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

BRIEF OF APPELLEES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Since the onset of the COVID-19 pandemic, the federal government has repeatedly stated that state governments retain their traditional authority to protect public health and safety, including authority over meatpacking plants and other private businesses that make up the nation's "critical infrastructure." The federal government's self-described role is one of "support."

Plaintiffs-Appellees filed state-court actions against Defendants-Appellants Tyson Foods and its managers and executives, raising Iowa-law claims for negligence and fraudulent misrepresentations that led to the deaths of their loved ones from COVID-19, contracted while working in Tyson's Waterloo, Iowa, plant. Tyson removed the cases to federal court, asserting that the claims relate to actions taken under the direction of federal officers. The district court correctly held that Tyson failed to demonstrate that it was "acting under" the federal government because there was no evidence that the United States assumed strict control over Tyson's operations, as is required for federal officer removal. The court also correctly ruled that Plaintiffs' claims do not relate to any federal official action, and that Tyson has no colorable federal defense to the claims.

Because understanding the error in Tyson's arguments requires consideration of the effects and meaning of several different federal statutes, Plaintiffs agree that the case merits fifteen minutes of oral argument per side.

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INTRODUCTION

The federal officer removal statute, 28 U.S.C. § 1442(a)(1), provides entities carrying out the business of the federal government access to a federal judicial forum when the lawfulness of their actions on behalf of the United States is challenged. The statute does not allow every case touching on matters important to the federal government or the nation's interests to be heard in federal court.

Accordingly, "not all relationships between private entities or individuals and the federal government suffice to effect removal" under section 1442(a)(1). *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224, 1231 (8th Cir. 2012). Private entities may remove only when they are under the federal government's "direct and extensive control," *id.* at 1223, and in a "subordinate or subservient" relationship, *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151 (2007) (citation omitted)—a relationship of "delegation," not "regulation," *Jacks*, 701 F.3d at 1233.

Despite the absence of such delegation, Defendants-Appellants Tyson Foods, its managers, and executives ("Tyson"), have invoked section 1442(a)(1) as a basis for federal jurisdiction over Iowa-law claims for negligence and fraudulent misrepresentations that led to the deaths of Plaintiffs-Appellees' loved ones from COVID-19, contracted while working in Tyson's Waterloo, Iowa, plant.

The COVID-19 pandemic, though, did not eliminate limits on the federal government's authority to displace states' police powers. "[E]ven in a pandemic, the

Constitution cannot be put away and forgotten." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020). The primary role of protecting public health and safety, and ensuring continued operations of critical infrastructure, remains with the states—as the federal government has repeatedly reaffirmed. As the Department of Homeland Security (DHS) put it, "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." A161. For the meatpacking industry, the Food Safety and Inspection Service (FSIS) of the United States Department of Agriculture (USDA) has confirmed the federal government's "supporting role," stating that "county health departments" and "state governments" may "shut down an FSIS-regulated establishment," and that "FSIS will follow state and local health department decisions." *See* USDA, COVID-19: Food Supply Chain (Food Supply Q&A), https://www.usda.gov/coronavirus/food-supply-chain.

These explicit acknowledgments of the federal government's supporting role contradict any assertion that the federal government assumed control over the meatpacking industry with the onset of the COVID-19 pandemic. No statute relating to critical infrastructure or national emergencies authorized a federal takeover. And neither Tyson's requests for federal assistance nor the continued operation of the pre-existing regulatory regime transformed Tyson into a subordinate carrying out

federal government commands. As in dozens of other industries, the federal government's assistance and guidance did not change the relationship between industry and regulator into one of delegation of federal authority.

The facts here are illustrative. On April 6, 2020, Tyson decided to shut down its Columbus Junction, Iowa, pork-processing plant because of a COVID-19 outbreak. Tyson transferred workers from Columbus Junction to Waterloo without any testing or quarantine, and without implementing social-distancing measures or providing personal protective equipment (PPE). Throughout April 2020, local officials repeatedly asked Tyson to shut down the Waterloo plant because of a COVID-19 outbreak and unsafe working conditions. Tyson refused. On April 22, 2020, Tyson reversed course and shut down the Waterloo plant. Meanwhile, however, Sedika Buljic, Reberiano Leno Garcia, Jose Luis Ayala, and Isidro Fernandez had already contracted COVID-19 at the plant.

Tyson's decisions to continue to operate the Waterloo plant, to do so without proper safety measures, and then to close the plant, were all its own. None of these decisions was compelled by, or even related to, directives from federal officers acting under color of their federal office. The district court's determination that Tyson was not entitled to invoke federal officer removal was thus correct—not because Tyson failed to show "formal" direction, but because it failed to produce *any* "candid, specific, and positive" evidence that demonstrated the relationship

required to trigger the statute's application. *Willingham v. Morgan*, 395 U.S. 402, 408 (1969). The only federal requirements to which Tyson was subject were the statutory and regulatory requirements applicable before COVID-19. Under *Watson*, these requirements are not a basis for removal. 551 U.S. at 157.

The meatpacking industry and others in the food and agriculture "critical infrastructure" sector are important to America's functioning—in a pandemic and at all times. Meatpacking workers, like grocery-store workers, doctors and nurses, and power-plant workers, were all crucial to the nation's survival during the early days of the COVID-19 pandemic and remain so today. Neither their importance nor the federal government's recognition of it, however, converts those workers, their managers, or their employers into federal officers.

STATEMENT OF ISSUES

The issue on appeal is whether, with the onset of the COVID-19 pandemic, the federal government assumed control over Tyson's meatpacking operations such that Tyson was "acting under" federal officials—although the federal government neither delegated any authority to Tyson nor exercised any statutory authority to take control of Tyson, and the federal government repeatedly confirmed it was playing a "supporting role" to state and local authorities in ensuring the continued functioning of critical infrastructure.

- 28 U.S.C. § 1442(a)(1)

- *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007)
- *Jacks v. Meridian Res. Co.*, 701 F.3d 1224 (8th Cir. 2012)
- *Mays v. City of Flint, Mich.*, 871 F.3d 437 (6th Cir. 2017)

STATEMENT OF THE CASE

These consolidated appeals arise from two suits brought under Iowa state law by survivors of workers at Tyson's Waterloo pork-processing facility who died from complications of COVID-19 in April and May 2020. Plaintiffs-Appellees Has Hari Buljic, Honorario Garcia, Arturo de Jesus Hernandez, Miguel Angel Hernandez, and Oscar Fernandez (Plaintiffs) allege that their loved ones contracted the coronavirus at the Waterloo plant before Tyson voluntarily closed it on April 22, 2020, and that Tyson failed to take reasonable precautions to minimize the spread of the coronavirus and made fraudulent misrepresentations to workers about the safety of the facility.

I. Factual Allegations

Since late March or early April 2020, Tyson executives and managers knew that COVID-19 was spreading through the Waterloo facility, but took few, if any, steps to stop it. A47; A278.

On April 6, 2020, Tyson suspended operations at its Columbus Junction facility after more than two dozen employees there tested positive for COVID-19. A48; A278. Tyson transferred potentially exposed workers from that plant to

Waterloo without testing or screening. A49; A280. Despite this risk, and the surging COVID-19 infection rates in meatpacking plants nationwide, the only safeguards put in place at Waterloo were temperature-check stations. A47; A278. Workers at Waterloo continued to work elbow-to-elbow, mostly without face coverings. A48; A279. Tyson did not warn employees about the presence and dangers of COVID-19, nor did it provide or require face coverings or other appropriate PPE. A48, 57; A278, 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. A48, 57; A278, 287. Rather than isolate and send home sick and symptomatic workers, plant managers allowed and encouraged infected and exposed employees to report to work and continue working. A49, 58; A280, 288. Instead of encouraging sick employees to stay home, Tyson offered cash bonuses for perfect attendance. A49; A280. When one worker vomited on the production line, Tyson allowed him to continue working and return to work the next day. *Id.*

On the night of April 12, 2020, nearly two dozen Tyson employees were admitted to the emergency room at a single Waterloo hospital. A48. Despite multiple requests from Black Hawk County and elected officials, Tyson refused to shut down the Waterloo plant even temporarily. A48; A279. Instead, plant management deliberately concealed the scope of the outbreak and lied to employees. A49, 53–54;

A280, 284. Managers falsely told workers that COVID-19 had not been detected at the facility and that their co-workers had the flu. A49, 54; A280, 284. They falsely stated that Tyson had adopted strict screening and tracing policies. A54; A284.

COVID-19 continued to spread among Waterloo workers, and, as a result, Tyson eventually did shut down the facility on April 22, 2020. A50; A281. By August 2020, Black Hawk County recorded more than 1000 cases of COVID-19 among Tyson employees—more than one-third of the Waterloo workforce. A51; A282. 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. A42; A274. They died from COVID-19 complications on April 18, April 23, May 25, and April 26, 2020, respectively. *Id.*

II. The Government 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). This action had two specific impacts. First, it allowed the Secretary of Health and Human Services to waive certain requirements of the Medicare, Medicaid, and State Children's Health Insurance programs, and the Health Insurance

Portability and Accountability Act Privacy Rule. *Id.* at 15,337. Second, under the National Emergencies Act, it made effective "any provisions of law conferring powers and authorities to be exercised during a national emergency." 50 U.S.C. § 1621(b). Tyson does not identify any such provisions of law relevant to this case.

Three days later, the White House issued "The President's Coronavirus Guidelines for America." A178–79. This two-page document, a version of which was later mailed to every American household, contained generic advice like "If you feel sick, stay home" and "Avoid discretionary travel." *Id.*; *see* Kevin Stankiewicz, *US households are being mailed 'President Trump's Coronavirus Guidelines for America*,' CNBC.com (Mar. 27, 2020).[1] It also stated, "If you work in a critical infrastructure industry, … you have a special responsibility to maintain your normal work schedule," A179, and "Listen to and follow the directions of your state and local authorities." A178.

On March 19, 2020, the Cybersecurity and Infrastructure Security Agency (CISA), a component of 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, A160–70. CISA provided an "initial list of

[1] http://www.cnbc.com/2020/03/27/us-households-are-being-mailed-trumps-coronavirus-guidelines.html.

'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." A160 (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. A164–70. 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." A161. 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. For example, the Federal Aviation Administration issued "interim health guidance" on how air carriers could "protect crewmembers from exposure and reduce the risk of transmission of COVID-19 onboard aircraft or through air travel."[2] The Department of Housing and Urban Development (HUD)

[2] FAA, SAFO 20003, COVID-19: Interim Health Guidance for Air Carriers and Crew (Mar. 12, 2020), https://content.govdelivery.com/attachments/USAFAA/2020/03/13/file_attachments/1400184/SAFO20003.pdf, superseded by SAFO 20009 (Mar. 3, 2021), https://www.faa.gov/other_visit/aviation_industry/airline_operators/airline_safety/safo/all_safos/media/2020/SAFO20009.pdf.

issued guidance for homeless services providers, including shelters, about how to limit the spread of COVID.[3]

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, 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." A180. 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 FSIS inspectors from their facilities because of risk of coronavirus exposure. A182.

[3] *See* HUD, Specific Considerations for Public Health Authorities to Limit Infection Risk Among People Experiencing Homelessness (Mar. 9, 2020), https://www.hudexchange.info/resource/5998/specific-considerations-for-public-health-authorities-to-limit-infection-risk-among-people-experiencing-homelessness/.

USDA's FSIS also created a website, "Common Questions about Food Safety and COVID-19" (Common Questions) (Mar. 18, 2020).[4] Two of the questions and answers it posted are particularly relevant to this case. First, in response 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, in response to the question, "Can a county health department or state government shut down an FSIS-regulated establishment?," FSIS stated: "Yes, and FSIS will follow state and local health department decisions." *Id.*[5]

More than a month 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 Centers for Disease Control (CDC) issued "interim guidance" for the meatpacking industry that, for the first time, "include[d] recommended actions employers can take to reduce the risk of exposure to the coronavirus." OSHA, Press

[4] https://web.archive.org/web/20210118080913/https://www.fsis.usda.gov/wps/portal/fsis/newsroom/Common-Questions-about-Food-Safety-and-COVID-19.

[5] Later in 2020, USDA re-posted these questions and answers on a different website, where they remain today. *See* Food Supply Q&A, *supra*.

Release, U.S. Department of Labor's OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries (Apr. 26, 2020).[6]

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.[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

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

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

protocols," and that plants "should resume operations as soon as they are able after implementing the CDC/OSHA guidance." May 5, 2020 Letter from Secretary Sonny Perdue (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 indicated 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* p.2.

III. Procedural History

The four plaintiffs in the *Buljic* action filed a petition in Iowa District Court for Black Hawk County on June 25, 2020, bringing claims against Tyson under state-law theories of negligence and fraudulent misrepresentation. A41. Oscar Fernandez filed a substantively similar petition in the same court on August 5, 2020. A273. Both petitions alleged that Tyson's failures to take basic precautions—including

[8] The link Tyson provided below, *see* A27, A218, is no longer live, but is archived at https://web.archive.org/web/20210126054925/https://www.usda.gov/sites/default/files/documents/stakeholder-letters-covid.pdf.

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 Plaintiffs' loved ones' deaths. *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. The notices of removal claimed that the district 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. A22–23; A211. In both cases, Tyson purported to have two "colorable federal defenses": preemption under the DPA and under the FMIA. A29–30; A221–22. Tyson, however, offered different theories as to how it was "acting under" a federal officer in the two cases.

In *Buljic*, the notice of removal asserted that "Tyson was under a Presidential order to continue operations pursuant to the supervision of the federal government and pursuant to federal guidelines and directives, including directives from the Secretary of Agriculture and guidance from the CDC and OSHA." A24. The notice cited the "Guidance for America," and identified Executive Order 13917 as the relevant "Presidential order," quoting that order in detail. A24, 25–26. The only USDA communications referenced were the May 5 letters. A26–27.

In *Fernandez*, the notice of removal asserted that the Waterloo facility "was operating as part of the federally designated 'critical infrastructure' at the direction of, and under the supervision of, the U.S. Department of Homeland Security and the U.S. Department of Agriculture." A212. The notice referenced "frequent contact with federal officers regarding the best way to safely continue operations," prior to April 26, 2020, and cited the presence of FSIS employees on-site at the facility. A216.

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. The court ruled 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 meet the statute's "acting under" requirement. ADD25–26; ADD54–55. It further found no "causal connection between [Tyson's] actions and the official authority" cited by Tyson, noting that Tyson *did* shut down its plants and the lack of evidence that any federal officer directed it to take or not take any of the actions that form the basis of Plaintiffs' claims, ADD26–27; ADD56–57. The court also held that neither the DPA nor the FMIA provided a colorable federal defense,

as required to support federal officer removal, ADD27–28; ADD57–58. Finally, the court held that Plaintiffs' petitions did "not contain a federal question" and thus that the court lacked jurisdiction under 28 U.S.C. § 1331. ADD29–30; ADD58–59.

SUMMARY OF ARGUMENT

Section 1442(a)(1) provides for the removal of state-court actions brought against federal officers, and private entities "acting under" federal officers, "for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). To satisfy this provision, a defendant must show that (1) it was acting under federal direction, (2) the claims against it relate to federal official acts, and (3) it has a colorable federal defense. As the Supreme Court has explained, the statute provides federal courts jurisdiction over cases against a private entity only where the entity is in a subservient relationship to federal officers and acting on the federal government's behalf.

Here, Tyson has shown no evidence that it was in a subservient relationship with, and thus "acting under," the federal government. No federal law brings "critical infrastructure" under the direction of the federal government during a national emergency, and the federal government explicitly disclaimed assuming any such control during the COVID-19 pandemic. There is no evidence the DPA's prioritization and allocation scheme was *ever* triggered with respect to Tyson, either before or after the relevant events of this case. None of the e-mails and phone calls

that Tyson cites shows that the federal government controlled Tyson's operations, only that Tyson asked for assistance. The federal government's repeated, explicit emphasis on state and local authority to "shut down" plants like Tyson's contradicts Tyson's claim of federal direction, and shows that the statute is not needed to avoid state court interference with federal operations.

Tyson has also not shown that Plaintiffs' Iowa-law negligence and fraudulent misrepresentation claims relate to any official act, as is required by section 1442(a)(1). Tyson's argument on this point is premised on the notion that it was under an "order" to keep its plants operating in accordance with CDC/OSHA guidance, but no such order exists. The CDC/OSHA guidance was not even issued until after the relevant events. Moreover, that Tyson shut down two of its plants in April 2020 disproves Tyson's assertion that Plaintiffs' claims are related to an "order" to keep those plants open.

Finally, neither of Tyson's asserted federal defenses is colorable. First, Tyson cannot assert a colorable defense under the DPA's statutory immunity provision because Tyson was not subject to a DPA order. Furthermore, the DPA provides immunity only where compliance with both a DPA order and another legal duty is impossible. Here, nothing the government said or did made it impossible for Tyson to protect workers or tell them the truth. Second, Tyson's novel FMIA preemption argument is not colorable because the legal obligations that Plaintiffs seek to enforce

are not within the scope of the FMIA, as confirmed by USDA's view of its authority under the statute.

Because Tyson has not met its burden to establish the federal officer removal statute applies, and its brief waives any argument for federal question jurisdiction, the Court should affirm the district court's remand orders.

STANDARD OF REVIEW

This Court reviews a district court's remand order *de novo*. *See Bell v. Hershey Co.*, 557 F.3d 953, 956 (8th Cir. 2009).

ARGUMENT

"Four elements are required for removal under § 1442(a)(1): (1) a defendant has acted under the direction of a federal officer, (2) there was a causal connection between the defendant's actions and the official authority, (3) the defendant has a colorable federal defense to the plaintiff's claims, and (4) the defendant is a 'person,' within the meaning of the statute." *Jacks*, 701 F.3d at 1230. The normal principle that the party seeking removal bears the burden of establishing jurisdiction applies. *See Betzner v. Boeing Co.*, 910 F.3d 1010, 1014 (7th Cir. 2018); *Mays v. City of Flint, Mich.*, 871 F.3d 437, 442 (6th Cir. 2017). Here, as the district court correctly concluded, Tyson has failed to establish the first three elements.

I. Private entities may remove under section 1442(a)(1) only when they are 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)(1) 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 1342 (quoting *Willingham*, 395 U.S. at 406) (cleaned up). In short, the statute protects officers and employees of the federal government against prosecution or suit in state courts for the performance of their official duties.

Section 1442(a)(1) applies to both federal officers themselves and to "any person acting under [an] officer," 28 U.S.C. § 1442(a)(1)—that is, to "[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)). The Supreme Court's earliest application of the statute to a private person is *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), in which the Court held 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 3).

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. When defendants have attempted to stretch the scope of the "acting under" provision, the Supreme Court has rejected those efforts. *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*, 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. The manufacturers removed the action on the ground that they were "acting under" a federal officer because (they claimed) the Federal Trade Commission (FTC) regulated the way they tested their cigarettes' tar and nicotine levels. *See* 551 U.S. at 154–56. This Court 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 marketing 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 Court also explained that the statutory purpose did not require 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 regulatory compliance, the Court stated, "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, 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.

Following *Watson*, courts have consistently recognized that "acting under" a federal officer means more than a regulator-regulated relationship: The term describes circumstances where "the federal government uses a private corporation to achieve an end it would have otherwise used its own agents to complete." *Papp v. Fore-Kast Sales Co., Inc.*, 842 F.3d 805, 812 (3d Cir. 2016) (quoting *Ruppel v. CBS Corp.*, 701 F.3d 1176, 1181 (7th Cir. 2012)); *see also Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 822 (10th Cir. 2020); *Mays*, 871 F.3d at 444. To qualify for federal officer removal, the relationship must be one where the private actor is not just subject to federal law but is essentially acting in the stead of the federal government.

This Court recognized this principle in its sole decision applying *Watson*, *Jacks*, 701 F.3d 1224. Distinguishing between private entities subject to "federal regulation" and those acting under federal "delegation," *id*. at 1234, the Court applied *Watson* to find that a health insurance provider under the Federal Employees Health Benefits Plan, administered by the Office of Personnel Management (OPM), was acting under a federal officer. The holding in *Jacks* did not rest on the fact that the provision of health benefits is important to the federal government or that it quite literally saves lives. Nor was it based "upon the fact that … OPM supervises and monitors many aspects of the provider's activities." *Id.* Rather, the Court found the provider was fulfilling "the basic *governmental task* of providing health benefits for

[the government's] employees." *Id.* (emphasis added). That is, rather than creating a Medicare-like program or directly providing health care following the Veterans Administration model, the government chose to act through private health insurers.

The "regulation" versus "delegation" distinction identified in *Jacks* is not one of formality, but rather focuses on the nature of the authority being exercised. Only where the authority is that of a federal officer—acting "under color of" federal office—does section 1442(a)(1) apply. To be sure, regulations deriving from federal authority may constrain private entities' actions. But to qualify for federal officer removal, the relationship needs to be one where the private actor is not only subject to federal law, but is subject to such extensive control that the private actor effectively assumes the role of the government. Absent such control, the purpose of the federal officer removal statute is not implicated, because there is no "significant risk of state-court prejudice." *Watson*, 551 U.S. at 152.

II. Tyson has not established that it was "acting under" a federal officer's authority.

Tyson's interactions with the federal government do not show a merging of identity between Tyson and the United States—either before or after Plaintiffs' loved ones contracted COVID-19 in Waterloo. As the district court correctly held, "While Tyson may have been in regular contact with DHS and USDA regarding continued operations of its facilities at the early stages of the COVID-19 pandemic, such contact under the vague rubric of 'critical infrastructure' does not constitute

'subjection, guidance, or control' involving 'an effort to assist, or to help carry out, the duties or tasks of the federal superior.'" ADD25 (quoting *Rhode Island v. Shell Oil Prods. Co., L.L.C.*, 979 F.3d 50, 59 (1st Cir. 2020)); ADD55 (same).

In rejecting Tyson's argument that it was acting as a federal officer, the district court properly held Tyson to its "burden of providing 'candid, specific and positive' allegations that [it] w[as] acting under federal officers" in its plant operations. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 130 (2d Cir. 2007) (quoting *Willingham*, 395 U.S. at 408); *see also Soper (No. 1)*, 270 U.S. at 35; *Suncor*, 965 F.3d at 824; *Mayor & City Council of Baltimore v. BP P.L.C.*, 952 F.3d 452, 466 n.9 (4th Cir. 2019), *cert. granted on other grounds*, 141 S. Ct. 222 (2020). Even this Court's decision in *Watson*, which the Supreme Court reversed for equating federal direction with regulation, recognized that "[w]hether a defendant is 'acting under' the direction of a federal officer depends on the detail and specificity of the federal direction of the defendant's activities and whether the government exercises control over the defendant." 420 F.3d at 856–57. Here, the district court rejected Tyson's allegations of federal direction because they did not show the kind of subservient relationship required.

Tyson characterizes the district court's holding as an erroneous application of a "formality" standard. Appellants' Br. 23–27. But the archetypal law-enforcement example Tyson itself invokes, *id*. at 26, illustrates that the district court's

determination was not tied to "formality." If a federal officer orally commands a civilian to drive the officer in hot pursuit of a criminal, the oral nature of that command would not change the fact that the civilian was acting under a federal officer's direction. But a vigilante who chased after a criminal suspect on his own accord could not show he was acting under federal direction, even if the President stated in a televised speech, "It is the policy of the United States to capture fleeing criminals," or "We have to fight back against crime." Nor could the vigilante obtain federal-officer jurisdiction on the ground that he had called the Federal Bureau of Investigation to seek assistance with respect to a crime. The difference between these scenarios is not formality of the direction, but the nature of the relationship and the kind of control exercised.

Here, none of the evidence Tyson cites shows the requisite control. Being a business in one of sixteen sectors of the economy designated "critical infrastructure" did not federalize Tyson's operations. Further, although Tyson relies on the President's references to the Defense Production Act, the DPA is irrelevant because there is no evidence that its prioritization and allocation scheme was invoked as to Tyson, either formally or informally. And neither Tyson's requests for assistance from federal agencies, nor USDA guidance as to how its preexisting inspection process would proceed during the pandemic, show the federal government took control over Tyson. Private for-profit food producers, although performing

important tasks, do not perform "basic *governmental* tasks," in an emergency or otherwise. The federal government's express recognition of continuing state and local authority over the meatpacking industry, and the fact that Tyson *did* exercise its discretion to shut down two plants in Iowa in April alone, confirm that Tyson was not "conduct[ing] business under the delegation of the federal government." *Jacks*, 701 F.3d at 1234.

A. Tyson's reliance on "directions" predating April 28, 2020, is not properly before the Court in *Buljic*.

As a preliminary matter, Tyson has waived much of its argument with respect to the *Buljic* case. Tyson now argues that it was subject to federal direction before Executive Order 13917, based on its status as "critical infrastructure" and communications with USDA and other federal agencies *before* April 28, 2020. That theory, however, was not asserted in the *Buljic* notice of removal. Rather, the notice stated that removal was permissible because Tyson "was operating pursuant to the President of the United States' authority to order continued food production and under the direct supervision of the U.S. Secretary of Agriculture," citing Executive Order 13917 and the Secretary of Agriculture's May 5 letters, which, it claimed, required it to operate consistent with the April 26 OSHA and CDC guidance. A24. The notice's four-page discussion of "Federal Direction" did not mention DHS, CISA, or any interaction with any federal agency before April 28. *See* A25–28; *cf.*

A212 (*Fernandez* notice of removal referencing ongoing "direction" and "supervision" of DHS and USDA).

A court's inquiry into whether federal officer jurisdiction is appropriate is "cabined by the notice of removal." *Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 4 (1st Cir. 2014) (citing *Ervast v. Flexible Prods. Co.*, 346 F.3d 1007, 1012 n. 4 (11th Cir. 2013)). A removing party need not provide its *evidence* for removal in the notice, but must provide a short and plain statement of its *grounds* for removal. *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 83–84 (2014). "[T]he removal notice must make the basis for federal jurisdiction clear, and contain enough information so that the district judge can determine whether jurisdiction exists." Wright & Miller, 14C Fed. Prac. & Proc. Juris. § 3733 (Rev. 4th ed.). While a removing party may "set out more specifically the grounds for removal that already have been stated in the original notice," an attempt to introduce *different* grounds for removal—beyond the expiration of time to remove—is improper. *Id.*; *see also James Valley Coop. Tel. Co. v. S.D. Network, LLC*, 292 F. Supp. 3d 938, 946 (D.S.D. 2017) (rejecting attempt to advance "different theory for removal than what [defendant] asserted in its Notice of Removal").

Applying this principle, courts have consistently refused to allow removing defendants to advance a new theory of jurisdiction in connection with a motion to remand. In *Mays*, for example, the Sixth Circuit found it improper to consider

communications between EPA and a state agency as a source of federal direction when the notice of removal did not reference those communications. 871 F.3d at 446–47. And several district courts have refused to consider arguments that one statute completely preempts a plaintiff's claims, thus giving rise to federal-question jurisdiction, where the notice of removal only asserted preemption by a different statute. *See, e.g.*, *Ross v. Hawaii Nurses' Ass'n Office & Prof'l Employees Int'l Union Local 50*, 290 F. Supp. 3d 1136, 1147 (D. Haw. 2018); *Bollea v. Clem*, 937 F. Supp. 2d 1334, 1351 n.3 (M.D. Fla. 2013); *Hahn v. Rauch*, 602 F. Supp. 2d 895, 909 (N.D. Ohio 2008).

In *Buljic*, Tyson "unambiguously stated its basis" for federal-officer jurisdiction: the April 28 Executive Order and follow-along May 5 letters. A24; *Ross*, 290 F. Supp. 2d at 1147. The notice of removal provided neither the district court nor Plaintiffs with notice that Tyson would be arguing that simply being part of "critical infrastructure" or receiving any DHS directions or USDA communications prior to April 28, 2020, brought it under federal officer direction. Because Tyson did not include its pre-April 28 theory of direction in the *Buljic* notice, that argument has been waived and the Court should not consider the argument in that case.

B. The pandemic did not federalize all "critical infrastructure."

In the *Fernandez* notice of removal, Tyson asserted that it was "acting under" federal official authority because it is part of the nation's critical infrastructure. A215; *see* Appellants' Br. 33–34. But no statute gives the federal government authority to assume control over critical infrastructure *en masse*, even in a national emergency, and Tyson has produced no evidence suggesting the federal government did so.[9] To the contrary, the evidence shows that the federal government took a supporting role to state and local governments and to private industry in their efforts to maintain critical infrastructure operations, as contemplated by statute and explicit orders throughout the pandemic. Finding such support to be a sufficient basis for federal officer removal "would expand the scope of the statute considerably, potentially bringing within its scope state-court actions filed against private firms in many highly regulated industries," *Watson*, 551 U.S. at 153, across all sixteen sectors of the economy considered critical infrastructure.

The President's March 13, 2020, national emergency declaration triggered "any provisions of law conferring powers and authorities to be exercised during a

[9] Tyson's suggestion, and that of *Fields v. Brown*, 2021 WL 510620 (E.D. Tex. Feb. 11, 2021), on which Tyson relies, that the federal government took control over all critical infrastructure without statutory authority would raise significant constitutional questions. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (finding President lacks inherent power to seize private property beyond statutory authority, even in a "grave emergency").

national emergency." 50 U.S.C. § 1621(b). The Critical Infrastructures Protection Act of 2001, 42 U.S.C. § 5195c, which Tyson cites, Appellants' Br. 34, however, contains no such provisions. Nor does that Act contain any provision providing the President authority to assert control over private industry. All the statute does is establish the National Infrastructure Simulation and Analysis Center (NISAC), *id.* at § 5195c(d), and set out "the policy of the United States," *id.* at § 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*. at § 5195c(1)–(2) (emphasis added).

No other cited authority empowers the federal government to take control of critical infrastructure. The 2013 policy planning document that listed sixteen categories of "critical infrastructure," for example, delegates authority to specific federal agencies to develop plans to mitigate the impact of disasters, and expressly states 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." Presidential Policy Directive/PPD-21, Critical Infrastructure Security and Resilience (Feb. 12, 2013), https://bit.ly/3jqTgcY (emphasis added); *see also* Homeland Security Presidential Directive 7, A153 (noting the federal government "will *collaborate*

with appropriate private sector entities") (emphasis added). It does not afford any special status to the identified sectors.

Not only do these documents fail to provide any authority for the federal government to exercise control over privately owned critical infrastructure, but the language they use—words like "partnership," "shared responsibility," "collaborate"—is inconsistent with the "subservient" relationship that would meet the "acting under" element. *Cf. Mays*, 871 F.3d at 447 (noting models of cooperative federalism show states were "working alongside" federal government, "not under it"). The documents explicitly contemplate that state and local governments will "share" responsibility.

No government statements about critical infrastructure after the onset of the COVID-19 pandemic show a departure from these policies. Indeed, one of the Presidential statements that Tyson partially quotes (at 9, 30) 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. Tyson seizes on the use of the phrase "hand-in-hand," but "[a] figure of speech does not make someone a federal officer or a person 'acting under' one." *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 808–09 (7th Cir. 2015). And a "hand-in-hand" relationship is not a subservient one, but a cooperative one—exactly what 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).

Other federal documents confirm that the federal government did not assume control over critical infrastructure. In publishing its list of essential workers, CISA stated it was doing so "to support State, Local, and industry partners," A162, that the list was *not* a directive, and 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." A161. The "supporting" nature of the federal role was confirmed

with respect to meatpacking facilities when USDA repeatedly stated that it would "follow" state and local government rules and authorities in their efforts to stop the spread of COVID-19 at meatpacking plants, and encouraged plants to do the same. A179; Common Questions; Food Supply Q&A. Although Tyson, without citation, states that "state and local officials did not have the authority to stop" plants from operating, Appellants' Br. 15, USDA said the opposite both before and after Executive Order 13917. *See* Common Questions; Food Supply Q&A.

Where state and local governments are "ultimately in charge," CISA Memo, A161, and where the federal government is itself "following" and reminding private entities of their obligations to "follow" state and local rules, *see, e.g.*, Common Questions; Food Supply Q&A; A179, the Supremacy-Clause-based federal officer removal statute has no place, given that it is "designed to protect the operations of the federal government from state interference." *Wyoming v. Livingston*, 443 F.3d 1211, 1222 (10th Cir. 2006); *see also Willingham*, 395 U.S. at 405 ("the removal statute is an incident of federal supremacy"); *Walker v. AMID/Metro P'ship, LLC*, 2008 WL 5382372, at *4 (E.D. La. Dec. 19, 2008) (distinguishing between "cooperative effort among federal, state, and local authorities [and] a federally marshaled and mandated endeavor").

Tyson's observation that some state and local governments exempted it and its workers from some COVID-related restrictions because the meatpacking industry

is part of critical infrastructure is irrelevant because the exemptions, like the restrictions themselves, were not directives of federal officers acting under color of federal law. As CISA made clear, the decision whether to use its list to determine which businesses and workers should be subject to exemptions was left to state and local officials' "own judgment." CISA Memo, A161. Some states, such as Minnesota, chose to use CISA guidance in determining whom the *states* would exempt from stay-at-home orders. *See* Minn. Emergency Exec. Order 20-48, Apr. 30, 2020.[10] Other 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.[11] Regardless of whether they used the CISA guidance, the states were exercising their own authority, not the federal government's.

Tyson relies heavily on the decision in *Fields*, which held that all entities designated critical infrastructure were "'acting under' the directions of federal officials when the federal government announced a national emergency on March 13, 2020." 2021 WL 510620, at *3. The district court there did not explain why that was so, examine any of the relevant texts, or address the federal government's own characterizations of its role as one of "support." Nor did it address the wide-ranging consequences of finding that the hundreds of thousands of businesses in

[10] https://www.leg.mn.gov/archive/execorders/20-48.pdf.

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

the sixteen sectors identified as critical infrastructure in 2013, including communications, information technology, financial services, and transportation systems, automatically became deputies of the federal government, at all times, with respect to all of their operations, as a result of the President's March 13 declaration.

C. Tyson was not subject to federal direction under the Defense Production Act.

Unlike the Critical Infrastructures Protection Act of 2001 and the 2013 directive, the DPA does provide an affirmative grant of authority to the Executive to commandeer private businesses. Here, however, there is no evidence that such authority was ever exercised as to Tyson. That it *could have been* is not enough to establish federal direction.

As Tyson notes, the DPA provides the President with authority to "'control the general distribution of any material in the civilian market' that the President deems 'a scarce and critical material to the national defense.'" Appellants' Br. 8 (quoting 50 U.S.C. § 4511(b)). But that authority is not unlimited. Title I of the DPA establishes a specific mechanism by which the President may control the production of vital materials: contract "prioritization" and "allocation." This mechanism allows the President to require firms to prioritize certain contracts or orders over others, and to allocate scarce materials in certain ways. 50 U.S.C. § 4511(a). The scheme "was enacted to reconcile conflicts between scheduled commercial production and sudden military needs in favor of war production." *Washington v. Monsanto Co*., 274 F.

Supp. 3d 1125, 1131 (W.D. Wash. 2017) (citing *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 981–82 (5th Cir. 1976)), *aff'd*, 738 F. App'x 554 (9th Cir. 2018).

The President has delegated his prioritization and allocation authority to designated officials, and 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)).

The procedures of APAS and Executive Order 13603 have not been utilized with respect to Tyson or meatpacking plants. Relying solely on a 1976 court opinion that predated APAS and Executive Order 13603, Tyson suggests that DPA authority can be exercised "informally." Appellants' Br. 34 (citing *E. Air Lines*, 532 F.2d at 992–93). Tyson does not recognize the significant due process concerns that would exist if the Executive invalidated or modified private contracts without following these procedures. *See*, *e.g.*, *In re United States*, 197 F.3d 310, 315 (8th Cir. 1999) (stating that, as a matter of due process, "administrative agencies may not take action

inconsistent with their internal regulations when it would affect individual rights" and citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–68 (1954)). But even if official authority under the DPA *could* be exercised informally, Tyson would still have to show that it *was* exercised, specifically with respect to Tyson. Tyson has not done so.

Tyson notes two comments by the President regarding the DPA prior to April 28, 2020. Neither comment constituted official federal action taken under color of law, and neither related to Tyson, meatpacking, or the food supply. First, 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."[12] Appellants' Br. 8. 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."

[12] Tyson did not present these remarks to the district court in opposing remand, and thus the Court should decline to consider them. *See, e.g., Central Valley Ag Coop. v. Leonard*, 986 F.3d 1082, 1090 (8th Cir. 2021).

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 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.[13]

Second, Tyson cites a March 24, 2020, tweet as evidence of "informal" DPA invocation. Appellants' Br. 14 (citing Doina Chiacu, *Trump Administration Unclear over Emergency Production Measure to Combat Coronavirus*, Reuters (Mar. 24, 2020), http://reut.rs/3rS3MN5). Again, 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 personal protective equipment. The tweet, which suggests that the DPA could be used in connection with mask production, cannot reasonably be read to compel anyone to

[13] 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. Leaving aside that the DPA was signed in 1950 by President Eisenhower, the phrase "should we need to invoke it" confirms that no entity came under federal direction that day.

do anything, much less a meatpacking company like Tyson. The tweet did not make Tyson, or any other company, a federal officer.

Likewise, Executive Order 13917, to the extent it has any relevance to actions and inactions predating April 28, did not constitute direction by a federal officer.[14] The Executive Order directs the 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. USDA later stated that issuing DPA orders remained "under active consideration." Food Supply Q&A. Absent any evidence the Secretary ever issued such orders—to Tyson—the DPA is irrelevant.

Tyson also relies on the Secretary's May 5 Letter, which also postdates Tyson's actions and inactions relevant to these cases. Even aside from the date, however, the letter is of no help to Tyson. The letter stated that plants "should" utilize the 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

[14] The court's statement that Tyson could not have been "acting under" directions that had not yet been issued, ADD25, does not mean the court found that "Tyson was unquestionably 'acting under' federal officers in operating its plants" *after* April 28. Appellants' Br. 36.

USDA." May 5 Letter. The Secretary explained that he was "exhort[ing]" industry to do these things, *id.*—a word choice that denotes a request, not a command. *See Am. Heritage Dictionary of the English Language* (5th Ed. 2020) (defining "exhort" as "to urge by strong, often stirring, argument, admonition, advice, or appeal"). A request that industry follow agency guidance does not meet the *Watson* standard.

Finally, mere compliance with a DPA prioritization or allocation order alone would not meet the "acting under" standard for federal officer removal. *See*, *e.g.*, *Washington v. Monsanto Co.*, 738 F. App'x 554, 556 (9th Cir. 2018) (compliance with DPA order was insufficient to satisfy "acting under" requirement per *Watson*); *Bailey v. Monsanto Co.*, 176 F. Supp. 3d 853, 870 (E.D. Mo. 2016) (same); *Ryan v. Dow Chem. Co.*, 781 F. Supp. 934, 950–51 (E.D.N.Y. 1992) (compliance with DPA order did not show defendant was "acting under" federal officer).

D. Neither Tyson's requests for assistance nor the continued functioning of the meat-inspection regime shows federal control.

Beyond references to "critical infrastructure" and the DPA, Tyson cites a handful of communications that it had with USDA and other federal agencies before April 28, 2020. This evidence shows only two things: (1) that Tyson sought assistance from the federal government and (2) that USDA communicated about how it would continue the statutorily mandated meat-inspection process. The communications show nothing "distinct from the usual regulator/regulated relationship." *Watson*, 551 U.S. at 157. Indeed, they evince less control over Tyson's

challenged actions than the "detailed supervision of the cigarette testing process" deemed insufficient to meet the "acting under" standard in *Watson*, 551 U.S. at 146 (citing 420 F.3d at 857).

To begin with, far from showing that Tyson was enlisted to assist the federal government in performing governmental tasks, the evidence shows that Tyson attempted to enlist the federal government's assistance in performing tasks of *private industry*. *Cf. County of San Mateo v. Chevron Corp.*, 960 F.3d 586, 602 (9th Cir. 2020) (agreement that allowed company and government "to coordinate … in a way that that would benefit both parties" did not show requisite "acting under" relationship). Emails offered by Tyson show that Tyson reached out to the federal government, seeking assistance, *see, e.g.*, A145, and that CISA encouraged Tyson to "Reach out any time!", A144. Tyson notes that it participated in a conference call with CISA on March 13, 2020, but 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. A137. CISA's request for input from industry does not show federal control.

Similarly, that Tyson, both individually and through an industry group, lobbied FEMA and USDA to help procure PPE and other supplies, A140, A170–177, demonstrates that 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 the government's response indicated that Tyson was "being heard." A173. Indeed, Tyson's stated concern that CDC "may suggest some type of protective face coverings," A173, confirmed that it did *not* regard itself to be under a government mandate with respect to PPE.

Finally, USDA statements about protocols for how FSIS inspectors would perform their regulatory functions during the pandemic do not show government control of Tyson's own operations. Federal law has long required FSIS inspectors—federal employees—to be present in meatpacking plants. *See* 21 U.S.C. §§ 603–06 (FMIA); 21 U.S.C. §§ 451 et seq. (Poultry Products Inspection Act); *see also* A140–41 (Tyson declarant stating that FSIS's inspectors continued to be present "notwithstanding the pandemic").[15] When plants expressed concern that COVID-19 would lead to a shortage of government inspectors, which in turn would slow their private operations, USDA issued guidance to assure industry that it would "provide[] the timely delivery of services," A180, and to answer meatpacking companies' questions about what screening *they* could impose on federal employees, A182. That the food-inspection regulatory regime soldiered on through the pandemic does not indicate that the regime became something other than a regulatory one.

[15] The *Fields* court incorrectly suggested that the presence of FSIS inspectors was the result of the pandemic. *See* 2021 WL 510620, at *3.

The communications between Tyson's government-relations executives and federal agencies are the kinds of emails exchanged between industry and regulatory officials thousands of times a day across the federal government. *See*, *e.g.*, A147.[16] They contain no direction from the federal government to do anything. They did not change the nature of the relationship between Tyson and the federal government into one of subservience.

E. By continuing to operate its pork-processing plants, Tyson was not performing a "basic governmental task."

Tyson claims that it was performing the "basic governmental task" of maintaining the American food supply. Appellants' Br. 30. But a task is not a "basic governmental" one as that term was used in *Watson* just because it is important to the nation. Rather, the question is whether a private entity is performing a task that, absent delegation of federal authority, "the Government itself would have had to perform." *Watson*, 551 U.S. at 153. Here, as explained above, there was no delegation of federal authority, and absent such delegation, no matter how important the task a private entity assumes, it is not "acting under" federal authority. *See*, *e.g.*, *Mays*, 871 F.3d 437 (state agency was not acting under a federal officer in ensuring

[16] Tyson's suggestion that such communications increased during the pandemic, Appellants' Br. 30, if accurate, would show a "difference … of degree, not kind." *Watson*, 551 U.S. at 157.

a safe drinking water supply absent delegation to act on federal government's behalf).

Moreover, the production of food is not a task the federal government undertakes on its own, but one left to private entities in the marketplace. This fact sharply distinguishes this case from *Jacks*, where instead of operating a health insurance plan for federal employees or providing health services to them directly, the federal government chose to enlist the services of a third-party. Instead, this case is similar to *Suncor*, where the Tenth Circuit found that fossil-fuel resource development was *not* "a critical federal function in the same vein as law enforcement" and, therefore, was not a basic governmental task. 965 F.3d at 826.

The onset of the COVID-19 pandemic did not convert market activity like food production into a governmental task—no matter how important that market activity is. The tasks Tyson performed—running its meat processing facilities to meet demands—remained the same. That Tyson was now faced with additional risks to worker health and safety, as were thousands of other American businesses, did not transform its work into tasks imbued with federal authority. Even if the federal government was pleased that Tyson was continuing to run its plants as Tyson saw fit, this sort of relationship is not what *Watson* contemplates. *See MobilizeGreen, Inc.*, 101 F. Supp. 3d at 43 ("Simply put, providing a benefit to a federal agency is not equivalent to fulfilling one of the federal agency's duties or tasks."). If Tyson

was performing a basic governmental task and thus exercising federal governmental authority, so was every grocery store employee, small farmer, truck driver, and restaurant worker. They plainly were not. It does not diminish the importance of their work to recognize that the pandemic did not convert them into federal-government operatives.

III. The challenged actions and inactions do not "relate to" the claimed federal direction.

Removal under section 1442(a)(1) requires that a defendant show it did something that constituted an act under a federal officer, and under color of that officer's office, and that the case being removed was brought against it "for or relating to" that act. As explained by Seventh Circuit, the "acting under the color of federal authority" "requirement is distinct from the 'acting under' requirement in the same way a bona fide federal officer could not remove a trespass suit that occurred while he was taking out the garbage—there must be a 'causal connection between the charged conduct and asserted official authority.'" *Ruppel*, 701 F.3d at 1181 (quoting *Jefferson Cty., Ala. v. Acker*, 527 U.S. 423, 431 (1999)). In 2012 in *Jacks*, this Court found such a "causal connection," as "it was because of" the insurer's participation in the federal health employee benefits plan that it was pursuing subrogation. 951 F.3d at 1230 & n.3 (citing *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008)).

Tyson argues that the addition of the phrase "or relating to" in a 2011 statutory amendment eliminated the causation requirement and replaced it with a "connected or associated" requirement. Appellants' Br. 38. But the 2011 amendment was "not a radical change." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 295 (5th Cir. 2020) (*en banc*). *Cf. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct.*, 141 S. Ct. 1017, 1026 (2021) ("the phrase 'relate to' incorporates real limits"). Several courts of appeals continue to refer to this element as one of causation. *See, e.g.*, *Betzner*, 910 F.3d at 1015; *Caver v. Central Alabama Electric Cooperative*, 845 F.3d 1135, 1144 (11th Cir. 2017); *Cabalce v. Thomas E. Blanchard & Assocs., Inc.*, 797 F.3d 720, 728–29 (9th Cir. 2015); *Ruppel*, 701 F.3d at 1179, 1181. And as the Fifth Circuit noted, there is no difference in practice between the causation requirement applied by this Court in *Jacks* (and by the Sixth, Seventh, and Ninth Circuits) and the "association or connection" requirement that the Fifth Circuit adopted in *Latiolais*. 951 F.3d at 295 n.8 (citing *Jacks*, 701 F.3d at 1230 & n.3).

Whatever difference may exist between the pre- and post-2011 standards, the Court need not resolve its contours in this case. Under the test urged by Tyson, a removing defendant must establish that the removed action "is connected or associated with an act under color of federal office." *Latiolais*, 951 F.3d at 296. The district court applied that standard, *see* ADD23–24, ADD53–54, and found Tyson

failed to meet it, because there is *no* connection between the claims and any official acts taken by a federal officer. *See* ADD26–27, 56–57.

First, federal directives issued *after* the actions being challenged are "obviously unrelated" to a plaintiff's claims for purposes of the statute. *Mays*, 871 F.3d at 447. Thus, even if the April 28 Executive Order or May 5 Letter somehow made Tyson and its employees federal agents, this case has no connection to any acts they went on to take in that capacity—as Tyson implicitly acknowledges. *See* Appellants' Br. 43 (criticizing Judge Reade for being "myopically focused on the Executive Order and other formal actions that post-dated it"). Likewise, the April 26 CDC/OSHA guidance, which Tyson argues Plaintiffs' claims "relate to," *id*. at 41, 45, is irrelevant to claims based on actions preceding it.

Second, Tyson claims that earlier interactions with the federal government constituted a "direction to keep plants operational," *id*. at 40, and suggests, therefore, that any claim that relates to its operation of its plants relates to federal direction. As explained above, though, no such direction existed, as confirmed by the fact that Tyson *did* shut down its Columbus Junction plant on April 6 and its Waterloo plant on April 22. *See* A47, A50. Tyson claims that its decisions to shut down the plants "ha[ve] no relevance," Appellants' Br. 45 n.5, but those decisions, and the lack of any federal consequence, belie its assertion that *any* action that slowed or stopped

production would have been "contradictory to the [claimed] federal direction to keep plants operational." *Id.* at 40.

Moreover, Tyson cannot evade the requirement that Plaintiffs' claims be "directed at the relationship between the [defendants] and the federal government[,]" *Baker v. Atlantic Richfield Co.*, 962 F.3d 937, 945 (7th Cir. 2020), by elevating its narrow communications with the federal government into a generic directive. Such an approach would read the "relating to" element "so broadly that it renders the 'acting under' requirement superfluous." *Ohio State Chiropractic Ass'n v. Humana Health Plan Inc.*, 647 F. App'x 619, 624–25 (6th Cir. 2016). Tyson must show that specific acts taken under the direction of a federal officer are "the source of tort liability." *BP*, 952 F.3d at 467. But the only pre-April 26, 2020, evidence Tyson references in its ten-page discussion of the related-to element, Appellants' Br. 37–46, is a string cite to a 2013 declaration recognizing the "food" sector as critical infrastructure, and to its requests for federal assistance in obtaining PPE. *Id.* at 41 (citing A137–38, A314–15; A140, A317; A144–46, A321–24; A170–77, A352–60). None of those documents required Tyson to remain open, nor do they say anything about what safety measures Tyson could or could not employ. *Cf. Ulleseit v. Bayer HealthCare Pharm.*, 826 F. App'x 627, 629 (9th Cir. 2020) ("relate to" element not met where the government neither directed the company to conceal risks nor prohibited more detailed warnings). Tyson's negligence and fraudulent

misrepresentations were not "connected or associated with" the fact that President Obama delegated to USDA the responsibility to develop a plan to prevent disruptions to the food supply in 2013. And while Tyson's failure to require or provide PPE may in some sense be related to its request that the federal government help it obtain PPE, Tyson's request was not an act under color of federal office.

In short, because "[t]here is simply no nexus between anything for which [Plaintiffs] seek[] damages and anything [Tyson] allegedly did at the behest of a federal officer," *Rhode Island*, 979 F.3d at 60, remand was appropriate.

IV. Tyson lacks a colorable federal immunity defense satisfying the requirements of the federal officer removal statute.

Section 1442(a)(1) requires a party invoking federal officer removal to "raise a colorable defense arising out of their duty to enforce federal law." *Willingham*, 395 U.S. at 406–07. Here, Tyson asserts that both the DPA and the FMIA preempt Plaintiffs' claims. Even assuming that such preemption defenses "arise out of [Tyson's] duty to enforce federal law," there is no colorable argument that either the DPA or FMIA preempts Plaintiffs' claims here.[17]

[17] Tyson's brief broadly states that it has "a colorable federal preemption defense to Plaintiffs' claims based on the federal directives under which it operated." Appellants' Br. 55. If Tyson means that something other than the DPA or FMIA provides such a defense, that argument is not properly before the Court. Both Notices of Removal asserted defenses of "Express preemption under the Federal Meat Inspection Act" and "Preemption under the DPA and the [April 28, 2020] Executive Order." A29–30; A221–22. This Court's review is limited to the bases for removal

A. The DPA does not provide Tyson with a colorable federal defense.

Tyson claims that the immunity provision of the DPA, 50 U.S.C. § 4557 preempts Plaintiffs' claims. That provision 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, there is no evidence that Tyson was acting under a "rule, regulation, or order issued" under the DPA, 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").

Even if Tyson had been subject to a DPA prioritization or allocation order, though, the DPA would not provide a colorable defense to Plaintiffs' tort claims. Section 4557 immunity extends only to claims resulting from the prioritization of certain contracts over others. *See United States v. Vertac Chemical 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.* To conclude otherwise, as the government explained in that case, would be "an absurd result." *Id.*

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asserted in Tyson's Notices of Removal, *see supra* pp. 27–28, not theories it has come up with since.

Rather, as the Federal Circuit and the Fifth Circuit have held, section 4557 codifies the common-law doctrine of impossibility and "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 also E. Air Lines*, 532 F.2d at 997.

In *Vertac*, this Court held that section 4557 did not provide a manufacturer immunity from claims under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) based on its waste disposal practices, even though it was producing Agent Orange subject to a DPA contract. Although the government had ordered the manufacturer to make Agent Orange, it did not dictate how the manufacturer should dispose of waste while doing so, 46 F.3d at 807, and thus violating CERCLA in disposing waste was not a risk imposed by its performance of the DPA contract, *id.* at 812. So too here, there is no colorable argument that any DPA order required Tyson to violate Iowa-law duties by ignoring the health and safety of its workers and making fraudulent misrepresentations about the safety of its Waterloo plant.

B. The Federal Meat Inspection Act does not provide a colorable federal defense.

Tyson's arguments that the FMIA preempts any and all state laws that protect meatpacking plant workers fare no better. The district court suggested those

arguments were frivolous, ADD28, 58, and no court has ever held that the FMIA preempts application of workplace safety laws to meatpacking plants. The FMIA's preemption clause only applies 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.

Worker safety laws are not colorably "within the scope" of the FMIA. The FMIA "regulates a broad range of activities at slaughterhouses to ensure both the safety of meat and the humane handling of animals." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012). USDA has "historically held that position that … it could not enact regulatory requirements related solely to worker safety," although "it could consider the effects its actions may have on worker safety." *United Food & Commercial Workers Union, Local No. 663 v. U.S. Dep't of Agric.*, 2021 WL 1215865 at *22 (D. Minn. Mar. 31, 2021). Thus, the FMIA's preemption clause focuses on, "at bottom, the slaughtering and processing of animals at a given location," *Harris*, 565 U.S. at 463, and generally leaves "state laws of general application" including "workplace safety regulations," untouched, *id*. at 467 n.10. Moreover, as USDA has recognized, OSHA is the federal agency that "has the statutory authority to regulate worker safety in slaughterhouses," *id*. at *3, and OSHA's authorizing statute does not have the broad field-preemptive scope that Tyson seeks to ascribe to the FMIA: It preempts state law only when a specific

federal standard is in force. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 100 (1992).

Tyson points to no provision of the FMIA that would allow USDA to adopt a worker safety rule. Of course, USDA regulations may impact worker safety and USDA may take those impacts into account in crafting regulations. But its role and its regulations under the FMIA are for the purpose of ensuring food safety. For example, the employee hygiene regulations cited by Tyson, Appellants' Br. 49, are explicitly tied to preventing "adulteration of product." 9 C.F.R. § 416.5. In enacting these regulations, USDA expressly declined to issue a worker health regulation regarding toilet facilities, noting that such a topic was within the realm of OSHA. *See* FSIS, USDA, Final rule, Sanitation Requirements for Official Meat and Poultry Establishments, 64 Fed. Reg. 56,400, 56,406 (Oct. 20, 1999). Tyson also cites a regulation concerning office space and other facilities that poultry plants must provide to *federal* employees conducting inspections mandated by the PPIA—not the FMIA. Appellants' Br. 50 (citing 9 C.F.R. § 381.36.). The regulation was issued under the PPIA—not the FMIA—and it is a requirement to enable federal inspections, not a worker safety rule.

Reading the FMIA to preempt state tort laws protecting injured workers when USDA has never regulated that subject, or claimed the authority to do so, would be to read the preemption clause's limitation to "requirements within the [FMIA's]

scope" out of the statute. Holding that *all* state laws are preempted to the extent they are applied within the four walls of a meatpacking plant would disregard the plain language limiting the clause's preemptive effect. *See Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (analysis of express preemption focuses "on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent") (internal quotation omitted). It would also create an absurd tension with the Occupational Safety and Health Act—which expressly provides that tort claims like Plaintiffs' are *not* displaced by that worker safety statute. 29 U.S.C. § 653(b)(4).

V. Tyson has waived the argument that the district court erred in holding that it lacked federal-question jurisdiction.

Tyson concedes that review of the district court's holding that it lacked federal-question jurisdiction is barred by *Jacks*. It does not argue that the district court's holding on federal-question jurisdiction was wrongly decided (or that *Jacks* was). In a footnote, though, it purports to "reserve the right" to make such an argument in the future should the Supreme Court overrule that aspect of *Jacks* in *BP*. A "reservation" in a footnote does not preserve an argument. *See, e.g.*, *Minneapolis Taxi Owners Coal., Inc. v. City of Minneapolis*, 572 F.3d 502, 506 (8th Cir. 2009) (finding footnote inadequate to preserve claim) (citing Fed. R. App. P. 28(a)(9)(A)). If Tyson wanted to preserve an argument about the district court's federal-question jurisdiction ruling, it had to make that argument in its brief. *Cf.*

United States v. McCraney, 612 F.3d 1057, 1067 n.6 (8th Cir. 2010) (noting party made argument foreclosed by circuit precedent "to preserve it for further review"). Tyson, however, made a strategic choice not to do so. Even if the Supreme Court reverses in *BP*, this Court will not be obligated to ignore that strategic choice. *Cf. United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (declining to consider issue decided by Supreme Court post-briefing where party did not argue it in initial briefing). Even those courts that excuse waiver due to an intervening change of law only do so "to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent." *GenCorp, Inc. v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007). Here, Tyson *has* prophesied such a reversal. Other appellants in similar circumstances have briefed all the grounds for removal they wish to preserve—including in *BP* itself. *See, e.g.*, *San Mateo*, 960 F.3d at 596 (discussing appellants' argument that court should address federal-question jurisdiction despite circuit precedent); *BP*, 952 F.3d at 459 (same). By choosing not to do so here, Tyson has waived any claim of error.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellees respectfully request the Court affirm the decisions below.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), it contains 12,978 words.

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April 5, 2021

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I hereby certify that on April 5, 2021, 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.

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