Nos. 21-1010 & 21-1012

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,
Nos. 20-cv-2055 & 20-cv-2079

BRIEF FOR APPELLANTS

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

These consolidated appeals raise novel and important questions about the scope of federal-officer removal in the context of the ongoing pandemic. Appellants respectfully submit that oral argument would assist the Court in resolving these appeals, which appear likely to provide the first federal appellate precedent addressing federal-officer removal in the COVID-19 context. Given the complex and novel questions presented, Tyson requests that the Court afford the parties 20 minutes of argument per side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellant Tyson Foods, Inc. certifies that it does not have a parent corporation and that no publicly held corporation owns more than ten percent of its stock. Appellant Tyson Fresh Meats, Inc. hereby certifies that it is a wholly owned subsidiary of Tyson Foods, Inc.

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INTRODUCTION

In early 2020, as the COVID-19 pandemic began its spread across the United States, the federal government enlisted private industry help in its efforts to ensure that the pandemic would not disrupt the operation of America's critical infrastructure. Among the government's chief concerns in the early days of the crisis was maintaining the national food supply chain, as empty grocery store shelves and freezers were a common sight as consumers increased purchases due to mandatory stay-at-home orders and expected shortages. The President invoked federal emergency powers to secure the continued operation of food producers to keep supplying food to the American people. Federal direction from early March on involved consultation and direction at the highest levels of government and was eventually formalized in an Executive Order on April 28, 2020. Appellants Tyson Foods, Inc. and Tyson Fresh Meats, Inc. (collectively "Tyson") were among the suppliers charged by the federal government with continuing to operate meat and poultry processing plants pursuant to federal direction and supervision.

Plaintiffs in these consolidated appeals represent the estates of four employees of Tyson's Waterloo, Iowa processing facility who contracted COVID-19 and ultimately died of complications related to the disease. Plaintiffs sued Tyson and certain Tyson executives and supervisors (collectively, "Appellants") in Iowa state court, claiming that they acted negligently and made fraudulent representations in

continuing to operate the meat and poultry processing plants during the COVID-19 crisis. Appellants promptly removed Plaintiffs' suits to federal court under the federal-officer removal statute, 28 U.S.C. §1442(a)(1), and on federal question grounds. Without conducting a hearing, the district court found federal jurisdiction lacking and remanded the cases to state court.

The district court appeared to accept that Tyson was acting under federal direction once the President issued his formal Executive Order under the Defense Production Act on April 28. But in the court's view, nothing the federal government did *before* that Executive Order sufficed to constitute federal direction—even though the President had declared a national emergency that triggered the federal government's emergency powers, had publicly declared the Defense Production Act to be "in full force," and both personally and through several agencies instructed Tyson to keep its plants operating long before the President issued the formal Executive Order, as part of the federal effort to prevent the pandemic from spiraling into a national food shortage.

The district court's decision cannot be reconciled with the federal-officer removal statute, precedents interpreting the statute, or the commonsense reality that federal direction is not always cloaked in formality, especially during an ever-changing and ongoing crisis. Indeed, the only other court to address this question has recently reached the opposite conclusion, finding federal-officer removal

appropriate on materially identical facts. The federal-officer removal statute is not limited to formal federal officers, but extends to actions against any person "acting under" a federal officer. 28 U.S.C. §1442(a)(1). As the Supreme Court has explained, the removal right extends to actions taken by a private party under federal "subjection, guidance, or control" in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal [government]." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 151-52 (2007) (emphasis in original). That aptly describes what Tyson was doing by continuing to operate its plants to ensure the nation's food supply both before and after the Executive Order. Tyson complied with federal directions coming from the President and numerous other federal officials—including those from the Office of the Vice President, United States Department of Agriculture, Department of Homeland Security, and Department of Transportation—to aid the federal government to accomplish its duty of preserving the nation's food supply chain during an unprecedented national emergency. That federal direction did not begin when the Executive Order was formally promulgated; it began as soon as the President declared the pandemic a national emergency, directed that critical infrastructure companies continue to operate, and made clear that his directions were backed by the full force of the Defense Production Act. Much like a private citizen enlisted to help federal officers in an ongoing manhunt, Tyson was enlisted to assist the federal government's efforts to confront an ongoing emergency and was

operating under federal direction long before that direction was formalized in the Executive Order. In short, far from *commencing* the federal direction, the Executive Order confirms that Tyson was operating "under" federal officers and federal direction from the earliest days of the pandemic.

That does not necessarily mean, of course, that every private party the federal government enlisted in its efforts to secure the continued operation of critical infrastructure during the COVID-19 pandemic is immune from any and all claims relating to those actions. The Executive Order itself confirms that Tyson and other food suppliers were subject to far more than moral suasion to do their part in responding to the crisis, and federal-officer removal does not equate to immunity. The question of liability will be resolved in due course. But if that question is to be litigated, it should plainly be litigated in a federal forum, with due regard for the role the federal direction played in providing uniform guidance and keeping Tyson's plants open and proper consideration of Tyson's (more than) colorable federal defenses, not in a state court where local considerations, rather than federal direction, are front and center. The federal-officer removal statute promises nothing less. This Court should vacate the district court's remand orders and allow these cases to proceed in the federal forum to which Appellants are entitled.

JURISDICTIONAL STATEMENT

Plaintiffs filed two suits against Appellants in the Iowa District Court for Black Hawk County. Appellants removed both cases to the United States District Court for the Northern District of Iowa under 28 U.S.C. §§1442(a)(1) and 1441(a). A22, A211. The district court issued remand orders in both cases on December 28, 2020. ADD1, ADD32. Appellants filed timely notices of appeal on December 31, 2020. A189, A377. This Court has jurisdiction under 28 U.S.C. §1291 and under 28 U.S.C. §1447(d), which expressly permits review of orders remanding cases removed pursuant to 28 U.S.C. §1442.

STATEMENT OF ISSUES

Whether the federal-officer removal statute entitles Appellants to a federal forum to defend actions they took under federal supervision and direction to keep Tyson's facilities operating during the COVID-19 pandemic.

The most apposite authorities are:

- 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)
- *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286 (5th Cir. 2020)
- *Fields v. Brown*, 2021 WL 510620 (E.D. Tex. Feb. 11, 2021)

STATEMENT OF THE CASE

This appeal arises from two suits seeking to hold Tyson and certain Tyson executives and supervisors liable for actions they took at the federal government's behest to assist the government in preserving the national food supply by keeping Tyson's meat and poultry processing plants operating in accordance with federal guidance during the COVID-19 pandemic.[1]

A. Factual Background

In February and March 2020, the novel coronavirus began its rapid spread across the United States, creating sudden and dramatic disruption. On March 13, 2020, the President declared a state of emergency across the country in response to the COVID-19 outbreak, retroactive to March 1, 2020—the first time in history that all 50 states have been subject to simultaneous disaster orders. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020). The federal government proceeded to devote significant effort to combating the pandemic and its potentially catastrophic effects, enlisting both public and private entities in its efforts to ensure that the rapid spread of the disease would not disrupt the nation's critical infrastructure. A particular focus of that effort was the protection of the nation's food supply. As the seriousness of

[1] All arguments made in this brief are on behalf of both Tyson and the individual defendants.

the pandemic and the reality of lockdown orders began to take hold, consumers nationwide began to stockpile food supplies. Those efforts produced empty grocery store shelves, photographs and media stories of which prompted further stockpiling, threatening to create a vicious cycle endangering the nation's food supply.

In confronting the crisis, the federal government did not write on a blank slate. In the aftermath of the September 11 attacks of 2001, Congress enacted the Critical Infrastructure Protection Act, which instructed the federal government to develop plans to protect designated "critical infrastructure" in the event of future disasters. The act defines critical infrastructure to include systems whose incapacity "would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." 42 U.S.C. §5195c(e). The federal government has identified 16 sectors of the national defense and economy deemed sufficiently vital to qualify as critical infrastructure—including, unsurprisingly, the "Food and Agriculture" sector. *See Presidential Policy Directive—Critical Infrastructure Security and Resilience*, The White House (Feb. 12, 2013), https://bit.ly/3t1vgRZ; *see also* A136, A315; A157-170, A337-351. Responsibility for coordinating protection of the "Food and Agriculture" sector is assigned to the Department of Agriculture and the Department of Health and Human Services, which have developed an extensive critical infrastructure plan to "protect against a disruption anywhere in the food system that would pose a serious threat to

public health, safety, welfare, or to the national economy." Food & Drug Admin. et al., *Food and Agriculture Sector-Specific Plan* 13 (2015), https://bit.ly/2MyJ31q.

The Defense Production Act ("DPA"), 50 U.S.C. §4501 *et seq.*, provides the federal government with additional authority. The DPA grants the President 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." *Id.* §4511(b). The Critical Infrastructure Protection Act expressly cross-references the DPA and characterizes the emergency preparedness activities that both statutes contemplate as part of the "national defense." *See* 42 U.S.C. §5195a(b). The statutes vest the President with ample authority to direct the operation of critical infrastructure like the distribution of meat and poultry to protect the national food chain—a point that the President underscored shortly after declaring a national emergency. *See Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, The White House (Mar. 18, 2020), https://bit.ly/2Nh91XZ ("We'll be invoking the Defense Production Act, just in case we need it.").

Tyson produces more than 20% of the nation's daily supply of meat and poultry—enough to feed 60 million Americans each day—and employs more than 120,000 workers at its processing facilities. A136, A313. Securing ongoing operation of Tyson's facilities was thus critical to ensuring that the COVID-19

pandemic would not interrupt the national food supply, particularly in light of the increased demand in the early days of the crisis as many Americans increased their grocery purchases and stockpiled food in response to public health guidance, mandatory stay-at-home orders, and expected shortages.

In keeping with critical infrastructure designations, Tyson and the rest of the food industry were quickly called upon to assist the federal government in ensuring the pandemic would not cause nationwide food shortages. On March 15, 2020—two days after declaring a retroactive national emergency—the President personally held a conference call with food and grocery industry leaders, including Tyson's CEO, to secure their commitment to keep the nation's food supply chain in operation. That conversation, in the President's words, confirmed that Tyson and other food companies would be "working hand-in-hand with the federal government as well as the state and local leaders to ensure food and essentials are constantly available," and that food suppliers would "work 24 hours around the clock, keeping their store stocked" to ensure that the national food supply would not be interrupted. Matt Noltemeyer, *Trump Meets with Food Company Leaders*, Food Business News (March 16, 2020), https://bit.ly/3t2fiXQ.

That obligation to aid the federal government in preventing a food shortage was reinforced to the public the next day. On March 16, 2020, the President issued "Coronavirus Guidelines for America" stating that workers "in a critical

infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply" had "a special responsibility to maintain your normal work schedule," and that critical infrastructure employers and workers "should follow CDC guidance to protect [their] health at work." A179, A363. On the same day, the Department of Agriculture issued a statement committing to "maintain the movement of America's food supply from farm to fork" and to "utilize [its] authority and all administrative means and flexibilities to address staffing considerations." A180, A365. The Department explained:

> We have all seen how consumers have reacted to the evolving coronavirus situation and how important access to food is to a sense of safety and wellbeing. It is more important than ever that we assure the American public that government and industry will take all steps necessary to ensure continued access to safe and wholesome USDA-inspected products.

Id. The Department emphasized that accomplishing these federal imperatives would require "working closely with industry to fulfill our mission of ensuring the safety of the U.S. food supply," and that "early and frequent communication" between government and industry would be "key." *Id.*

Consistent with those directives and assurances, numerous federal agencies immediately began coordinating with Tyson to ensure its continued cooperation in carrying out the government's mission of ensuring that the national food supply chain would remain intact. For instance, on March 13, 2020—the same day the

President issued the national emergency declaration—the Cybersecurity and Infrastructure Security Agency ("CISA"), a division of the Department of Homeland Security, held a conference call with Tyson and others to coordinate procuring and delivering critical supplies, such as personal protective equipment, to food companies to enable them to continue to operate during the declared national emergency. A137, A314. Communication and coordination with CISA and its subsidiary National Risk Management Center ("NRMC") continued over the following days and months. A137, A314-315; *see* A145, A323 (email chain between Tyson and NRMC to coordinate on "prioritization of precautionary measures for critical infrastructure components").

The NRMC also communicated directly with Tyson to ensure that Tyson had critical infrastructure designations in place for all employees necessary for continued operations, all of whom received letters authorizing them to continue working and traveling in support of their critical functions notwithstanding state or local quarantine regulations. A139-140, A316-317; *see* A157, A338 (sample letter). Those employees were instructed to keep those letters on them at all times, and to be prepared to show them to local officials who might attempt to restrict their actions. A139-140, A316-317. The Department of Transportation also provided special status for transportation workers, including Tyson truck drivers delivering

meat and poultry, to operate during the pandemic to provide much needed "food for emergency restocking of stores." A139, A316 (brackets omitted).

The Department of Agriculture and the Federal Emergency Management Agency ("FEMA") likewise worked to provide Tyson and federal workers at Tyson's sites with the necessary personal protective equipment and other critical supplies to continue to operate. A140, A317; *see* A173-174, A355-356 (email chain between Tyson and Department of Agriculture regarding personal protective equipment needs, noting that Department was "taking every action to inform FEMA of the need for [personal protective equipment] in the food supply chain and build considerations for the food supply chain into their greater supply chain efforts"). Among other things, the Department instructed meat and poultry plant operators to provide assessments of the personal protective equipment they would need to remain in operation, which Tyson provided and updated as relevant CDC guidance evolved. A140, A317; *see* A173-174, A355-356 (Tyson email informing Department that if, as expected, upcoming CDC guidance would require protective face coverings for critical infrastructure workers, Tyson would need such coverings for 116,000 workers a day to continue operating); A176, A359 (Department email requesting assessment of "unfulfilled PPE needs required to maintain operational continuity over the next 60 days" (emphasis omitted)).

Tyson's operations were also subject to continuous supervision through the Department of Agriculture's Food Safety and Inspection Service ("FSIS"). While FSIS employees were already on site at Tyson's meat and poultry processing facilities before the pandemic, the pandemic introduced unique concerns and additional oversight responsibilities. A140-141, A317-318. As FSIS emphasized in a March 20 statement, it sought "a united effort with our industry partners in preventing the spread of COVID-19 while continuing to produce safe food for consumers." A141, A318. In accordance with that mission, FSIS held regular calls with industry representatives from March 2020 onwards to distribute information regarding the pandemic and made regulatory changes as necessary to ensure that meat and poultry would remain available for sale. *Id.* Congress, for its part, recognized the increased role of FSIS by allocating additional funding to support its efforts to ensure that meat and poultry processing facilities could continue to provide the nation a safe and secure food supply. *Id.*; *see* A182, A368.

While the federal government had more pressing priorities in the early days of the pandemic than formalizing the obligation of meat and poultry processing facilities to continue to operate, the Vice President underscored that the obligation was a matter of federal necessity, not private choice, in public remarks on behalf of the Coronavirus Task Force that he led. He not only thanked food industry workers for their "great service to the people of the United States of America," but also

emphasized that the United States needed those workers "to continue, as a part of what we call our critical infrastructure, to show up and do your job"; in exchange, he promised that the federal government would "continue to work tirelessly in working with all of your companies to make sure that that workplace is safe." *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing*, The White House (Apr. 7, 2020), https://bit.ly/3pcdiZP. And the President underscored that the heroic efforts to keep the food supply chain functioning were not optional. He openly declared: "The Defense Production Act is in full force, but haven't had to use it because no one has said NO!" Doina Chiacu, *Trump Administration Unclear over Emergency Production Measure to Combat Coronavirus*, Reuters (March 24, 2020), http://reut.rs/3rS3MN5.

Despite the clear federal mandate to the food industry to continue operating in accordance with federal guidance, state and local officials began demanding inconsistent and in some cases, unworkable, rules seeking to shut down local food processing plants, expressing concerns about the potential for workplace exposure to COVID-19. *See* A48, A279. While Tyson tried to work with each community, the divergent rules each demanded became untenable. Those state and local efforts ultimately led the President to formalize federal efforts by issuing an Executive Order underscoring that the nation's meat-processing plants were serving a critical

federal need under federal direction, and that state and local officials did not have the authority to stop them from doing so.

On April 28, 2020, the President issued Executive Order 13917, which expressly invoked his authority under the DPA to ensure the continued national supply of meat and poultry. *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). The order acknowledged that there had been "outbreaks of COVID-19 among workers at some processing facilities." *Id.* But it warned that "recent actions in some States [that] have led to the complete closure of some large [food] processing facilities … threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national [COVID-19] emergency." *Id.* Executive Order 13917 therefore invoked the President's powers under DPA §101(b), 50 U.S.C. §4511(b), to delegate authority to the Secretary of Agriculture to "ensure that meat and poultry processors continue operations consistent with the guidance for their operations jointly issued by the CDC and OSHA," emphasizing the importance of ensuring that "processors of beef, pork, and poultry" would "continue operating and fulfilling orders to ensure a continued supply of protein for Americans." *Id.*

That same day, the Department of Agriculture announced that it would continue to "work with meat processing to affirm they will operate in accordance with [applicable] CDC and OSHA guidance," and would continue to work with federal, state, and local officials alike "to ensure that facilities implementing this guidance to keep employees safe can continue operating." *USDA to Implement President Trump's Executive Order on Meat and Poultry Processors*, U.S. Dep't of Agriculture (Apr. 28, 2020), https://bit.ly/3tbmIrC. The announcement emphasized that meat and poultry producers play "an integral role in the continuity of our food supply chain," and it made clear that their continued operation was not just permissible, but a national imperative. *Id.*

The following week, acting under Executive Order 13917, the Secretary of Agriculture issued a letter instructing meat-processing plants to either remain open or submit written plans to reopen. Letter from Sonny Perdue, Sec'y of Agric., *Re: Executive Order 13917 Delegating Authority Under the Defense Production Act with Respect to the Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* (May 5, 2020). That letter reiterated that meat and poultry producers play "an integral role in the continuity of our food supply chain," and instructed them "[e]ffective immediately" to "utilize the guidance issued … by the CDC and OSHA specific to the meat and poultry processing industry" to "safeguard[] the health of the workers and the community while staying

operational or resuming operations." *Id.* Meat and poultry processing plants that had been closed due to the COVID-19 pandemic, the Secretary instructed, "should resume operations as soon as they are able after implementing the CDC/OSHA guidance for the protection of workers." *Id.*

B. Procedural History

Plaintiffs represent the estates of four former employees at Tyson's meat-processing facility in Waterloo, Iowa, who contracted COVID-19 and ultimately died in April and May 2020 of complications related to the disease. A42, 273-274. Plaintiffs filed two materially identical suits (one brought by Plaintiff Oscar Fernandez and the other brought by the remaining Plaintiffs) in Iowa state court, naming Tyson and certain individual Tyson executives and supervisors as defendants. A42-44, A274-275. Plaintiffs allege that the individual Tyson executives and supervisors failed to take adequate precautions and abide by federal guidance to ensure that Tyson employees at the Waterloo plant would not become infected with COVID-19. A56-66, A286-297. Plaintiffs also allege that the individual defendants made various fraudulent misrepresentations about the presence of COVID-19 at the Waterloo plant, the efficacy of the safety measures Tyson had implemented, and the need to keep the plant open to avoid national meat shortages. A53-54, A283-284; A59, A289; A63-64, A294; A64-66, A295-296. Plaintiffs allege that Tyson made the same fraudulent misrepresentations, and that

Tyson is vicariously liable for the individual defendants' actions. A53-56, A283-286.

Tyson removed the cases to the U.S. District Court for the Northern District of Iowa on two grounds. A22-37, A211-228. First, Tyson asserted removal under the federal-officer removal statute, which allows removal of any civil action against "any officer (or any person acting under that officer) of the United States … for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). Tyson explained that it was "acting under" federal supervision and control in continuing to operate its plants as instructed by the federal government; that Plaintiffs' claims related to actions Tyson took under federal direction; and that Tyson had colorable federal defenses to Plaintiffs' claims, as those claims are preempted by the Federal Meat Inspection Act ("FMIA") and by the federal orders Tyson received. A25-33, A214-222. Second, Tyson asserted removal on federal question grounds, on the basis that Plaintiffs' claims necessarily raise federal issues that are actually disputed and substantial. A33-36, A222-225; *see* 28 U.S.C. §§1331, 1441(a); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

The district court did not hold a hearing but granted Plaintiffs' motions to remand the cases to state court on the papers, resolving the motions in both cases in materially identical orders. ADD1-31, ADD32-60. As to federal-officer removal, the court reasoned that "[t]he primary allegations in [Plaintiffs' complaints] all took

place prior to April 28, 2020," when the President issued Executive Order 13917. ADD25, ADD54. While the court acknowledged that Tyson was "in regular contact with [the federal government] regarding continued operations of its facilities at the early stages of the COVID-19 pandemic," ADD25, ADD55, it viewed the federal control and supervision that pre-dated Executive Order 13917 as insufficient to entitle Tyson to a federal forum. The court also held that there was an insufficient "causal connection" between the federal exercise of authority over Tyson and the actions Plaintiffs challenge because (again) the "primary allegations in the [complaints]" focused on the period before Executive Order 13917 issued, and because "[n]o federal officer directed Tyson to keep its Waterloo facility open in a negligent manner … or make fraudulent misrepresentations to employees." ADD26-27, ADD56-57. The court further held that Tyson has not raised a colorable federal defense because (once again) the "primary allegations in the [complaints]" focus on the period before Executive Order 13917, and because in the court's view the FMIA does not preempt Plaintiffs' claims. ADD26-27, ADD57-58. Finally, the court rejected federal question removal, holding that Plaintiffs' claims do not arise under federal law. ADD27-28, ADD58-59.[2]

[2] While this Court's precedent currently forecloses challenging the district court's resolution of the federal question issue in this appeal, *see Jacks*, 701 F.3d at 1229, Appellants reserve the right to raise those arguments should the Supreme Court

All Appellants filed timely notices of appeal from both remand orders, A189, A377, and this Court consolidated the appeals and stayed the remand orders pending appeal. Shortly thereafter, the only other court to address this issue disagreed with the decision below and found federal-officer removal proper on materially identical facts. *Fields*, 2021 WL 510620. That court held that Tyson acted under federal direction in continuing to operate its plants after the President's national emergency declaration in March 2020; that negligence claims alleging failure to take adequate precautions against COVID-19 were related to that federal direction; and that Tyson had a colorable defense under the Poultry Products Inspection Act ("PPIA"), which parallels the FMIA. *Id.* at *2-5.

SUMMARY OF ARGUMENT

The federal-officer removal statute exists to ensure that federal officers *and* those acting under their direction have access to a federal forum to defend themselves against claims relating to their federal duties. The statute does not turn on formalities or limit its protections to those formally designated or deputized as federal officers. Instead, by its very terms, it extends to those operating "under" a federal officer. Thus, it is well established that federal-officer removal extends to private parties operating under federal direction. For example, if federal officers

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abrogate that precedent in *BP, P.L.C. v. Mayor and City Council of Balt.*, No. 19-1189 (U.S. argued Jan. 19, 2021).

enlist a private party to assist in a manhunt, the private party, no less than the formal federal officers, is entitled to have a suit arising out of the manhunt proceed in federal court. Any other result would contradict the text, defeat the purposes of the federal-officer removal statute, and allow plaintiffs to circumvent the statute by the simple expedient of omitting the formal officers from the complaint.

What is true of manhunts is no less true of federal efforts to respond to a crisis like the pandemic. The federal government recognized that keeping the food supply chain operative during the pandemic was both imperative and not something that the federal government could accomplish alone. Accordingly, beginning in the early days of the COVID-19 pandemic, the federal government directed Tyson and others to continue operating critical infrastructure like meat and poultry processing plants under the supervision of the federal government to help prevent the pandemic from spiraling into a national food shortage. Indeed, Tyson was instructed by the President himself to keep its plants operating to the greatest extent possible, and Tyson answered that charge. The federal-officer removal statute entitles Tyson to defend against allegations of resulting injury in a federal forum.

Tyson readily satisfies the statute's requirement of having acted under the direction of a federal officer—in fact, numerous federal officers, up to and including the President and Vice President—in continuing to operate its Waterloo facility in accordance with federal guidance during the COVID-19 crisis. Multiple federal

agencies and officers directed Tyson to carry on its operations in accordance with federal guidance to accomplish the basic governmental task of preventing disruption of the national food supply chain. Plaintiffs' claims are plainly related to the actions Tyson took under that federal direction; indeed, they arise directly out of Tyson's continued operation of its plants and the safety measures Tyson employed under the federal government's supervision. And Tyson, a company regulated by the Department of Agriculture, has federal defenses under the express preemption provisions of the FMIA and the DPA and under settled conflict preemption principles that are at least (and, indeed, far more than) colorable. The federal officer removal statute requires nothing more.

The district court nonetheless remanded these cases to state court, insisting that Tyson did not qualify for federal-officer removal until the President memorialized the federal government's commands in Executive Order 13917. That result cannot be reconciled with the text or purposes of the statute—which is why the only other court to address this issue has reached the exact opposite conclusion. Nothing in the federal-officer removal statute requires formality. As noted, the statute extends its protection to those acting "under" formal federal officers. Moreover, the purposes underlying the statute turn on functionality, not formality. A private party enlisted to help in a federal effort, especially one that overrides state and local preferences in pursuit of a national objective, is just as entitled to (and in

need of) the protection of a federal forum as a formal officer. Indeed, someone saddled with federal responsibilities without the formality of a federal badge or Executive Order may be uniquely vulnerable to being held accountable for decisions resulting from federal direction rather than free choice.

Here, the President himself and numerous other federal officials made clear to Tyson that continued operation of its plants was a matter of national necessity, not private choice, once the President declared a national emergency. To deny Tyson a federal forum simply because the government did not reduce its commands to a formal order until six weeks into the unprecedented national crisis that COVID-19 created would be fundamentally inconsistent both with the federal-officer removal statute's core purpose the and with the reality of facts on the ground. This Court should therefore vacate the district court's remand orders and vindicate Tyson's right under the federal-officer removal statute to a federal forum.

ARGUMENT

STANDARD OF REVIEW

This Court "review[s] a district court's order of remand for lack of subject matter jurisdiction *de novo*." *Wullschleger v. Royal Canin U.S.A., Inc.*, 953 F.3d 519, 521 (8th Cir. 2020).

I. Federal-Officer Removal Turns On Functionality, Not Formality.

Congress has authorized the removal to federal court of any civil action against "any officer (or any person acting under that officer) of the United

States … for or relating to any act under color of such office." 28 U.S.C. §1442(a)(1). By giving federal officers and those acting under them a right to a federal forum, the statute not only ensures "a federal forum for cases where federal officials must raise defenses arising from their official duties," *Willingham v. Morgan*, 395 U.S. 402, 405 (1969), but also serves to "avert various forms of state court prejudice against federal officers or those private persons acting as an assistant to a federal official in helping that official carry out federal law," *Jacks*, 701 F.3d at 1231. It is thus beyond dispute that the protections of the statute extend beyond formal federal officers to private individuals enlisted to support federal efforts with federal direction but without the formal trappings of a federal badge. *Id.*; *see Watson*, 551 U.S. at 150.

This Court has set out a four-part test for assessing federal-officer removal efforts by private parties, explaining that removal is authorized where "(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;

see also Latiolais, Inc., 951 F.3d at 296.[3] Needless to say, because that test is addressed to circumstances where someone other than a full-time federal employee asserts federal-officer removal, the test focuses on the functions the defendant performed, not on the formality of the federal direction.

Nonetheless, in finding that Tyson failed to satisfy three of the four factors, the district court in effect demanded such formality, emphasizing again and again that much of the relevant conduct here pre-dated the President's April 28 Executive Order. That overarching insistence on formality is erroneous as a matter of law and fact, and the error pervaded the district court's entire analysis. As a matter of law, the statute and precedents could hardly be clearer that what matters is functional direction, not formal deputization. By authorizing removal by persons "acting under" a federal officer, 28 U.S.C. §1442(a)(1), the plain language of the federal-officer removal statute permits removal not only by federal officials themselves, but also by "private persons who lawfully assist the federal officer in the performance of his official duty." *Watson*, 551 U.S. at 151 (internal quotation marks omitted). "The words 'acting under' are broad," and both the Supreme Court and this Court have made clear that they must be "liberally construed" in accordance with the

[3] It is undisputed that Appellants are "persons" under §1442(a)(1) and satisfy the fourth *Jacks* factor. *Jacks*, 701 F.3d at 1230 n.3 ("[T]he 'person' contemplated by the federal officer removal statute includes corporations.").

federal-officer removal statute's basic purpose: to provide federal officers, and those acting under their direction, with a federal forum in which to defend their actions. *Id.* at 147; *see also Jacks*, 701 F.3d at 1230. That objective "should not be frustrated by a narrow, grudging interpretation" of the statute. *Willingham*, 395 U.S. at 407.

A demand for formality is particularly misguided here, because the federal government is most likely to enlist private help in dealing with unfolding emergencies, when time is of the essence and formalizing arrangements is impractical. If a federal officer jumps into the passenger seat and tells a private individual to drive in pursuit of a fleeing suspect, there is federal direction even though there is no time for a formal deputization. *Cf. Maryland v. Soper*, 270 U.S. 9, 30 (1926) (chauffeur acting under orders of federal officers had "the same right to the benefit of [federal-officer removal] as they"). Moreover, the *need* for a federal forum certainly does not depend on whether someone acting at federal direction is also cloaked in formal federal authority. To the contrary, as noted, a private actor taking action disfavored by local authorities pursuant to federal direction but without the protection of a formal badge or order is uniquely vulnerable and uniquely in need of a federal forum.

The district court's repeated focus on the April 28 Executive Order was misguided as a factual matter as well. The Executive Order represented the formalization of federal direction that began at least six weeks earlier, not the

commencement of federal direction. As detailed below, the President had invoked the DPA, and the federal government had issued directives on everything from continued operations to protective gear, long before the Executive Order. Thus, rather than viewing the Executive Order as the commencement of federal direction, the court should have recognized this formalization of federal direction as the kind of extraordinary action that should have made this a straightforward case for a federal forum. In all events, once the lens is adjusted to correct for the district court's undue focus on the Executive Order, it becomes clear that Tyson satisfies the requirements for federal-officer removal.

II. Tyson Acted Under The Direction Of Federal Officers.

Tyson readily satisfies the first element of the *Jacks* test for federal-officer removal because it "acted under the direction of a federal officer" (in fact, numerous federal officers) in continuing to operate its Waterloo plant in the early days of the COVID-19 pandemic. *Jacks*, 701 F.3d at 1230. To be acting under a federal officer, a private party must be involved in "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior," *Watson*, 551 U.S. at 152 (emphasis in original), through a relationship that "typically involves 'subjection, guidance, or control,'" *id.* at 151 (quoting Webster's New International Dictionary 2765 (2d ed. 1953)). In short, the assistance the private party provides the federal government must "go[]

beyond simple compliance with the law and help[] officers fulfill other basic governmental tasks." *Id.* at 153; *see Jacks*, 701 F.3d at 1231.

The facts of *Watson* are instructive. There, Philip Morris and other cigarette companies sought to invoke federal-officer removal to defend against claims that they had advertised certain cigarette brands as "light" by manipulating testing results to register lower levels of nicotine and tar than a smoker would actually inhale. *Watson*, 551 U.S. at 146. Philip Morris argued that it had "acted under" the Federal Trade Commission ("FTC") in testing its cigarettes because the FTC engaged in "detailed supervision of the cigarette testing process." *Id.* at 147. The Supreme Court rejected that argument, explaining that mere compliance with federal regulation "does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official' … even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored." *Id.* at 153; *see id.* at 153-54. Instead, the critical question is whether the private party acted "to *assist*, or to help *carry out*, the duties or tasks of the federal superior," *id.* at 152 (emphasis in original), by helping the federal government "fulfill other basic governmental tasks" that otherwise "the Government itself would have had to perform," *id.* at 153-54. Because Philip Morris was not performing a task for the government *itself* in testing its cigarettes, *see id.* at 154-57, but rather was just abiding by the requirements the

government imposed on cigarette manufacturers, close government supervision of its testing activities did not justify federal-officer removal.

By contrast, a private entity enlisted to help the government accomplish one of its *own* objectives satisfies the "acting under" element of §1441(a)(1). This Court's decision in *Jacks* provides a helpful example. There, a health insurance provider that provided insurance for federal employees under the Federal Employees Health Benefits Act sought federal-officer removal in a suit challenging subrogation provisions in the provider's plan. *Jacks*, 701 F.3d at 1228. This Court found that the provider was entitled to federal-officer removal, explaining that the provider was acting under color of the federal government because the government had enlisted it to "help the government fulfill the basic task of establishing a health benefits program for federal employees." *Id.* at 1233. Because the provider was aiding the government in carrying out "the basic governmental task of providing health benefits for its employees," *id.* at 1234—a task the government would have to ensure was accomplished with or without that particular provider's aid—it was acting under the federal government for purposes of §1442(a)(1).

Applying those principles, Tyson plainly satisfies the "acting under" element for federal-officer removal. *See Fields*, 2021 WL 510620, at *2-3. In the ordinary course, Tyson certainly operates its plants under pervasive federal, state, and local regulation, but it is not operating at the *behest* of the government. That changed with

the advent of COVID-19. From the earliest days of the COVID-19 crisis in the United States, the federal government enlisted Tyson in its efforts to fulfill a paradigmatic "basic governmental task": ensuring that the national food supply would not be interrupted during an unprecedented national crisis. *Watson*, 551 U.S. at 153; *see supra* pp.6-9. Photographs of empty grocery shelves brought home that these were extraordinary times, and that leaving the food supply to ordinary market forces and private decision-making was not an option. Thus, once COVID-19 hit, the federal government made emphatically clear that Tyson was no longer just obligated to ensure that its business was carried out in "compliance with the law." *Watson*, 551 U.S. at 153. It was obligated to aid the federal government in preventing an unprecedented national emergency from spiraling into a national food shortage, and to follow the federal government's direction and close supervision in doing so.

That message was conveyed through repeated communications from all levels of the federal government, up to and including the President himself. Just two days after declaring the COVID-19 outbreak a national emergency, the President personally spoke with Tyson and other food industry leaders to make clear that they would be "working hand-in-hand with the federal government" to make sure that "food and essentials are constantly available" and would keep working "24 hours around the clock." Noltemeyer, *supra*; *see also* The President's Coronavirus

Guidelines for America, A179, A363 (noting that workers in critical infrastructure industries, such as "food supply," had "a special responsibility to maintain your normal work schedule" and "should follow CDC guidance to protect [their] health at work"). And the President made clear from the start that his instructions to those he enlisted in the federal government's efforts to protect and preserve the operation of critical infrastructure like the food supply chain were backed by the "full force" of the DPA. *See Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force in Press Briefing* (Mar. 18, 2020), *supra*.

The Department of Agriculture reiterated that message in public statements, committing to "work[] closely with industry to fulfill our mission of ensuring the safety of the U.S. food supply" and "maintain the movement of America's food supply from farm to fork." A180, A365; *see also id.* (promising that "government and industry will take all steps necessary to ensure continued access to safe and wholesome USDA-inspected products"). The Vice President made the same point in thanking food industry workers for their "great service to the people of the United States of America," explaining that the federal government *needed* them "to continue, as a part of what we call our critical infrastructure, to show up and do your job." *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force Press Briefing*, (April 7, 2020), *supra*.

That message not only was clearly conveyed, but was implemented at a granular level by numerous federal agencies that worked closely with Tyson, under the federal government's "critical infrastructure" framework, to ensure its continued aid in getting food to the American public. *See supra* pp.7-12. CISA, NRMC, and the DOT worked closely with Tyson to keep its plants in operation, securing critical infrastructure designations for Tyson's key functions and employees and helping Tyson ensure that those employees would not be stopped by local authorities and prevented from working. A137-140, A314-317; *see* A157, A338. The Department of Agriculture and FEMA likewise coordinated closely with Tyson to address its needs for personal protective equipment and other critical supplies to continue operations at its meat and poultry processing plants in accordance with CDC guidance, and Tyson itself in some cases provided PPE to federal employees working at its sites. *See* A171-177, A352-360. And FSIS supervised the operation of those plants on the ground, working on site throughout the pandemic in "a united effort with our industry partners in preventing the spread of COVID-19 while continuing to produce safe food for consumers," and holding regular calls with industry representatives to resolve any problems. A141, A318. Congress confirmed the pervasive new role of the federal government in overseeing the operation of this critical infrastructure by allocating additional funding to FSIS to accommodate its additional responsibilities in light of the pandemic. A140-141, A317-318.

Given the exigent circumstances, much of that federal direction was accomplished through emails, phone calls, and weekly meetings with FSIS and other federal officials, rather than formal written orders or regulations. The district court seized on that informality and refused to recognize any federal direction until it was formalized in the April 28 Executive Order. The court thus found it critical that "[t]he primary allegations in [Plaintiffs' complaints] all took place prior to April 28, 2020." ADD25, ADD54. But as the uncontested evidence confirms, *see supra* pp.6-14, federal direction did not spring from the ether on April 28. The federal government enlisted Tyson's assistance to preserve the national food supply from the earliest days of the pandemic, more than six weeks before the President issued Executive Order 13917. Indeed, even the district court recognized that Tyson was "in regular contact with [the federal government] regarding continued operations of its facilities at the early stages of the COVID-19 pandemic." ADD25, ADD55. And as explained, *see supra* pp.25-27, nothing in §1442(a)(1) limits federal-officer removal to cases where the federal government has memorialized its efforts to enlist the aid of a private party in a formal legal document, much less an Executive Order.

The district court's myopic focus on the absence of formal direction before Executive Order 13917 was particularly misplaced given the authorities under which the federal government was acting. The court pejoratively labeled everything that transpired between Tyson and the federal government before Executive Order 13917

part of "the vague rubric of 'critical infrastructure.'" ADD25, ADD55. But the whole point of the "critical infrastructure" regime developed in the wake of September 11 is to enable the federal government to enlist the aid of third parties as needed to ensure the continued operation of any infrastructure "so vital to the United States that [its] incapacity or destruction … would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." 42 U.S.C. §5195c(e). When the federal government invokes that authority—whether formally or informally—to instruct private parties whether or how to carry on their business during a national emergency, it is virtually by definition enlisting those parties in carrying out the duty of the government itself to ensure the continued provision of "services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States." *Id.* §5195c(b)(3).

Likewise, the whole point of the DPA is to enable the President to enlist the aid of private parties to protect the nation against threats to its safety and security. And by giving the President "broad authority" to command private parties as necessary to accomplish those objectives, the DPA enables the President and his subordinates to employ "informal and indirect methods of securing compliance" rather than "formal, published regulations." *E. Air Lines, Inc. v. McDonnell Douglas*

Corp., 532 F.2d 957, 992-93 (5th Cir. 1976).[4] Indeed, nothing in the DPA "gives any indication that the Government may not seek compliance with its priorities policies by informal means"; to the contrary, "Congress intended to accord the Executive Branch great flexibility in molding its priorities policies to the frequently unanticipated exigencies of national defense." *Id.* at 993. And federal officials can often invoke their authority under the DPA just as effectively through informal "jawboning" as they can through formal orders, using "the threat of mandatory powers … as a 'big stick' to induce voluntary cooperation." *Id.* at 980, 998. Such informal measures are not only permissible, but especially appropriate in a time of national crisis, when "a cumbersome and inflexible administrative process is antithetical to the pressing necessities." *Id.* at 998.

The President made no secret he was applying just such an approach here, publicly announcing long before the issuance of Executive Order 13917 that "[t]he Defense Production Act is in full force, but haven't had to use it because no one has said NO!" Chiacu, *supra*. And when the President eventually did issue a formal Executive Order invoking the DPA to keep Tyson and other meat and poultry processors operating, that formalization was not prompted by any seismic shift in

[4] While *Eastern Air Lines* is a breach of contract case rather than a federal-officer removal case, it addresses the same relevant question: what constitutes an exercise of federal government authority under the DPA. *See* 532 F.2d at 997 (rejecting argument that an "order" under the DPA requires a formal legal order).

the degree of federal direction, but simply reflected the reality that the added formality was needed and useful in responding to efforts by state and local officials to interfere with the federal government's mandate that facilities continue to operate in accordance with federal, not state or local, guidance. *See* 85 Fed. Reg. at 26,313. If anything, then, the reason for the issuance of Executive Order 13917 reinforces the need for a federal forum, as a private party working to accomplish federal objectives that are inconsistent with state and local preferences is uniquely vulnerable in a state forum. Moreover, the reason behind the formalization of the federal role underscores that the Executive Order marked the formalization of federal direction, not its commencement.

In short, even the district court appeared to recognize that once the President issued Executive Order 13917, Tyson was unquestionably "acting under" federal officers in operating its plants. *See* 85 Fed. Reg. at 26,313 (instructing Secretary of Agriculture to "take all appropriate action … to ensure that meat and poultry processors continue operations" consistent with CDC and OSHA guidance). But Executive Order 13917 did not arise *in vacuo*. It merely marked the formalization of the unprecedented federal involvement in ensuring the national food supply that commenced with the declaration of a nationwide emergency and the invocation of the critical infrastructure emergency plans—plans that had been in place long enough to create friction with some state and local officials. The existence of

Executive Order 13917 thus makes this a straightforward case for federal-officer removal, as it confirms this case is far from a situation where a private party subject only to ordinary federal regulation, not extraordinary federal direction, seeks removal. The Executive Order did not give rise to a previously non-existent basis for removal, but just confirmed what had been clear from the start of the pandemic: Tyson was now acting under the "'subjection, guidance, or control'" of the federal government to aid it in accomplishing a "basic governmental task[]." *Watson*, 551 U.S. at 151, 153; *see Fields*, 2021 WL 510620, at *2-3.

III. Plaintiffs' Claims Are Clearly Related To Actions That Tyson Took Under Federal Direction.

Tyson satisfies the second element for federal-officer removal as well because Plaintiffs assert claims "for or relating to" actions that Tyson took under the direction of the federal government. 28 U.S.C. §1442(a)(1); *see Fields*, 2021 WL 510620, at *2-3. That standard is not demanding and was deliberately broadened by Congress in the last decade. In 2011, Congress amended §1442(a)(1) by revising the requirement that a claim be "for any act under color of such office" to add the words "relating to," such that the statute now renders removable any action against "any officer (or any person acting under that officer) of the United States … for or relating to any act under color of such office," 28 U.S.C. §1442(a)(1). *See* Removal Clarification Act of 2011, Pub. L. No. 112-51, 125 Stat. 545 (2011). The Supreme Court has emphasized that "related to" is a term of breadth. *Lamar, Archer & Cofrin,*

LLP v. Appling, 138 S.Ct. 1752, 1760 (2018) ("[W]hen asked to interpret statutory language including the phrase 'relating to' … this Court has typically read the relevant text expansively."). And while this Court has not yet had occasion to opine on the import of that amendment, every circuit to do so has held that statute expands the scope of federal-officer removal and eliminates any strict "causal connection" between the federal officer's directions and the plaintiff's claims.

That is, defendants need not "demonstrate that the acts for which they [are] being sued occurred at least in part because of what they were asked to do by the government." *In re Commonwealth's Mot. to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 471 (3d Cir. 2015) (emphasis omitted) (internal quotation marks omitted). Instead, a defendant need only show that the challenged conduct is "connected or associated with an act pursuant to a federal officer's directions." *Latiolais*, 951 F.3d at 296; *see, e.g.*, *Baker v. Atl. Richfield Co.*, 962 F.3d 937, 943-44 (7th Cir. 2020); *Sawyer v. Foster Wheeler L.L.C.*, 860 F.3d 249, 258 (4th Cir. 2017) ("[T]here need be only a connection or association between the act in question and the federal office[.]") (internal quotation marks and emphasis omitted); *Commonwealth's Mot.*, 790 F.3d at 471 ("[I]t it sufficient for there to be a 'connection' or 'association' between the act in question and the federal office."). That relaxed standard allows for ready application of the removal standard at the

threshold and ensures a federal officer need not prove "an airtight case on the merits" just to secure a federal forum in which to defend its actions. *Baker*, 962 F.3d at 943.

The necessary relationship need only exist with respect to at least one claim, as it is black-letter law that §1442(a)(1) "authorizes removal of the entire action even if only one of the controversies it raises involves a federal officer or agency." 14C Wright & Miller, Fed. Prac. & Proc. Juris. §3726 (4th ed.); *see Baker*, 962 F.3d at 945; *Sawyer*, 860 F.3d at 257. As such, to satisfy this second element for federal-officer removal, Tyson need only show that at least one of Plaintiffs' claims is "connected or associated" with Tyson's continued operation of its plants in the early days of the COVID-19 pandemic at the behest and under the direction and supervision of the federal government. *Latiolais*, 951 F.3d at 296. As this Court has recognized, even before the 2011 amendments, "[t]he hurdle erected by this requirement [wa]s quite low." *Jacks*, 701 F.3d at 1230 n.3. It is lower still after the 2011 amendments.

Plaintiffs' claims readily clear that "quite low" bar. As to their negligence claims, Plaintiffs assert that Tyson acted negligently by continuing to operate the Waterloo plant without taking adequate precautions to protect workers against COVID-19—for instance, by "[f]ailing to provide all employees with appropriate personal protective equipment," "[f]ailing to require employees to wear face coverings," "[f]ailing to provide sufficient hand washing or hand sanitizing

stations," "[f]ailing to configure communal work environments so that workers are spaced at least six feet apart," "[f]ailing to install physical barriers … to separate or shield workers from each other," "[f]ailing to … promote social distancing," "[f]ailing to develop, implement or enforce appropriate cleaning, sanitation, and disinfection practices," "[f]ailing to slow production in order to operate with a reduced work force," "[f]ailing to provide and maintain a safe work environment," "[f]ailing to take reasonable precautions to protect workers from foreseeable dangers," "[f]ailing to abide by State and Federal rules, regulations, and guidance," and "[f]ailing to abide by appropriate OSHA standards, directives, and guidance." A56-59, A286-289; A61-64, A291-294; *see also* A55, A285 (alleging Tyson's "prolonged refusal to temporarily close down the Waterloo Facility" was "evidence of Tyson's incorrigible, willful and wanton disregard for workplace safety and culpable state of mind").

Those allegations are unquestionably "connected or associated" with actions that Tyson took under the direction of the federal government. *Latiolais*, 951 F.3d at 296; *see Fields*, 2021 WL 510620, at *4. Tyson could have paused its operations while it retrofitted its facility in the way Plaintiffs imagine, but doing so would have been contradictory to the federal direction to keep plants operational to promote the national food supply. Moreover, the measures that Plaintiffs would insist upon run counter to the instructions the federal government provided as to whether and under

what circumstances meat-processing facilities should continue to operate to ensure that the pandemic would not disrupt the nation's food supply.

For instance, Plaintiffs' claims that Tyson should have modified its facilities and its "cleaning, sanitation, and disinfection practices" are directly related to the ongoing federal supervision of operations at Tyson facilities and practices by FSIS personnel throughout the pandemic, *see* A140-141, A317-318, as well as to the federal guidance with respect to appropriate COVID-19 precautions that Tyson received from the CDC and OSHA (which, notably, did not instruct food producers to adopt specifically tailored COVID-19 precautions for meat and poultry processing plants until April 26, 2020, *see U.S. Department of Labor's OSHA and CDC Issue Interim Guidance To Protect Workers in Meatpacking and Processing Industries*, U.S. Dep't of Labor (Apr. 26, 2020), https://bit.ly/3jnXMIX). Plaintiffs' claims that Tyson "[f]ail[ed] to provide all employees with appropriate personal protective equipment" and "[f]ail[ed] to require employees to wear face coverings," A57, A287; A62, 292, are directly related to the close federal direction and oversight under which Tyson operated in obtaining and distributing personal protective equipment. *See* A137-138, A314-315; A140, A317; A144-146, A321-324; A170-177, A352-360 (detailing coordination between CISA, the Department of Agriculture, and FEMA to provide Tyson adequate personal protective equipment and other critical supplies). And, of course, Plaintiffs' allegations that Tyson

"[f]ail[ed] to abide by … Federal rules, regulations, and guidance" and "[f]ail[ed] to abide by appropriate OSHA standards, directives, and guidance" plead plaintiffs out of state court. A59, A289; A62, A294.

Although one claim related to federal direction is sufficient, Plaintiffs' fraudulent misrepresentation claims are likewise connected and associated with the federal directions under which Tyson operated in the early stages of the pandemic. Plaintiffs claim that Tyson misrepresented, *inter alia*, "the efficacy of safety measures implemented at the facility" and "the need to keep the facility open to avoid U.S. meat shortages," including alleged false statements that "[t]he Waterloo Facility was a safe work environment," "[s]afety measures implemented at the facility would prevent or mitigate the spread of COVID-19 and protect workers from infection," and "[t]he Waterloo Facility needed to stay open in order to avoid U.S. meat shortages." A53-54, A284. Setting aside that Plaintiffs' allegations of intentional falsehood are inherently implausible given the novelty of the virus and the rapidly changing information about the safety and efficacy of precautionary measures in the early days of the pandemic, these purported misrepresentations are obviously connected and associated with the federal government's directives regarding the national need to keep meat processing facilities operating, as well as with its instructions regarding the measures facilities should take to protect their workers, and its own views on whether Tyson's facilities must continue to operate.

Indeed, in many instances, Plaintiffs seek to impose state-law liability on Tyson for repeating the same guidance it received from federal officials. It is hard to imagine a closer relationship between the federal direction and the alleged state-law violation than that.

The district court gave three reasons for concluding that Plaintiffs' allegations were not related to the actions that Tyson took under federal direction. None is convincing.

First, while the court purported to assume for purposes of its "relating to" analysis that "Tyson acted under the direction of a federal officer," it nonetheless repeated its error in analyzing that element by insisting that "the primary directives relied upon by Tyson, President Trump's April 28, 2020 Executive Order and Secretary Perdue's May 5, 2020 letter, were issued after the primary allegations in the Petition had taken place." ADD26, ADD56. That is simply not a fair characterization of Tyson's argument. While *the district court* may have been myopically focused on the Executive Order and other formal actions that post-dated it, *Tyson*'s argument has always been that, from at least the President's emergency declaration on March 13 onward, Tyson was operating at the direction of the federal government, to assist the government in fulfilling its obligation to ensure a stable food supply to a nation in crisis. It is one thing for the court to (wrongly) conclude that the pre-Executive Order actions were insufficient to *support* Tyson's arguments;

it is another thing for the court to disregard Tyson's reliance on them. In assessing the connection between the federal directions and a plaintiff's claims, a court must "credit the defendant's theory of the case," not the plaintiff's. *Leite v. Crane Co.*, 749 F.3d 1117, 1124 (9th Cir. 2014); *see Jefferson Cnty. v. Acker*, 527 U.S. 423, 432 (1999); *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 137 (2d Cir. 2008). And to the extent the court simply meant to repeat its view that Tyson was not "acting under" the direction of the federal government until April 28, that is incorrect for all the reasons already explained. *See supra* Part II.

Second, the district court asserted that Tyson had "incorrectly frame[d]" the allegations in Plaintiffs' complaints by underscoring Plaintiffs' allegations that Tyson acted negligently in continuing to operate the Waterloo facility. ADD26, ADD56; *see* A57, A288 (alleging Tyson was negligent by "[f]ailing to slow production"); A55, A285 (alleging that Tyson's "prolonged refusal to temporarily close down the Waterloo Facility" showed an "incorrigible, willful and wanton disregard for workplace safety"). While recognizing that Plaintiffs' complaints included allegations that "production should have been halted or slowed due to the COVID-19 threat," the court concluded that "overall, the allegations in the Petition do not focus on the shutting down of the facility" and "are not directed at Tyson's decision not to shut down the facility." ADD27, ADD56.

That reasoning fails twice over. First, regardless of the district court's sense of the "focus" of Plaintiffs' complaints, *Id.*, it is undeniable that one of Plaintiffs' contentions is that Tyson should have slowed or shut down the Waterloo plant—and was negligent for failing to do so. That alone is sufficient to show the necessary connection between Plaintiffs' claims and the federal direction under which Tyson was operating. *Baker*, 962 F.3d at 945 (federal-officer removal "need not be justified as to all claims asserted in the plaintiffs' complaint," but rather "need only apply to one claim to remove the case"); *see* Wright & Miller, *supra*, §3726. Moreover, even setting aside Plaintiffs' slow-down/shut-down allegations, their other claims of alleged negligence or purported misrepresentations readily show the requisite "connection or association" with the federal directions under which Tyson was operating. *Sawyer*, 860 F.3d at 258; *see Fields*, 2021 WL 510620, at *4; *supra* pp.27-37. Plaintiffs' claims that Tyson should have taken different precautions or provided different information relate directly to the guidance with which the federal government instructed Tyson to comply in aiding its efforts to prevent disruption of the nation's food supply.[5]

[5] That Tyson temporarily closed the Waterloo facility from April 22 to May 7, 2020, and temporarily closed another Iowa facility due to a COVID-19 outbreak, has no relevance to whether Plaintiffs' claims are related to actions that Tyson was carrying on at the federal government's behest. *Contra* ADD26-27, ADD56. Nor do those temporary closures undermine the conclusion that Tyson was operating its facilities at the direction of the federal government.

Third, and most problematic, the district court found the "relating to" element not satisfied because "[n]o federal officer directed Tyson to keep its Waterloo facility open in a negligent manner … or make fraudulent misrepresentations." ADD27, ADD56-57. That is exactly the strict causation standard that Congress rejected by adding "relating to" to the federal removal statute in 2011. *See Latiolais*, 951 F.3d at 292; *Sawyer*, 860 F.3d at 258 (recognizing that this amendment "'broadened the universe of acts' that enable federal removal" (brackets omitted) (quoting H.R. Rep. 112-17(I), at 6 (2011)). It is also a formula for writing federal-officer removal out of the statute books. Virtually every state-law complaint alleges negligence or misrepresentation, and virtually no federal direction takes the form of "perform negligently" or "make fraudulent representations." Thus, under the district court's formulation, no case removed to federal court under the federal-officer removal statute could stay there for long. That is plainly not the judgment Congress made in enacting the statute or expanding it to allow the removal of allegations that relate to federal directions. The proper standard is readily satisfied where the federal government, with an eye to the national priority of keeping the food supply chain functioning, directs food suppliers to continue their operations pursuant to the instructions the federal government provides about the rapidly evolving standards for safety and efficacy in confronting an extraordinary pandemic.

IV. Tyson Has More Than Colorable Federal Defenses.

Tyson also satisfies the third element for federal-officer removal because it has colorable (in fact, meritorious) federal defenses to Plaintiffs' claims. The burden to show a colorable federal defense is not a heavy one, and a court need not "hold that a defense will be successful before removal is appropriate." *United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001). Instead, "[f]or a defense to be considered colorable, it need only be plausible." *Id.*; *see Latiolais*, 951 F.3d at 297 (federal defense is colorable unless it is "immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous"). After all, federal-officer removal exists to ensure (among other things) that federal defenses are fairly considered, not to ensure that they will always succeed. And Tyson need not show that every safety precaution that the plaintiffs allege it should have taken is preempted by FMIA—it is enough that even one of Plaintiffs' theories of liability is preempted. *See Sawyer*, 860 F.3d at 257 (holding defendant was entitled to removal where it had a colorable federal defense to even one of plaintiffs' claims). Tyson's federal defenses here are more than plausible and readily meet the relatively undemanding threshold required.

A. Tyson Has a Colorable Preemption Defense Under the FMIA.

Tyson has a far more than colorable preemption defense under the FMIA, which "regulates the inspection, handling, and slaughter of livestock for human

consumption." *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012); *Fields*, 2021 WL 510620, at *4-5 (finding colorable defense under the parallel PPIA). The FMIA expressly preempts all state "requirements within the scope of [the FMIA] with respect to premises, facilities, and operations of any [meat-processing] establishment … which are in addition to, or different than those made under [the FMIA]." 21 U.S.C. §678. That express preemption provision "sweeps widely" and "prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the [FMIA] and concern a slaughterhouse's facilities or operations." *Harris*, 565 U.S. at 459-60. Any such state requirement, whether imposed by statute, regulation, or tort law, is invalid under the FMIA. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 322-24 (2008) (recognizing that "a provision pre-empting state 'requirements' pre-empt[s] common-law duties," including "common-law causes of action for negligence").

In determining whether a state requirement falls "within the scope of" the FMIA (and is therefore preempted), the pertinent question is not whether the federal government has *actually* adopted that requirement or one with which it conflicts, but whether the federal government *could* adopt it. If the federal government "could issue regulations under the FMIA" governing a particular area, then that area "must fall within the FMIA's scope"—regardless of whether the federal government has

actually chosen to exercise its authority in that area, let alone adopted any conflicting regulation. *Harris*, 565 U.S. at 466.

There can be no serious dispute that the federal government *could* issue regulations under the FMIA addressing the same areas and imposing the same requirements that Plaintiffs seek to impose on Tyson through their lawsuits. In fact, for decades the Department of Agriculture *has* promulgated hundreds of pages of federal regulations under the FMIA governing the operation of meat-processing facilities, including detailed requirements addressing the control of infectious diseases among facility workers and the required use of personal protective equipment. For example, FSIS has promulgated a specific "[d]isease control" regulation providing that "[a]ny person who has or appears to have an infectious disease … must be excluded from any operations which could result in product adulteration and the creation of insanitary conditions until the condition is corrected." 9 C.F.R. §416.5(c). FSIS regulations also govern the personal protective equipment that facility workers must wear, such as "[a]prons, frocks, and other outer clothing worn by persons who handle product," which "must be of material that is disposable or readily cleaned" and "must be changed during the day as often as necessary to prevent adulteration of product and the creation of insanitary conditions." *Id.* §416.5(b). The federal government could go further and require the

kind of plexiglass partitions between workers that Plaintiffs' complaints envision, but it has never gone that far.

Detailed federal FSIS regulations also govern facilities that must be available for hygiene and sanitation. For example, poultry inspection stations must provide "[h]and rinsing facilities … within easy reach," which "must have a continuous flow of water or be capable of being immediately activated and deactivated in a hands-free manner, must minimize any splash effect, and must otherwise operate in a sanitary manner," as well as providing "water at a temperature between 65 and 120 degrees Fahrenheit." *Id.* §381.36(f)(1)(vi). As these existing regulations confirm, federal authority under the FMIA already extends to setting disease control and hygiene requirements for meat and poultry processing facilities. Plaintiffs' attempt to impose additional requirements in that area through state tort law is therefore expressly preempted. At the very least, that federal preemption defense is plainly sufficiently plausible to entitle Tyson to litigate it in a federal forum. *Todd*, 245 F.3d at 693; *see Fields*, 2021 WL 510620, at *4-5.

The district court deemed Tyson's FMIA preemption defense so implausible that it accused Tyson of raising it "for the sole purpose of obtaining jurisdiction." ADD28, ADD58. That claim is nothing short of remarkable. Not only *could* the federal government impose rules and regulations on the issues Plaintiffs seek to regulate through state tort law; the federal government *has* issued pervasive rules

and regulations relating to safety and sanitation in meat and poultry processing facilities (albeit not ones that are identical to those envisioned by Plaintiffs). *See Fields*, 2021 WL 510620, at *4-5 (holding a parallel PPIA preemption defense colorable).

The district court declared it "difficult to see how" the multitude of "federal regulations … regarding infectious disease" in meat processing plants "relate to the tort claims alleged in [Plaintiffs' complaints] or the issues raised by the coronavirus pandemic." ADD28, ADD57-58. But COVID-19 is an infectious disease, and while the disease control and hygiene regulations FSIS adopted pre-pandemic may not have been issued with the coronavirus in mind, they exemplify the federal authority of FSIS under the FMIA to adopt whatever additional coronavirus-related requirements it deems necessary for meat and poultry processing facilities—which means, under the FMIA's express preemption clause, states do *not* have the power to impose different or additional requirements of their own. *Harris*, 565 U.S. at 459-60, 466. Indeed, the Department of Agriculture and FSIS *have* been providing guidance to Tyson and others on appropriate COVID-19 precautions ever since the beginning of the pandemic, including through close coordination on the amounts and type of personal protective equipment needed and what other precautions should be taken to secure the safety of workers and food alike. *See supra* pp.31-32. To the extent Plaintiffs believe that those precautions were inadequate or that the federal

government was insufficiently quick to adapt, that exemplifies both the case for preemption and the need for federal-officer removal. If Plaintiffs' real claim is that the federal regulators were negligent, they cannot evade a federal defense or a federal forum by suing Tyson.

The district court also noted that "state laws of general application (workplace safety regulations, building codes, etc.) will usually apply to slaughterhouses." ADD28, ADD57 (quoting *Harris*, 565 U.S. at 467 n.10). But Plaintiffs do not seek to subject Tyson to any "state laws of general application" with respect to "'other matters,' not addressed in the express preemption clause." *Harris*, 565 U.S. at 467 n.10. They seek to impose additional state-law requirements on the "premises, facilities and operations" specifically governed by that clause and within the scope of the FMIA. 21 U.S.C. §678; *see Harris*, 565 U.S. at 467 (state requirements that "reach[] into the slaughterhouse's facilities and affect[] its daily activities" are preempted); *cf.* A57, A287 (claiming Tyson employees acted negligently by, *inter alia*, "[f]ailing to modify the alignment of workstations," "[f]ailing to install physical barriers," "[f]ailing to develop, implement, or enforce appropriate cleaning, sanitation, and disinfection practices," "[f]ailing to provide all employees with appropriate personal protective equipment," and "[f]ailing to provide sufficient hand washing or hand sanitizing stations"). That attempt to impose additional disease control and hygiene restrictions on Tyson's facilities "runs smack into the FMIA's

regulations" and is unmistakably preempted. *Harris*, 565 U.S. at 467. At the very least, that federal preemption defense—which, contrary to the district court's accusations, Tyson has actively pressed and fully intends to continue pressing no matter where these claims are litigated—is sufficiently colorable to entitle Tyson to resolution in a federal forum.

B. Tyson Has Colorable Federal Defenses Under the DPA and the Federal Directives Under Which Tyson Operated.

Tyson also has colorable federal defenses based on the DPA and the federal directions under which Tyson operated before the President issued Executive Order 13917. Congress enacted the DPA to preserve "the ability of the domestic industrial base" to "prepare for and respond to … natural or man-caused disasters," and in particular to "provide for the protection and restoration of domestic critical infrastructure operations under emergency conditions." 50 U.S.C. §4502(a)(1), (a)(2)(C). In keeping with that broad mission, the DPA grants the President "an array of authorities … to take appropriate steps to maintain and enhance the domestic industrial base," *id.* §4502(a)(4), including the extraordinary authority to "allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate" in cases of national emergency, *id.* §4511(a). The DPA also supplements those broad powers with an explicit defense to liability for actions that a private party takes subject to federal directives under the DPA, providing that "[n]o 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 pursuant to this chapter." *Id.* §4557; *see Hercules Inc. v. United States*, 516 U.S. 417, 429 (1996) (noting that this provision "plainly provides immunity").

The extensive federal supervision and control under which Tyson operated in March and April 2020, after the President had invoked the DPA, give it a far more than colorable claim to immunity under that provision. As explained, the Executive Branch can exercise authority under the DPA through informal directives and "means of persuasion" just as well as through formal orders, *see E. Air Lines, Inc.*, 532 F.2d at 994, and that is precisely what it did here. Tyson's compliance with those federal directives as to whether and how it should continue to operate its facilities entitle it to immunity from Plaintiffs' claims under 50 U.S.C. §4557. More important, the fact that the DPA "at the very least plausibly shields" Tyson from liability, *Todd*, 245 F.3d at 693, is sufficient to show a colorable federal defense and justify federal-officer removal.

Contrary to what Plaintiffs' amicus suggested below, nothing in *United States v. Vertac Chemical Corp.*, 46 F.3d 803 (8th Cir. 1995), bars §4557 immunity here. *Vertac* holds that §4557 immunity extends only to liability for complying with government instructions under §101(a) of the DPA, not to any and all liability a party may incur while carrying out a government contract. *Id.* at 812. But Plaintiffs'

claims here *do* seek to impose liability on Tyson for carrying out federal directives authorized under §101(a) to "allocate materials, services, and facilities … as [the President] shall deem necessary or appropriate" in case of national emergency, 50 U.S.C. §4511(a), so they fall squarely within "the risk imposed by section 101(a) of the DPA," *Vertac*, 46 F.3d at 812. At a minimum, Tyson has at least a colorable defense under §4557.

Tyson also has a colorable federal preemption defense to Plaintiffs' claims based on the federal directives under which it operated. Those federal directions required Tyson to continue operating in compliance with CDC—not state and local—guidance, and they preempt any conflicting obligations Plaintiffs may attempt to derive from state tort law. *See, e.g.*, *Brooks v. Howmedica, Inc.*, 273 F.3d 785, 798 (8th Cir. 2001) ("state requirements which conflict or interfere with … federal directives" are preempted). That preemption defense is especially strong in light of the broad authority that Congress afforded the President under the DPA, as Congress plainly did not intend to allow those critical emergency executive powers to be "compromise[d] … by deference to every provision of state statute or local ordinance." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 376 (2000). At the very least, that federal defense is sufficiently colorable to sustain federal-officer removal.

The district court's only reason for rejecting it—that the President did not issue Executive Order 13917 until April 28, 2020—is plainly wrong, as executive commands need not be memorialized in an Executive Order to fall under the DPA. *See E. Air Lines, Inc.*, 532 F.2d at 994. Once again, the district court's reasoning rises and falls with its insistence that nothing the federal government demanded of Tyson mattered until the President memorialized those demands in an Executive Order. That reasoning cannot be reconciled with the federal-officer removal statute, the DPA and the critical infrastructure protection regime, or the basic reality of the fast-moving facts on the ground as the federal government charged Tyson and others with aiding its efforts to mitigate the effects of an unprecedented global pandemic. Those facts more than suffice to demonstrate that Tyson is entitled to a federal forum in which to defend its actions in answering that federal charge.

CONCLUSION

This Court should vacate the district court's remand orders.

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February 17, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that the textual portion of the foregoing brief (exclusive of the disclosure statement, tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 13,000 words as determined by the word counting feature of Microsoft Word 2016.

I also hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

Pursuant to Circuit Rule 28A(h), I also hereby certify that electronic files of this Brief and accompanying Addendum have been submitted to the Clerk via the Court's CM/ECF system. The files have been scanned for viruses and are virus-free.

s/Paul D. Clement
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CERTIFICATE OF SERVICE

I hereby certify that on February 17, 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.

s/Paul D. Clement
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