Nos. 21-1010 & 21-1012

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HUS HARI BULJIC, et al.,

Plaintiffs-Appellees,

v.

TYSON FOODS INC., et al.,

Defendants-Appellants.

OSCAR FERNANDEZ,

Plaintiff-Appellee,

v.

TYSON FOODS INC., et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Iowa
Case Nos. 20-cv-02055 & 20-cv-2079
Hon. Linda E. Reade

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO STAY THE ISSUANCE OF THE MANDATE

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March 2, 2022

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INTRODUCTION

On December 30, 2021, a panel of this Court unanimously held that Tyson was not "acting under" a federal officer in running its Waterloo, Iowa, plant in March and April 2020, notwithstanding Tyson's requests for assistance from the federal government, irrelevant Presidential tweets, and broad nationwide guidance. *Buljic v. Tyson Foods*, 22 F.4th 730 (8th Cir. 2021). In reaching that conclusion, which was urged by the United States as well as Plaintiffs-Appellees, the Court noted that the record "tells a different story" from the one Tyson advanced in its briefs. *Id.* at 739. Applying the standard set forth in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007), to the facts in the record, the Court held 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." 22 F.4th at 742.

The Court subsequently denied Tyson's petition for rehearing and rehearing en banc, without calling for a response and without noted dissent. The same day, the Ninth Circuit Court of Appeals quoted this Court's decision approvingly in rejecting a similar federal-officer argument. *See Saldana v. Glenhaven Healthcare LLC*, __ F.4th __, 2022 WL 518989, at *4 (Feb. 22, 2022).

Now, Tyson asks the Court to stay the mandates in these actions—which were filed in Iowa state court nearly 21 months ago and have yet to proceed to the

responsive pleading stage—pending the outcome of a certiorari petition Tyson does not commit to filing anytime soon.

Tyson does not argue that any circuit split currently exists. Rather, Tyson's stay request is based upon speculation that three separate possibilities will all go its way: that, in a case scheduled for oral argument in May, the Fifth Circuit will issue a conflicting opinion before October (when Tyson's petition would be considered by the Supreme Court if Tyson obtains an extension of the deadline to file it); that the Supreme Court will grant Tyson's petition for certiorari to resolve the as-yet nonexistent circuit split; and that five Justices of the Supreme Court will then disagree with this Court's unanimous decision. Tyson's hope that all three of these potentialities occur does not meet the reasonable probability required by the relevant standard for issuing a stay. Nor do the monetary costs to Tyson associated with moving forward with state court litigation provide a sufficient basis to continue to delay these cases. The families of Sedika Buljic, Reberiano Leno Garcia, Jose Luis Ayala, and Isidro Fernandez have been thwarted in their attempts to even *begin* litigating the merits of their claims that Tyson's negligence and misrepresentations killed their loved ones. As the families have already been forced to bear the non-compensable costs of delay, time, and expense associated with federal litigation over the last 19 months, the equities do not favor a stay.

BACKGROUND

Plaintiffs, surviving family members of four workers at Tyson's Waterloo, Iowa pork processing facilities, commenced these actions in the Iowa District Court for Black Hawk County in June and August 2020. A41, A273. They brought claims for fraudulent misrepresentation and gross negligence under Iowa state law, contending that Tyson's March and April 2020 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—caused their family members to contract COVID-19 at the Waterloo facility, and later die as a result. *See*, *e.g.*, A54–55, A56–69, A283–85, A286–89.

Tyson removed *Buljic* to the District Court for the Northern District of Iowa on July 27, 2020, A22, and removed *Fernandez* to the same court on October 2, 2020, A211. Plaintiffs in both cases moved to remand the actions to state court. *See* *Buljic* Dist.Ct.Dkt.15; *Fernandez* Dist.Ct.Dkt.22. On December 28, 2020, the district court granted both motions in substantively identical orders. ADD1; ADD32. That same day, the district court clerk mailed copies of the remand orders to the state court. Clerk's Office Entry at *Buljic*, Dist.Ct.Dkt.57; *Fernandez* Dist.Ct.Dkt.49.

On January 29, 2021, Tyson moved this court for administrative stays and stays of the district court's remand order pending appeal, and for consolidation of

the two appeals. On February 8, 2021, the Court granted Tyson's "motion to stay the district court's remand orders pending appeal." Feb. 8, 2021, Order. The court also consolidated the appeals.

On appeal, Tyson sought review solely of whether it was entitled to remove Appellees' state-law action to federal court under the federal-officer removal statute. *See Buljic*, 22 F.4th at 741. The United States, a group of 18 states and the District of Columbia, and others appeared as amicus in support of Appellees. On December 30, 2021, this Court issued its unanimous opinion affirming the district court's remand orders. Tyson's motion for panel rehearing and rehearing *en banc* was denied without noted dissent, and without a call for response, on February 22, 2022.

Tyson's deadline for filing a petition for certiorari is currently May 23, 2022. *See* 28 U.S.C. § 2101(c). If it seeks an extension, the deadline may be extended to July 22, but no later, for "good cause." *Id.*

ARGUMENT

In deciding whether to grant a stay of the mandate pending a petition for a writ of certiorari, this Court "consider[s] whether there is a reasonable probability that the Supreme Court will grant certiorari, whether there is a fair prospect that the movants will prevail on the merits, whether the movants are likely to suffer irreparable harm in the absence of a stay, and the balance of the equities, including the public interest." *John Doe I v. Miller*, 418 F.3d 950, 951 (8th Cir. 2005) (denying

stay of mandate pending certiorari where panel was divided and five judges of this Court dissented from denial of rehearing *en banc*); *see also* 8th Cir. I.O.P. F ("[T]he court usually denies a stay unless the panel concludes there is a reasonable chance certiorari will be granted."). Even where these factors are met, "'[a] stay is not a matter of right,' … [i]t is instead an exercise of judicial discretion, and 'the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.'" *Indiana State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009) (per curiam) (quoting *Nken v. Holder*, 556 U.S. 418, 433–34 (2009)). Tyson's request to continue to stall litigation of Appellees' cases on the chance that the Fifth Circuit Court of Appeals *might* disagree with this Court's application of *Watson* by September does not meet this standard.

I. There is no "reasonable probability" that the Supreme Court will grant certiorari and rule in Tyson's favor.

A. It is not probable that the Supreme Court will grant review of a fact-bound decision consistent with the decisions of sister circuits.

Tyson's request for a stay is premised on the possibility that the Supreme Court will grant a petition for certiorari that Tyson will eventually file in this action. "A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. No such compelling reasons exist here. This Court's decision was an application of the standard set out in *Watson* to the facts in the record. Although Tyson asserts (erroneously) that this Court misapplied that standard, "[a] petition for

a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." *Id.*

As Tyson's motion reflects, no conflict exists between this Court's decision and the decision of any other United States court of appeals or state court of last resort. *See* Sup. Ct. R. 10(a). To the contrary, at least two courts of appeals have rejected arguments that removal is justified under the federal-officer removal statute where defendants relied on the same "critical infrastructure" guidance as Tyson does here. *See Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 406 (3d Cir. 2021), (cited by the panel in this case, 22 F.4th at 740), rehearing *en banc denied* (Feb. 7, 2020); *Saldana*, 2022 WL 518989, at *4 (citing this Court's opinion). As this Court noted in its opinion, its holding was consistent with decisions from other courts of appeals as well. *See* 22 F.4th at 730 (citing Second, Third, and Ninth Circuit cases); *id*. at 741 (citing Sixth Circuit case).

B. The possibility of a circuit split at some future date does not indicate a probability of certiorari review in this case.

Aware that there is no divide among courts of appeals, Tyson argues that the Fifth Circuit *might* create a circuit split when it issues decisions in two cases tentatively calendared for argument the week of May 9, 2022: *Glenn v. Tyson Foods, Inc.*, No. 21-40622 (5th Cir.), and *Chavez v. Tyson Foods, Inc.*, No. 21-11110 (5th Cir.). But what Tyson refers to as a "very real prospect," Motion at 5, does not suggest a reasonable probability that certiorari will be granted in this case.

First, Tyson's petition for certiorari in *this* case is due on May 23, 2022—less than three weeks after *Glenn* and *Chavez* are scheduled to be argued. It is not "reasonably probable" that the Fifth Circuit will issue *any* decision in those appeals by then. Although Tyson may eventually seek a sixty-day extension of time, to July 22, to file such a petition, *see* Sup. Ct. R. 13.5, the Fifth Circuit may well not have ruled by that time, or by the time a petition filed by that date will be considered by the Supreme Court.[1]

Second, it is not reasonably probable that the Fifth Circuit will reverse the decisions of the district courts in *Glenn* and *Chavez*, which correctly applied Fifth Circuit and Supreme Court precedents. *See Glenn v. Tyson Foods*, No. 9:20-cv-184, 2021 WL 3614441 (E.D. Tex. Aug. 12, 2021); *Chavez v. Tyson Foods*, No. 3:21-cv-1184-C (N.D. Tex. Oct. 27, 2021), attached as Ex. A. While Tyson accurately notes that other district courts have disagreed with this Court and the district courts in these cases, *Glenn*, and *Chavez*, each of those courts relied on the holding in *Fields v. Brown*, 519 F. Supp. 3d 388 (E.D. Tex. 2021), which is directly at odds with decisions of three courts of appeals.[2] In *Fields*, the district court held that, "based on

[1] The desire to await a Fifth Circuit opinion that could diverge from this Court's opinion, of course, is not in and of itself "good cause" for an extension.

[2] That the Fifth Circuit, without opinion, denied a petition for interlocutory appeal in *Fields*, says nothing about what a merits panel in *Glenn* and *Chavez* (or eventually in *Fields*) will hold, given the discretionary nature of 28 U.S.C. § 1292(b) certification, which is based on consideration of several factors.

the critical-infrastructure designation [of Tyson], defendants were 'acting under' the directions of federal officials when the federal government announced a national emergency on March 13, 2021." 519 F. Supp. 3d at 393. Unanimous panels of this Court, the Third Circuit, and the Ninth Circuit have all explicitly held that an entity's participation in one of the thirteen sectors of the economy designated critical infrastructure is *not* a basis for finding that entity has been "acting under" a federal officer since the onset of the COVID-19 pandemic. *See Buljic*, 22 F.4th at 740; *Saldana*, 2022 WL 518989, at *4; *Maglioli*, 16 F.4th at 406. So too have many district courts in cases not involving Tyson or meatpacking. *See, e.g., Burton v. Silverado Escondido, LLC*, 2021 WL 5087259, at *7 (S.D. Cal. Nov. 2, 2021) (expressly declining to follow *Fields* and its progeny); *Estate of Jenkins v. Beverly Hills Senior Care Facility*, 2021 WL 3563545, at *6 (C.D. Cal. Aug. 12, 2021).

In addition, the Fifth Circuit is unlikely to adopt *Fields*'s holding when it decides *Glenn* and *Chavez*, as *Fields* was premised on a misunderstanding of the facts. The district court in that case found relevant that "[t]he FSIS had employees staffed onsite at meatpacking plants—including those operated by Tyson Foods—to ensure that they maintained operations" and that "Congress allocated additional funding to the FSIS to help maintain FSIS presence at facilities so that operations could continue." 519 F. Supp. 3d at 392. As established by the record in this case, however, the FSIS employees staffed onsite at meatpacking plants were food safety

inspectors, who are required by statute to be on site at meatpacking facilities irrespective of whether there is a pandemic or other national emergency. *See* 21 U.S.C. §§ 455, 603–605. Congress's provision of additional funding for this regulatory function did not alter the nature of this ordinary regulatory activity—which, under *Watson*, does not create an "acting under" relationship.

C. Even if the Supreme Court were to grant certiorari, it would be unlikely to find federal jurisdiction.

Even accepting Tyson's speculation that the Fifth Circuit *might* view federal-officer removal differently from unanimous panels of this Court and the Third and Ninth Circuits, thus creating a circuit split, and even assuming that the Supreme Court would then grant certiorari, there would be no reasonable probability that the Supreme Court would reverse the decision of this Court. For the reasons explained in the Court's decision, the Supreme Court would surely affirm this Court's correct application of *Watson*, which is consistent with that of the other courts of appeals that have addressed federal-officer removal in the COVID-19 context.

Moreover, even if the Supreme Court were to reverse this Court's decision, which addressed one element of federal-officer removal jurisdiction, Tyson fails to meet two other required elements. As the district court held, Tyson also "failed to demonstrate a causal connection between its actions and a federal authority" and "failed to demonstrate it has a colorable federal defense." *See Buljic v. Tyson Foods, Inc.*, 2020 WL 13042580, at *14 (N.D. Iowa Dec. 28, 2020). For jurisdiction in

federal court to be proper, Tyson would have to establish that *both* of these holdings were also incorrect. *Cf. Buljic*, 22 F.4th at 742 (declining to reach other elements in light of "acting under" holding). As explained in Appellees' merits brief (at 45–53), the district court's holdings were correct.

II. Tyson has not shown irreparable harm warranting a stay.

Addressing irreparable harm, Tyson invokes the "time and expense spent litigating in state court," stating "there would be no way to unring that bell or compensate Tyson" should certiorari be granted and this Court's decision be reversed. Motion at 13. But as the Ninth Circuit recently held in denying a motion to stay pending appeal in another federal-officer removal case, "[t]hese considerations … do not rise to the level of irreparable harm." *City & Cty. of Honolulu v. Sunoco LP*, 2021 WL 1017392, at *1 (9th Cir. Mar. 13, 2021). Rather, it is well established that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercraft Clothing Co*., 415 U.S. 1, 24 (1974). And given that Tyson has not even filed a responsive pleading in state court, "the theoretical possibility that the state court could irrevocably adjudicate the parties' claims and defenses while these appeals are pending also falls short of meeting the demanding irreparable harm

standard." *Sunoco*, 2021 WL 1017392 at *1.[3] The preliminary steps that would occur in the state court during the time it would take the Supreme Court to consider Tyson's petition (and to decide the merits in the unlikely event the petition were granted) would advance the ultimate resolution of this case whether it remained in state court or returned to federal court.

Moreover, Tyson's argument about unnecessary litigation cuts both ways. Since Tyson removed these actions to the district court in July and October 2020, Plaintiff-Appellees—families of workers that died from illnesses contracted at Tyson's facility—have borne the time and expense spent litigating in federal court, although both the district court and this Court have held removal was unjustified. The harm associated with delay in the family's attempts to proceed with their cases against Tyson is likewise non-compensable. *Cf. Dakota, Minn. & E. R.R. Corp. v. Schieffer*, 742 F. Supp. 2d 1055 (D.S.D. 2010) (delaying resolution of litigant's claim in another forum would be prejudicial). Although Tyson is free to choose to seek discretionary certiorari review of this Court's unanimous decision, the equities

[3] In the unlikely event that the Supreme Court granted certiorari and reversed this Court, the case could return to federal court. "[F]ederal courts are fully capable of ensuring that the proceeding in state court returns to federal court if a remand order is vacated, including by enjoining state proceedings if the state court failed to give effect to the decision reversing remand." *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 423 F. Supp. 3d 1066, 1075 (D. Colo. 2019).

do not favor putting Tyson's financial interest in delay ahead of the interests of the families of its dead workers in timely pursuit of their claims.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request the Court deny Defendants-Appellants' motion to stay issuance of the mandate.

Respectfully submitted,

/s/ Adam R. Pulver

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March 2, 2022

CERTIFICATE OF COMPLIANCE

1. This opposition complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), it contains 2,861 words.

2. This opposition 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 Office 365 MSO in 14-point Times New Roman.

3. This opposition has been scanned for viruses and is virus-free.

March 2, 2022

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam R. Pulver
Adam R. Pulver
Attorney for Plaintiffs-Appellees

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARIA YOLANDA CHAVEZ, *Individually and on Behalf of Minor LC and Estate of Jose Angel Chavez, Et Al.*,	)	
Plaintiffs,	)	
v.	)	
TYSON FOODS, INC. *d/b/a Tyson Foods;* TYSON FRESH MEATS, INC.; TRANSPLACE TEXAS, LP.; AXIOM MEDICAL; COMMUNITY CARE HEALTH NETWORK, LLC. *d/b/a Matrix Medical*,	)	
Defendants.	)	Civil Action No. 3:21-CV-1184-C

ORDER

For essentially the reasons argued therein, the Court **ORDERS** that Plaintiffs' Motion to Remand be **GRANTED** and that this civil action be **REMANDED** back to the County Court at Law No. 3, Dallas County, Texas.[1] Specifically, the Court finds that Defendants have failed to carry their heavy burden in establishing that: (1) they were acting under the direction of a federal officer when they engaged in the alleged tortious conduct; (2) the alleged conduct is connected or associated with an act taken pursuant to a federal officer's directions; or (3) a colorable federal defense is available.[2] *See Mumfrey v. CVS Pharm., Inc.*, 719 F.3d 392, 397 (5th Cir. 2013) (the

[1] The Court emphasizes that any doubts should be strictly construed in favor of remand. *African Methodist Episcopal Church v. Lucien*, 756 F.3d 788, 793 (5th Cir. 2014).

[2] Moreover, the removal of this civil action based upon federal question jurisdiction was not proper because Plaintiffs' common-law tort claims do not depend necessarily on a disputed or substantial question of federal law. *See Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) ("the question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."). Additionally, merely referencing federal

party seeking to remove a case to federal court bears the burden of showing that federal jurisdiction exists and that removal was proper); *see also Glenn v. Tyson Foods, Inc.*, ___ F. Supp. 3d ___, 2021 WL 3614441 (E.D. Tex. Aug. 12, 2021); *Fernandez v. Tyson Foods, Inc.*, 509 F. Supp. 3d 1064 (N.D. Iowa 2020); *but see Wazelle v. Tyson Foods, Inc.*, 2021 WL 2637335 (N.D. Tex. June 25, 2021); *Fields v. Brown*, 519 F. Supp. 3d 388 (E.D. Tex. 2021).[3]

Any and all pending Motions are **DENIED AS MOOT** subject to being refiled in state court.

The Clerk of Court shall mail a certified copy of this Order to the County Clerk of Dallas County, Texas.

SO ORDERED.

Dated October 27, 2021.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

regulations within the context of state law negligence claims does not confer federal question jurisdiction. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 813 (1986) ("the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction.").

[3] The Court notes that the United States has filed an amicus brief in two consolidated and closely related appeals—currently pending before the United States Court of Appeals for the Eighth Circuit— in which the United States argues that "Tyson is not entitled to a federal forum because it was not performing a federal function under the direction of a federal officer during the relevant period, and federal law provides no defense to plaintiffs' claims." *See Buljic v. Tyson Foods, Inc.*, Nos. 21-1010 & 21-1012 (8th Cir.).