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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, contrary to the unanimous holdings of the courts of appeals, generic statements of support and encouragement from federal officials, nonbinding guidance that explicitly defers to state and local authorities, and industry requests for federal government assistance transform private market activity into acts taken "under" federal officer direction for purposes of removal under 28 U.S.C. § 1442(a)(1).

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INTRODUCTION

Two courts of appeals, including the Eighth Circuit in this case, have considered Tyson's claims that its operation of meat- and poultry-processing plants in early 2020 constituted action taken "under" the direction of federal officers, as that term is used in the federal-officer removal statute, 28 U.S.C. § 1442(a)(1). Both courts concluded, in the words of the Eighth Circuit, that "[t]he record … tells a different story." Pet. App. 15. The tweets, press statements, guidance, and industry requests for federal aid that Tyson put forward, to the extent they have anything to do with Tyson *at all*, do not demonstrate the kind of subservient relationship between a private actor and the federal government that this Court has held is necessary to justify federal-officer removal.

The courts of appeals' thorough decisions finding Tyson's evidence of federal direction inadequate under existing case law is consistent with those of three additional courts of appeals considering similar arguments made by other regulated entities facing COVID-19-related claims. Those courts, too, unanimously rejected the notion that the federal response to COVID-19 so radically changed the relationship between the federal government and participants in the nation's "critical infrastructure" industries as to transform those participants into ones acting under federal officers, and thus able to avoid state court jurisdiction over all claims relating to their operations pursuant to section 1442(a)(1). In total, then, five courts of appeals have concluded, all unanimously, that, under this Court's precedent, recognition by federal officials of the *importance* of private-sector activities does not render performance

of those activities action taken "under" federal officer direction, as section 1442(a)(1) requires.

Despite this broad consensus and the federal government's agreement as expressed in amicus briefs in the courts of appeals, Tyson seeks review. Its petition, however, mischaracterizes both the facts, as methodically explained by the courts of appeals, and the holdings of the court below. To the extent that Tyson disagrees with the Eighth Circuit's (and Fifth Circuit's) reading of the factual record, that disagreement is not a basis for this Court's review. And Tyson's accusation that the lower courts have adopted new rules limiting federal officer removal by rejecting its arguments is unsupported. As the Eighth Circuit explained, the reason "Tyson's argument that it was 'acting under' federal officers is untenable" is because it has not shown that any federal directive, formal or informal, existed. Pet. App. 19. This straightforward, fact-bound conclusion is compelled by the Court's precedent.

There is no question that the events underlying this case arose during "the greatest national health crisis in a century." Pet. 1. But as the courts of appeals have agreed, "[t]here is no COVID-19 exception to federalism." *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 400 (3d Cir. 2021). Contrary to Tyson's assertion, there is nothing "dangerous" about this conclusion. Pet. 37. Rather, the answer that Tyson seeks—that any action the federal government deems important is federalized for jurisdictional purposes—would be dangerous to the constitutional division of responsibilities between the federal government and the states. There is no basis for review.

STATEMENT

Factual background

A. The Waterloo outbreak

The two actions that comprise this case stem from an outbreak of COVID-19 at Tyson's pork processing facility in Waterloo, Iowa, in March and April 2020. Pet. App. 9.

On April 6, 2020, Tyson suspended operations at its facility in Columbus Junction, Iowa, after more than two dozen employees there tested positive for COVID-19. 8th Cir. App. 48, 278. Tyson transferred potentially exposed workers from that plant to Waterloo without testing or screening. *Id.* 49, 280. Indeed, despite the well-publicized, surging COVID-19 infection rates in meatpacking plants nationwide, the only safeguards that Tyson put into place at Waterloo were temperature-check stations. *Id.* 47, 278. Workers at Waterloo continued to work elbow-to-elbow, mostly without face coverings. *Id.* 48, 279. Tyson did not provide or require face coverings or other appropriate personal protective equipment (PPE). *Id.* 48, 57, 278, 287. Tyson did not promote social distancing, did not modify communal work areas to minimize contact between employees, and did not install physical barriers to separate or shield workers from each other. *Id.* 48, 57, 278, 287. Rather than isolating and sending home sick and symptomatic workers, plant managers allowed and encouraged infected and exposed employees to report to work and continue working. *Id.* 49, 58, 280, 288. When one worker vomited on the production line, Tyson allowed him to keep working and return to work the next day. *Id.* 49, 280.

On the night of April 12, 2020, nearly two dozen Tyson employees were admitted to the emergency room at a single Waterloo hospital. *Id.* 48. Despite multiple requests from Black Hawk County and elected officials, Tyson refused to shut down the Waterloo plant, even temporarily. *Id.* 48, 279. Instead, plant management deliberately concealed the scope of the outbreak and lied to employees. *Id.* 49, 53–54, 280, 284. Managers falsely told workers that COVID-19 had not been detected at the facility and that their co-workers had the flu. *Id.* 49, 54, 280, 284. They falsely stated that Tyson had adopted strict screening and tracing policies. *Id.* 54, 284.

COVID-19 continued to spread among Waterloo workers, and, as a result, Tyson eventually shut down the facility on April 22, 2020. *Id.* 50, 281. By August 2020, Black Hawk County had recorded more than 1,000 cases of COVID-19 among Tyson employees—more than one-third of the Waterloo workforce. *Id.* 51, 282. Among them were Sedika Buljic, Reberiano Leno Garcia, Jose Luis Ayala, and Isidro Fernandez, all of whom contracted the coronavirus while working at Tyson's Waterloo plant and later died from COVID-19. *Id.* 42, 274.

B. The federal response to the pandemic

In March and April 2020, various federal government officials took steps to assist state and local governments, businesses, and the American people as they coped with the pandemic. On March 13, 2020, the President declared a national emergency. *See* Pres. Proclamation 9994, Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19), 85 Fed. Reg. 15,337 (Mar. 18, 2020). Three days later, the White House issued "The

President's Coronavirus Guidelines for America." 8th Cir. App. 178–79. This two-page document contained generic advice like "If you feel sick, stay home" and "Avoid discretionary travel." *Id.* It also stated, "If you work in a critical infrastructure industry, … you have a special responsibility to maintain your normal work schedule," and "Listen to and follow the directions of your state and local authorities." *Id.*

On March 19, 2020, the Cybersecurity and Infrastructure Security Agency (CISA), a component of the Department of Homeland Security (DHS), issued guidance explicating the reference to critical infrastructure workers in the "Guidelines for America." CISA, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response (CISA Memo) (Mar. 19, 2020), 8th Cir. App. 160–70. CISA provided an "initial list of 'Essential Critical Infrastructure Workers' *to help State and local officials* as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security." *Id.* 160 (emphasis added). That list included hundreds of categories of workers, including those in meatpacking plants, as well as, *inter alia*, restaurant delivery employees, bank tellers, auto repair workers, hotel workers, and blood donors. *Id.* 164–70. CISA emphasized that "this list is advisory in nature" and "is not, nor should it be considered to be, a federal directive or standard in and of itself." *Id.* 161. CISA confirmed 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.*

Around the same time, federal agencies started issuing guidance to industries they regulate and serve. With respect to the meatpacking industry, concern quickly arose in March 2020 about the safety of federal employees conducting on-site examinations and inspections of animals, carcasses, and meat during the slaughter and production process, as required by the Federal Meat Inspection Act (FMIA) and other laws. *See*, *e.g.*, 21 U.S.C. §§ 603–06 (FMIA); 21 U.S.C. § 455 (Poultry Products Inspection Act). Given "questions about how the department will continue to ensure that grading and inspection personnel are available" despite the pandemic, on March 16, 2020, the U.S. Department of Agriculture (USDA) issued a "Statement to Industry," in which it "assured" the industry that it was "committed to ensuring the health and safety of [USDA] employees while still providing the timely delivery of services." 8th Cir. App. 180. USDA stated that agency field personnel would "be working closely with establishment management and state and local health authorities to handle situations as they arise." *Id.* It later issued a memorandum identifying conditions under which regulated entities were allowed to exclude USDA inspectors from their facilities because of risk of coronavirus exposure. *Id.* 182.

USDA also created a website titled "Common Questions about Food Safety and COVID-19" (Common Questions) (Mar. 18, 2020).[1] Two of the

[1] https://web.archive.org/web/20210118080913/https://www.fsis.usda.gov/wps/portal/fsis/newsroom/Common-Questions-about-Food-Safety-and-COVID-19. Later in 2020, USDA reposted these questions and answers on a different website, where they remain today. *See* USDA, COVID-19: Food Supply Chain

(*Footnote continued*)

questions and answers it posted are particularly relevant to this case. First, to the question whether plants were required to "report to FSIS if employees become ill with COVID-19," the agency responded: "In the event of a diagnosed COVID-19 illness, FSIS will follow and is encouraging establishments to follow the recommendations of local public health authorities regarding notification of potential contacts." *Id.* Second, to the question, "Can a county health department or state government shut down an FSIS-regulated establishment?," FSIS responded: "Yes, and FSIS will follow state and local health department decisions." *Id.*

Throughout March 2020, Tyson, individually and through an industry group, lobbied both the Federal Emergency Management Agency (FEMA) and USDA to help procure PPE and other supplies. 8th Cir. App. 140, 170–177. At the time, Tyson stated that it was concerned that the Centers for Disease Control (CDC) "may suggest some type of protective face coverings." *Id*. 173. On April 3, 2020, a Tyson executive commented that the government's response to its requests for assistance indicated that Tyson was "being heard." *Id.*

More than three weeks later, after Sedika Buljic and Reberiano Garcia had died, after Tyson had closed the Waterloo plant due to COVID-19 outbreaks, and on the day Isidro Fernandez died, the Occupational Safety and Health Administration (OSHA) and the CDC issued "interim guidance" for the meatpacking industry that, for the first time, "include[d] *recommended* actions employers can take to reduce

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(Food Supply Q&A), https://www.usda.gov/coronavirus/food-supply-chain#food-safety.

the risk of exposure to the coronavirus." OSHA, Press Release, U.S. Department of Labor's OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries (Apr. 26, 2020) (emphasis added).[2]

On April 28, 2020, President Trump issued Executive Order 13917, 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). That order directed the Secretary of Agriculture to "take all appropriate action" under section 101 of the Defense Production Act (DPA) "to ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA." *Id.* at 26,313.

In the wake 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).[3] 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 that plants "should resume operations as soon as they are able after implementing the CDC/OSHA

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[2] https://www.osha.gov/news/newsreleases/national/04262020.

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

guidance." May 5, 2020 Letter from Secretary Sonny Perdue (May 5 Letter).[4] The letter 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 "exhort[ed] [stakeholders] to do this," and noted 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, "If necessary, the Secretary may issue orders under the Executive Order and the Defense Production Act requiring meat and poultry establishments to fulfill their contracts." Food Supply Q&A, *supra* n.1.

In an amicus brief filed in the court of appeals, the United States confirmed that no such orders were ever issued. U.S. Amicus Br. 4.

Procedural background

A. District court proceedings

Tyson's petition to this Court arises from two actions brought by survivors and administrators of the estates of Sedika Buljic, Reberiano Leno Garcia, Jose Luis Ayala, Jr., and Isidro Fernandez. The plaintiffs in the *Buljic* action, the survivors of Ms. Buljic, Mr. Garcia, and Mr. Ayala, filed a petition in Iowa District Court for Black Hawk County on June 25, 2020, bringing claims against Tyson under state-law

[4]https://web.archive.org/web/20210126054925/https://www.usda.gov/sites/default/files/documents/stakeholder-letters-covid.pdf.

theories of negligence and fraudulent misrepresentation. 8th Cir. App. 41. The son of Isidro Fernandez filed a substantively similar petition in the same court on August 5, 2020. *Id.* 273. Both petitions alleged that Tyson's failures to take basic precautions—including failures to require workers to wear face coverings, to isolate and send home sick workers, and to inform or warn workers of possible COVID-19 exposure—and its fraudulent misrepresentations to workers about risks to their health resulted in the deaths of the plaintiffs' loved ones. *Id.* 54–55, 56–69, 283–85, 286–89.

Tyson removed both actions to the United States District Court for the Northern District of Iowa, asserting that that court had jurisdiction under both the federal-officer removal statute, 28 U.S.C. § 1442(a)(1), and the federal-question jurisdiction statute, 28 U.S.C. § 1331. 8th Cir. App. 22–23, 211. Plaintiffs in both cases moved to remand the actions to state court. On December 28, 2020, the district court granted both motions in substantively identical orders. Pet. App. 25, 66. As to section 1442(a)(1), the court held that Tyson failed to establish the requisite elements for federal-officer removal. First, it held that Tyson "failed to demonstrate that it acted under the direction of a federal officer," noting that the dates of Executive Order 13917 and the May 5 letters made them irrelevant, and that the March 13 national emergency declaration and Tyson's claimed "constant contact" with federal agencies and operation as "critical infrastructure" did not demonstrate Tyson was "acting under" any federal officers as required by the statute. *Id.* 57–59, 96–97. Second, the court held there was no "causal connection between [Tyson's] actions and the official authority" cited by Tyson, noting the lack of evidence that any federal officer

directed Tyson to take or not take any of the actions that form the basis of Plaintiffs' claims. *Id.* 59–60, 97–99. The court further pointed out that, despite Tyson's claims that the federal government was forcing it to keep its plants open, Tyson *did* shut down plants both before and after the Waterloo outbreak. *Id.* 60, 98. Third, the court held that neither the DPA nor the FMIA provided Tyson with a colorable federal defense to the claims at issue *Id.* 60–62, 99–100. The court also rejected Tyson's federal-question jurisdiction argument. *Id.* 62–63, 101–02.

B. Court of appeals proceedings

Tyson appealed both remand orders to the Eighth Circuit, where the cases were consolidated. On appeal, Tyson abandoned its federal-question argument and pursued only the federal-officer removal theory. *See* Pet. App. 20–21.

The Eighth Circuit unanimously affirmed the district court's remand order. While recognizing that "[t]he federal officer removal statute is to be 'liberally construed,'" *Id.* 12 (quoting *Cty. Bd. of Arlington Cty. v. Express Scripts Pharmacy, Inc.*, 996 F.3d 243, 250–51 (4th Cir. 2021)), the court explained that "not all relationships between private entities and the federal government satisfy" the statutory requirement that a private individual have been "'acting under' a federal officer or agency in carrying out the acts that underlie the plaintiff's complaint." *Id.* (citing *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2001)). Pointing to this Court's decision in *Watson*, the court of appeals stated that "the fact that an entity—such as a meat processor—is subject to pervasive federal regulation alone is not sufficient to confer federal jurisdiction." *Id.* 13. Rather, the court explained, "the private entity

must help federal officers fulfill 'basic governmental tasks.'" *Id.* (quoting *Watson*, 551 U.S. at 153). The Eighth Circuit highlighted several examples from prior case law where this standard had been met, including where "a private person was acting under the direction of a federal law enforcement officer" and "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." *Id.* 13–14 (quoting *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018), and citing *Maryland v. Soper*, 270 U.S. 9, 30 (1926), *Jacks v. Meridian Res. Co, LLC*, 701 F.3d 1224, 1233 (8th Cir. 2012), *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 469 (3d Cir. 2015), and *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 136–37 (2d Cir. 2008)).

The court of appeals found that Tyson did not meet this standard, because its claim that "various communications from federal officials … constituted federal directives" was not supported by the record. *Id.* 15. The court methodically addressed each piece of evidence on which Tyson relied and explained why none established an "acting under" relationship.

First, the court of appeals explained, the fact that the "food and agriculture" sector was one of sixteen sectors of the economy designated "critical infrastructure" "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." *Id.* 15–16. Noting the "scores of categories of workers" referenced in the CISA March 2020 guidance, and citing a Third Circuit opinion rejecting a similar argument, the court concluded: "It cannot be that the federal government's

mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction." *Id.* 16 (citing *Maglioli*, 16 F.4th at 406). To the contrary, Tyson's "designation as 'critical infrastructure' meant that the federal government provided *it* assistance, rather than the other way around," and "'government advice and assistance' are not enough to establish the 'acting under' relationship that § 1442(a)(1) requires.'" *Id*. 16 (quoting *Graves v. 3M Co.*, 17 F.4th 764, 770 (8th Cir. 2021)).

Second, the court turned to the "various communications from federal officials and agencies" cited by Tyson. The court explained that statements of the President and Vice President that Tyson relied upon did no more than "underscore[] the importance of the food and agriculture industry," and that USDA's March 16 "Statement to Industry" only "reaffirmed that the Department remained committed to working closely" with industry and emphasized the need for "ongoing communication." *Id*. 17. The court explained that these statements "[a]t most" showed that "the federal government was encouraging Tyson—and other industries—to continue to operate normally." *Id.* But they did not show any federal officer "direct[ed] or enlist[ed] Tyson to fulfill a government function or even t[old] Tyson specifically what to do." *Id.* To the contrary, subsequent events showed Tyson "retained complete, independent discretion over the continuity of its operations." *Id.* 18.

Finally, the court found no evidence to support Tyson's argument that it was subject to directives issued pursuant to the DPA. *Id.* 18. The court explained that March 2020 references to the DPA by President Trump had nothing to do with Tyson or the

meatpacking industry at all. *Id.* And Executive Order 13917, which at least related to the meatpacking industry, post-dated the injuries at issue in the cases. *Id.* Even if that Executive Order could be construed as a directive for purposes of section 1442(a)(1)—which the court explained seemed unlikely given no evidence that USDA ever exercised the authority to issue orders that the Executive Order delegated to it—no federal action that preceded it, formal or informal, contained any directive to Tyson. *Id.* 19.

The court "thus conclude[d] that Tyson was not 'acting under' a federal officer at the time that Plaintiffs' relatives contracted COVID-19 and is therefore not eligible for removal under the federal officer removal statute." *Id.* 20. In light of this finding, it did not address the other requirements of the statute that the district court had also found lacking. *Id.*

Tyson filed a petition for rehearing and rehearing en banc, which was denied without a call for a response and without noted dissent. *Id.* 24.

REASONS FOR DENYING THE WRIT

To remove a state-law action to federal court under 28 U.S.C. § 1442(a)(1), a private actor must show that (1) it acted under the direction of a federal officer, (2) the claims against it relate to action taken pursuant to the federal officer's directions, and (3) it has a "colorable federal defense" to the state-law claims against it. *See, e.g.*, *Moore v. Elec. Boat Corp.*, 25 F.4th 30, 34 (1st Cir. 2022); *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (en banc); *Sawyer v. Foster Wheeler LLC*, 860 F.3d 249, 254 (4th Cir. 2018); *see also Jefferson Cty., Ala. v.*

Acker, 527 U.S. 423, 431 (1999) (construing earlier version of statute).

The court of appeals' conclusion that Tyson's invocation of the statute failed to satisfy the first element does not warrant review. That factbound determination is consistent with the precedent of other courts of appeals and this Court. Tyson's failure to meet the other requirements of the statute, as recognized by the district court, presents an additional reason to deny the petition.

I. The courts of appeals are in wide agreement about both the law and its application to Tyson's facts.

Although Tyson asserts that this case raises a question that is a "source of disarray in the lower courts," Pet. 35 (capitalization altered), Tyson does not identify *any* conflict between the court of appeals' decision in this case and decisions of any other court of appeals (or this Court). Nor can it: No court of appeals has found that recognition of an industry as important, during a pandemic or otherwise, combined with non-binding guidance, is enough to convert a regulated entity into one "acting under" federal officer direction for purposes of section 1442(a)(1), as this Court defined that term in *Watson*. To the contrary, two circuits rejected this argument as made by Tyson, and three additional circuits have rejected similar arguments raised by other "critical infrastructure" entities that were the recipients of federal guidance during the COVID-19 pandemic. No court of appeals has held otherwise.

A. Two courts of appeals have rejected Tyson's arguments as unsupported by the facts and the law.

As Tyson acknowledges, it made the same arguments in this case and to the Fifth Circuit, which also unanimously rejected them. In *Glenn v. Tyson Foods, Inc.*, 40 F.4th 230 (5th Cir. 2022), *pet. for cert. docketed* Nov. 10, 2022, the Fifth Circuit conducted its own independent analysis of Tyson's evidence in support of its claim of federal-officer direction, and it reached the same conclusion as the Eighth Circuit: "[T]he record simply does not bear out Tyson's theory" that it "was 'acting under' direction from the federal government when it chose to" continue to operate its plants during the pandemic. *Id.* at 232. Rather, the record shows only "encouragement to meat and poultry processors to continue operating, careful monitoring of the food supply, and support for state and local governments"—none of which amounts to federal officer direction under the statute as construed by this Court. *Id.* at 237.

Like the Eighth Circuit, the Fifth Circuit carefully examined each piece of evidence that Tyson put forward in support of its claim that it was acting under federal direction. As to the food industry's designation as "critical infrastructure," the court noted that federal guidance to critical infrastructure entities was both "nonbinding" and explicitly preserved the primacy of state and local authorities *Id.* at 235. In addition, it found that Tyson's communications with USDA "only show[ed] that Tyson was subject to heavy regulation—not that it was an agent of the federal government." *Id.* at 236. Indeed, the court concluded that Tyson's argument that the regulation to which it was subject sufficed to demonstrate that it was

performing a governmental task was weaker than the argument rejected by this Court in *Watson*. *Id.* (citing 551 U.S. at 156–57).

Moreover, contrary to the petition's suggestion, the Fifth Circuit did *not* hold that "clear government demands" cited by Tyson were insufficiently "explicit" to trigger federal-officer removal. Pet. 34 (citing *Glenn*, 40 F.4th at 232). Rather, it held that, as a factual matter, "the record does not support Tyson's claim" that "federal officials made it clear that Tyson had to keep its plants open." 40 F.4th at 237. "President Trump's proclamation declaring a national emergency, a conference call held in early March between the President and dozens of companies, a presidential tweet, guidance from the CDC and OSHA, and the Vice President's statement encouraging food industry employees to do their jobs" constituted encouragement, not direction, the court concluded. *Id.* Finally, the Fifth Circuit held that neither Executive Order 13917 nor USDA's subsequent letters actually directed meat and poultry plants to do *anything*. *Id.*

As it had in the Eighth Circuit, Tyson sought en banc rehearing of the Fifth Circuit's decision. And as in the Eighth Circuit, rehearing was denied without a request for a response, with no member of the court calling for a poll on rehearing en banc. *See* Aug. 29, 2022 Order, *Glenn v. Tyson*, 5th Cir. No. 21-30622. Since *Glenn* was decided (and after Tyson filed its petition), the Fifth Circuit has vacated as contrary to its decision in *Glenn* two of the district court orders cited by Tyson, Pet. 35, and remanded those cases to the district court to consider whether jurisdiction exists on other grounds. *Fields v. Brown*, No. 21-40818, 2022 WL 4990258 (5th Cir. Oct. 3, 2022);

Wazelle v. Tyson Foods, Inc., No. 22-10061, 2022 WL 4990424 (5th Cir. Oct. 3, 2022).[5]

B. Courts of appeals widely agree that federal recognition of an entity's importance during a pandemic does not establish an "acting under" relationship.

Two courts of appeals' rejection of Tyson's factual assertions as unsupported by the record and its legal argument as foreclosed by this Court's decision in *Watson* is a compelling indication that the petition is unworthy of review. The consensus among the courts of appeals, however, is even broader. In the context of COVID-19 alone, four courts of appeals have rejected arguments by nursing homes asserting, like Tyson,

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[5] Tyson cites two additional decisions issued contemporaneously by a single district judge, finding that Tyson was entitled to invoke the federal-officer removal statute, relying on the now-vacated district court decisions in *Fields* and *Wazelle*. Pet. 35 (citing *Johnson v. Tyson Foods, Inc.*, No. 21-cv-01161, 2021 WL 5107723 (W.D. Tenn. Nov. 3, 2021), and *Reed v. Tyson Foods, Inc.*, No. 21-cv-01155, 2021 WL 5107725 (W.D. Tenn. Nov. 3, 2021)). A district court decision reaching the opposite conclusion from two unanimous courts of appeals is not the sort of "disarray" that warrants this Court's intervention. Moreover, those cases are challenges to Tyson's COVID-19 vaccination policy, which raises factual questions different from those in this case, and the plaintiffs in each case subsequently amended their complaints to include claims arising under federal law—minimizing the significance of the court's rulings on federal-officer removal jurisdiction and making appellate review on that issue unlikely. *See Johnson v. Tyson Foods, Inc.*, 2022 WL 2161520 (W.D. Tenn. June 15, 2022) (addressing federal claims); *Reed v. Tyson Foods, Inc.*, 2022 WL 2134410 (W.D. Tenn. June 14, 2022) (same). The decisions on federal-officer removal in *Johnson* and *Reed* also conflict in principle with the Sixth Circuit's decision in *Mays v. City of Flint, Michigan*, 871 F.3d 437 (6th Cir. 2017)—a conflict best addressed in the first instance by the Sixth Circuit.

that nonbinding recommendations and guidance from federal officials, combined with a "critical infrastructure" designation, establish the sort of "special relationship" that *Watson* requires a private entity to show to support removal under section 1442(a)(1). 551 U.S. at 157.

In the first such decision, *Maglioli*—which both the Eighth and Fifth Circuits cited favorably in rejecting Tyson's arguments, Pet. App. 16–17; *Glenn*, 40 F.4th at 235—the Third Circuit held that COVID-19 infection-control guidance, which the defendant nursing homes referred to as "comprehensive directives," did not establish an "acting under" relationship. 16 F.4th at 405. *Maglioli* pointed out that those documents, like the documents on which Tyson relies, "contain[ed] verbiage denoting guidance, not control." *Id*. *Maglioli* also held that the nursing home industry's federal designation as "critical infrastructure," like the meatpacking industry's, did not suffice to show the requisite subservient relationship. The court explained that "doctors, weather forecasters, clergy, farmers, bus drivers, plumbers, dry cleaners, and many other workers" had all been similarly designated, and that it was implausible that all such workers had been "deputize[d]" as federal agents. *Id.* at 406.

Since *Maglioli* was decided, three other courts of appeals have reached the same conclusion, in opinions cross-referencing each other and, notably, the opinion in this case. *See Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210, 1212–13 (7th Cir. 2022); *Mitchell v. Advanced HCS, LLC*, 28 F.4th 580, 589–91 (5th Cir. 2022) (citing *Buljic* approvingly); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679 (9th Cir.

2022) (same).[6] These courts' holdings are in full agreement with that of the Eighth Circuit in this case: A defendant's showing "that it operated as a private entity subject to government regulations, and that during the COVID-19 pandemic it received additional regulations and recommendations from federal agencies," is not enough to satisfy section 1442(a)(1). *Saldana*, 27 F.4th at 686. And when a federal agency "set[s] forth aspirations and expectations, not mandates," it is not "directing" a private entity within the meaning of section 1442(a)(1). *Mitchell*, 28 F.4th at 590.

Although Tyson does not acknowledge these decisions in the petition, Tyson conceded in the courts of appeals that these cases were correctly decided and "broke no new ground." Appellants' Response to Rule 28(j) Letter, *Glenn v. Tyson*, 5th Cir. No. 21-40622 (Mar. 23, 2022) (discussing *Mitchell*); *see also* Appellants' Response to Rule 28(j) Letter, Oct. 26, 2021 (discussing *Maglioli*); Appellants' Reply Br., *Glenn v. Tyson*, 5th Cir. No, 21-40622 (same).[7] Tyson's

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[6] This Court denied the *Saldana* defendants' petition for certiorari, which was limited to their complete preemption theory of jurisdiction and did not address the Ninth Circuit's federal-officer removal holding. *See* Order, *Glenhaven Healthcare LLC v. Saldana*, No. 22-192 (Nov. 21, 2022).

[7] The nursing home cases, like the decisions in this case and in *Glenn*, are also consistent with courts of appeals decisions applying *Watson* in cases unrelated to the pandemic. *See, e.g.*, *Box v. PetroTel, Inc.*, 33 F.4th 195, 199 (5th Cir. 2022) (holding private entity's request for federal assistance in connection with its otherwise private oil and gas operations was not a basis for federal-officer removal); *Fidelitad,* 904 F.3d at 1101 n.3 (rejecting drone manufacturer's argument that federal-officer removal was appropriate "because it was helping the government achieve

(*Footnote continued*)

argument below was just that the nursing home cases are distinguishable on factual grounds. As explained in the thorough analyses of the record undertaken by the Eighth and Fifth Circuits, however, no relevant factual distinction exists. And to the extent that Tyson asserts that the Eighth and Fifth Circuits misapplied to the particular facts of its cases what it concedes to be the properly stated rule of law identified in *Maglioli*, *Saldana, Mitchell*, and *Martin*, such a claim of error is not a basis for review by this Court. *See* Sup. Ct. R. 10.

II. The factbound nature of the decision below makes it particularly unsuitable for review.

The court of appeals' conclusion that "Tyson has failed to show that it was performing a basic governmental task or operating pursuant to a federal directive in March and April of 2020," Pet. App. 20, was a factual one. The court of appeals examined each piece of evidence presented by Tyson and found that the evidence did not support Tyson's assertions of government control. *Id.* 14–19.

In its petition, Tyson ignores the factual analysis undertaken below, repeatedly making assertions that were addressed and rejected as meritless in the Eighth Circuit's opinion. For example, Tyson continues to rely on a tweet by President Trump about the DPA, Pet. 15, even though the Eighth Circuit already explained that that tweet had nothing to do with Tyson's operations, as it was "clearly related to the production and distribution of masks and ventilators," Pet. App. 18. Similarly, Tyson asserts

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foreign policy objectives"); *Mays*, 871 F.3d at 447 (finding statute not satisfied where defendant was "working alongside" a federal agency, "not under it").

without citation that it "prioritized … federal commands over competing dictates from state and local authorities," Pet. 27, even though the court of appeals concluded that no such "federal commands" existed, Pet. App. 19. Tyson has at no point identified evidence in the record that Tyson "prioritized" any federal direction over a state or local one.

Tyson may believe that the Eighth Circuit (and the Fifth Circuit) got the facts wrong. But even if that were the case, it would not provide a reason for this Court's review. *See* Sup. Ct. R. 10. That Tyson's argument rests on factual assertions that the lower courts found to be unsupported highlights that this case does not raise an important legal question that needs to be settled by the Court. Whether an entity that "follow[s] federal directives during an emergency" is "entitled to the protections of a federal forum," Pet. 23, may be an interesting question, but it is not one the Eighth Circuit found presented by this case or that it purported to answer.

III. The opinion below does not contain the "rules" Tyson ascribes to it.

Perhaps recognizing this Court's hesitance to grant review on factbound questions, Tyson suggests that the Eighth Circuit made two broader holdings about the availability of federal-officer removal. First, it asserts that the Eighth Circuit created a "rule" that holds that the federal-officer removal statute is only available where a private entity is "enlisted" to perform a task that "the federal government 'typically' performs itself," as opposed to one that only arises during an emergency. Pet. 27–31. Second, it suggests that the court of appeals adopted a rule that "informal" directives cannot provide the federal

control required by section 1442(a)(1). The opinion contains neither rule, and there is no reason for the Court to grant review to address either proposition.

A. Tyson's argument about the word "typically" cites language in the paragraph of the Eighth Circuit's opinion discussing the relevance of the "critical infrastructure" designation that was afforded to sixteen sectors of the economy, and concluding that "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." Pet. App. 15–16. The court went on to say:

> [S]imilarly, 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. It cannot be that the federal government's mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction.

Id. at 16 (citing *Jacks*, 701 F.3d at 1230 (quoting *Watson*, 551 U.S. at 152), and *Maglioli*, 16 F.4th at 406).

In context, the Eighth Circuit's use of "typically" does not mean "in normal times," as Tyson suggests. Rather, the Court was using the term in reference to what constitutes a "basic governmental task," as that term is used in *Watson*, 551 U.S. at 153. Defending the nation from a nuclear attack, investigating airplane crashes, and negotiating the release of Americans held abroad are all tasks "typically" performed by the

federal government in emergency circumstances, although they are tasks that, fortunately, are not necessary on a daily basis. Tyson's suggestion that this paragraph would bar someone from invoking the federal-officer removal statute where they "assist[] federal officers in pursuing a suspect in an emergency," Pet. 30, is an unreasonable reading of the court's opinion. The pursuit of suspects in emergencies is a task "typically" performed by government actors. Moreover, Tyson's suggestion rests entirely on dicta unnecessary to the court's judgment and is thus not an independent basis for review. *Cf. Jennings v. Stephens*, 574 U.S. 271, 277 (2015) ("This Court … does not review lower courts' opinions, but their judgments."). To the extent that the paragraph addressing Tyson's "critical infrastructure" argument reflects a rule, the rule is that work that the federal government recognizes as important is not the same as work that "helps officers fulfill … basic governmental tasks." *Watson*, 551 U.S. at 152. As discussed above, pp. 18–21, *supra*, that rule has been adopted by five courts of appeals.

B. Tyson repeatedly suggests that the Eighth Circuit incorrectly required a "formal" direction to satisfy the statute's "acting under" element. *See, e.g.*, Pet. 3, 4, 22, 27, 31, 32, 34, 36. But in response to Tyson's policy arguments below, the Eighth Circuit made clear it was *not* adopting any such rule and that Tyson's fixation on formal versus informal directives "misses the point":

> Tyson's argument that it was "acting under" federal officers is untenable not because the federal actions early in the pandemic were informal, but rather because they contained no … directive.

Pet. App. 19. The Eighth Circuit did not reject Tyson's reliance on, for example, tweets about respirator manufacturing and generic statements thanking workers in the food industry because the tweets and statements were "informal"; it rejected reliance on them because they did not direct Tyson (or anyone else) to do anything. This case presents no reason for the Court to address any distinction between "formal" and "informal" directives.

IV. Alternative bases for affirmance recognized by the district court counsel against review.

This case is not suitable for review for the additional reason that, as the district court found, even if Tyson had been "acting under" federal officer direction when it failed to contain and made misrepresentations about the outbreak in Waterloo, it has not satisfied the two other requirements of the federal-officer removal statute. *See* Pet. App. 59–62, 97–100. Although the Eighth Circuit did not reach these elements in light of its holding regarding the "acting under" requirement, each provides an independent basis for affirmance. And together, they make this case an especially unsuitable vehicle for addressing the questions raised by the petition.

First, the acts complained of—Tyson's failure to take precautions to prevent the spread of COVID-19, misrepresentations about infection control measures in place, and active concealment of the presence of COVID-19 cases in the Waterloo facility—are not "connected or associated with an act pursuant to a federal officer's directions." *Latiolais*, 951 F.3d at 296. As the district court found, no federal government communication required Tyson to remain open, much less addressed what safety measures Tyson could or

could not employ or the statements it could make about them. Pet. App. 60. The undisputed fact that Tyson voluntarily closed its plants *after* the decedents in this case died demonstrates that its failure to do so earlier was not "an act pursuant to a federal officer's directions." *Id.*

Second, Tyson has no colorable federal defense to the state-law claims in this case. Below, Tyson asserted that the DPA and the FMIA both preempted the plaintiffs' claims. As to the DPA, its immunity provision, 50 U.S.C. § 4557, may be invoked only by a person "compl[ying] with a rule, regulation, or order issued" under the DPA. Tyson was not subject to any DPA rule, regulation, or order—either at the time of the events in this case or any time since. And even if it were, section 4557 immunity extends only to claims resulting from the prioritization of certain contracts over others. *See United States v. Vertac Chem. Corp.*, 46 F.3d 803, 812 (8th Cir. 1995). It does not "allow[] a government contractor to violate the laws with impunity, so long as it is performing a rated contract." *Id.*; *accord Hercules Inc. v. United States*, 24 F.3d 188, 203 (Fed. Cir. 1994); *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 997 (5th Cir. 1976). No such claims are at issue here.

As to the FMIA, that statute's preemption clause applies only to state laws that create "requirements within the scope" of the FMIA "with respect to premises, facilities and operations" of FMIA-regulated establishments. 21 U.S.C. § 678. As this Court has explained, that clause focuses on, "at bottom, the slaughtering and processing of animals at a given location," *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 463 (2012), and generally leaves "state laws of general application," including "workplace safety regulations,"

untouched, *id*. at 467 n.10. Iowa's gross negligence and fraudulent misrepresentation laws and the duties they impose on employers with respect to worker safety are just such laws of general application.

Because, on the face of these two statutes, neither defense is even arguably applicable, Tyson cannot meet the colorable federal defense requirement. Therefore, it could not establish jurisdiction under section 1442(a)(1) even if this Court were to give credence to its implausible assertion that the pandemic placed it into a subservient relationship with the federal government and converted all its operations into ones performed at the direction of a federal officer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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