally presented request[] for priority." *Id.* at 997. Contrary to Tyson's suggestion, Appellants' Br. 58, *Eastern Air Lines* says nothing about "informal directives and 'means of persuasion'" other than those relating to contract prioritization.

Eastern Air Lines does not support Tyson here. Nothing that Tyson points to as an informal directive constituted an "informally presented request for priority." None of the guidance documents discussed above, and none of the regulatory measures taken by FSIS to ensure food safety and to ensure that FSIS inspectors had continued, safe access to Tyson facilities, had anything to do with contracts.

Attempting to show that it acted under color of law, Tyson quotes the President's statement in a March 18, 2020, Press Conference, that "[w]e'll be invoking the Defense Production Act, just in case we need it." Appellants' Br. 9. Nowhere in the entire press conference did the President mention Tyson, meatpacking, or food. *See* Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing (March 18 Remarks), The White House (Mar. 18, 2020), https://bit.ly/2Nh91XZ. Later that day, the President

issued Executive Order 13909, invoking the DPA and delegating to the Secretary of Health and Human Services the authority to issue priority and allocation orders solely with respect to "health and medical resources." Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of COVID-19, 85 Fed. Reg. 16,227 (Mar. 23, 2020). Tyson does not claim that any of its actions or inactions relate to that order. The President's March 18 comments had no more to do with Tyson than with Jiffy Lube, Starbucks, or any other non-healthcare business in America. *See Buljic*, 2021 WL 6143549, at *6 (explaining that the comments were "clearly related to the production and distribution of masks and ventilators").[6]

In addition, Tyson cites a March 24, 2020, tweet as evidence of "informal" DPA invocation. Appellants' Br. 16 (citing Doina Chiacu, *Trump Administration Unclear over Emergency Production Measure to*

[6] The President also tweeted that same day, "I only signed the Defense Production Act to combat the Chinese Virus should we need to invoke it in a worst case scenario in the future." Charlie Savage, *How the Defense Production Act Could Yield More Masks, Ventilators and Tests*, N.Y. Times (Mar. 20, 2020), https://www.nytimes.com/2020/03/20/us/politics/defense-production-act-virus.html. The phrase "should we need to invoke it" confirms that no entity came under federal direction that day.

Combat Coronavirus, Reuters (Mar. 24, 2020), http://reut.rs/3rS3MN5). The tweet had nothing to do with Tyson. It stated:

> The Defense Production Act is in full force, but haven't had to use it because no one has said NO! Millions of masks coming as back up to States.

Id. The tweet seems to refer to Executive Order 13909 and its application to PPE, as it suggests that the DPA could be used in connection with mask production. The tweet cannot reasonably be read to compel anyone to do anything, much less a meatpacking company like Tyson. As the Eighth Circuit held in *Buljic*, Tyson's argument "is untenable not because the federal actions early in the pandemic were informal, but rather because they contained no … directive" at all. 2021 WL 6143549, at *6.

2. Neither Executive Order 13917 nor related guidance invoked DPA authority as to Tyson.

President Trump issued Executive Order 13917 on April 28, 2020. *See* 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. Unlike the pre-April 28, 2020, references to the DPA on which Tyson relies, Executive Order 13917 did relate to the meatpacking industry. But neither that document nor any action taken by the Secretary of

Agriculture constituted a deployment of DPA prioritization authority, formally or informally. That the words "Defense Production Act" were uttered did not have the effect of bringing the meatpacking industry under federal control.

Executive Order 13917 directed the Secretary of Agriculture to "take all appropriate action" under section 101 of the DPA, 50 U.S.C. § 4511, "to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA." 85 Fed. Reg. at 26,313. Following issuance of the Executive Order, USDA took two actions. First, the Secretary of Agriculture sent two letters on May 5, 2020, one to "stakeholders" and one to governors. *See* USDA, Press Release, Secretary Perdue Issues Letters on Meat Packing Expectations, May 6, 2020.[7] The stakeholder letter stated that "meat and poultry processing plants" "should utilize" the April 26 CDC/OSHA guidance, that plants that were contemplating reductions of operations or had recently closed "should submit written documentation of their operations and health and safety protocols," and

[7] https://www.usda.gov/media/press-releases/2020/05/06/secretary-perdue-issues-letters-meat-packing-expectations.

that plants "should resume operations as soon as they are able after implementing the CDC/OSHA guidance." Letter from Secretary Sonny Perdue, May 5, 2020 (May 5 Letter).[8] It also stated that USDA would work with, among others, "state, tribal, and local officials to ensure facilities are implementing practices consistent with the guidance to keep employees safe and continue operations." *Id.* The Secretary stated he was "exhort[ing] [stakeholders] to do this," and that "further action under the Executive Order and the Defense Production Act is under consideration and will be taken if necessary." *Id.* Second, USDA posted questions and answers about the Executive Order on its website, where it stated that, "[i]f necessary, the Secretary may issue orders under the Executive Order and the Defense Production Act requiring meat and poultry establishments to fulfill their contracts." Department of Agriculture, COVID-19: Food Supply Chain (Food Supply Q&A), https://www.usda.gov/coronavirus/food-supply-chain.

None of these documents reflect prioritization—formal or informal—under the DPA. The Executive Order only directs the

[8] These letters, cited by Tyson, Appellants' Br. 18, are available at https://web.archive.org/web/20210126054925/https://www.usda.gov/sites/default/files/documents/stakeholder-letters-covid.pdf.

Secretary of Agriculture to take "appropriate action." 85 Fed. Reg. at 26,313. Granting a federal official broad authority to act in his discretion is not evidence that the official acted at all, and certainly not that he acted as to Tyson. *See Buljic*, 2021 WL 6143549, *6 at n.6 (noting that the Executive Order did not trigger the DPA prioritization scheme). The Secretary's May 5 letter is of no help to Tyson either, because its recommendation that plants "should" utilize CDC/OSHA guidance and that "plants contemplating reductions of operations or recently closed since Friday May 1, and without a clear timetable for near term resumption of operations, should submit written documentation of their operations and health and safety protocol developed based on the CDC/OSHA guidance to USDA," has nothing to do with contract prioritization pursuant to Title I of the DPA.

In the Spring of 2020, USDA stated that issuing DPA orders remained "under active consideration." Food Supply Q&A. The United States has since confirmed that no such orders were ever issued. Brief for the United States as Amicus Curiae at 4, *Buljic v. Tyson Foods, Inc.*, 8th Cir. No. 21-1010 (Apr. 13, 2021) ("While USDA has expressed its support for the continuing operation of meat and poultry processing facilities, it

has not exercised its DPA authority to enter any contracts or issue any orders requiring action by that industry."). Absent any evidence the Secretary ever issued such orders—and issued them with respect to contracts held by Tyson and to be performed at its Center or Sherman plants—the DPA is irrelevant to these cases.

B. The narrow DPA defense does not apply to tort claims like the plaintiffs' here.

Tyson also argues that the immunity provision of the DPA, 50 U.S.C. § 4557, provides a colorable defense to the claims against it. Section 4557 provides that "No person shall be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with a rule, regulation, or order issued" under the DPA. Because, as explained above, the DPA was never triggered as to Tyson, this defense is not colorable. *See Anderson v. Hackett*, 646 F. Supp. 2d 1041, 1053 (S.D. Ill. 2009) (stating that DPA does not provide a colorable defense where "[d]efendants have pointed to no 'rule, regulation, or order issued pursuant to the Act[,]' compliance with which has exposed them to liability").

Further, even if Tyson's Center or Sherman plants were performing DPA-rated contracts, the immunity provided by section 4557 would not

apply to the claims brought here, under this Court's controlling precedent. Section 4557 immunity is narrow: aside from "exonerat[ing]… breaches [of contracts] resulting from compliance with priority orders subsequently held to be invalid, the provision 'is simply declaratory of the common law (doctrine of impossibility).'" *E. Air Lines*, 532 F.2d at 997 (quoting *United States v. Tex. Construction Co.*, 224 F.2d 289, 293 (5th Cir. 1955)). That is, section 4557 "provid[es] a defense for a DPA contractor against a suit by a non-government customer in the event that the DPA contractor is forced to breach another contract to fulfill the government's requirements." *Hercules Inc. v. United States*, 24 F.3d 188, 203 (Fed. Cir. 1994); *see In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 844–45 (E.D.N.Y. 1984) (stating that the § 4557 defense does not apply to negligence claims). Tyson's brief does not cite this precedent, much less explain how the claims here fit within the scope of section 4557. And they do not: The plaintiffs are not customers claiming that Tyson performed a prioritized contract over their own. No prioritized contract prohibited Tyson from providing safe working conditions.

Finally, Tyson briefly argues that the DPA provides a colorable federal defense for purposes of the federal officer removal statute because

"federal directions required Tyson to continue operating in compliance with CDC federal directives" and those directives "preempt any conflicting obligations Plaintiffs may attempt to derive from state tort law." Appellants' Br. 59. Notably, however, Tyson fails to explain how Texas tort law conflicts with any federal directives applicable to Tyson. There is no colorable conflict.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of Plaintiffs-Appellees, the Court should affirm the district court's remand orders.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 6,161 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Century Schoolbook.

January 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2022, the foregoing brief has been served through this Court's electronic filing system upon counsel for the parties.

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