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.

On Appeal from the United States District Court
for the Northern District of Iowa

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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INTERESTS OF THE UNITED STATES

Plaintiffs filed suit in state court alleging that workers at a Tyson Foods pork-processing facility contracted COVID-19 as a result of defendants' negligent operation of the facility and fraudulent misrepresentations regarding the risks to workers. Defendants (collectively Tyson) removed the case to federal court under 28 U.S.C. §§ 1441 and 1442(a)(1), and the district court remanded the matter to state court. Tyson appealed, urging that section 1442(a)(1), which provides for removal of suits against parties "acting under" a federal officer, applies in these circumstances because Tyson was allegedly acting at the direction of the federal government in processing meat during the relevant period. Tyson also contends that it has a colorable federal defense because the Defense Production Act of 1950 (DPA), 50 U.S.C. § 4501 *et seq.*, and the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 601 *et seq.*, preclude plaintiffs' claims.

The United States has a strong interest in the proper interpretation of the federal-officer removal provision and the other federal laws Tyson invokes. Section 1442(a)(1) was enacted for the protection of federal entities and officers and those enlisted by the federal government to perform federal tasks. An overbroad reading of that provision would undermine the federal interests it was meant to protect. Similarly, the DPA gives the Executive Branch important authorities for protecting the public in exigent circumstances, and the United States has an interest in ensuring that its provisions are not misconstrued. The government likewise has an interest in

the proper construction of the FMIA, which is an important tool of the U.S. Department of Agriculture (USDA).

STATEMENT

A. Statutory and Administrative Background

1. The Defense Production Act authorizes the President to direct private companies to give priority to federal contracts in exigent circumstances. Specifically, the President may "require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order." 50 U.S.C. § 4511(a). In addition, "for the purpose of assuring such priority," the President may "require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance," and he may "allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense." *Id.*

Other DPA provisions authorize the President to take measures to limit the hoarding of needed supplies, 50 U.S.C. § 4512, to authorize agencies to offer loans or loan guarantees to companies for specified purposes, *id.* §§ 4531, 4532, and to take certain measures "[t]o create, maintain, protect, expand, or restore domestic industrial base capabilities essential for the national defense," *id.* § 4533(a)(1). The Act precludes liability "for any act or failure to act resulting directly or indirectly from

compliance with a rule, regulation, or order issued pursuant to this chapter, notwithstanding that any such rule, regulation, or order shall thereafter be declared by judicial or other competent authority to be invalid." *Id.* § 4557.

2. On March 13, 2020, the President declared a national emergency based on the COVID-19 pandemic. 85 Fed. Reg. 15,337 (Mar. 13, 2020). In the weeks that followed, government officials made many statements regarding the operation of industries that constitute critical infrastructure. The government issued nonbinding guidance urging most Americans to stay home and stating that critical infrastructure workers should "maintain [their] normal work schedule." A179, A363. "Food manufacturer employees and their supplier employees" were among the more than one hundred categories of essential critical infrastructure workers identified by the government in these communications. *See* A163-70, A345-51. Other statements by the federal government acknowledged the importance of continued food production and the maintenance of other essential services.

On April 28, 2020, the President issued Executive Order 13,917, authorizing the Secretary of Agriculture to use the means provided by the DPA "to determine the proper nationwide priorities and allocation of all the materials, services, and facilities necessary to ensure the continued supply of meat and poultry, consistent with [federal] guidance for the operations of meat and poultry processing facilities," and to "issue such orders and adopt and revise appropriate rules and regulations as may be necessary to implement this order." 85 Fed. Reg. 26,313, 26,314 (Apr. 28, 2020).

While USDA has expressed its support for the continuing operation of meat and poultry processing facilities, it has not exercised its DPA authority to enter any contracts or issue any orders requiring action by that industry.

B. Prior Proceedings

1. Plaintiffs, the survivors of four workers at Tyson's Waterloo, Iowa, pork-processing facility who died after contracting COVID-19, filed two state-court suits in June 2020 alleging, *inter alia*, that defendants were negligent in failing to develop and implement adequate safety measures at the facility, including workplace screening, testing, and contact tracing, A56-59, A286-89, and that they falsely represented to workers that COVID-19 was not spreading through the facility; that sick or symptomatic workers would be sent home immediately and would not be permitted to return until cleared by health officials; that workers would be notified of close contacts with infected co-workers; and that safety measures implemented at the facility would keep workers safe, A53-54, A283-84. Tyson filed a notice of removal to federal court under 28 U.S.C. §§ 1441 and 1442(a)(1). A22, A211.

2. The district court granted plaintiffs' motion to remand to state court. With respect to removal under section 1442(a)(1), the court held that Tyson had failed to carry its burden of showing (1) that it was acting under the direction of a federal officer, (2) that there was a causal connection between its actions and the official authority being asserted, and (3) that it has a colorable federal defense to plaintiffs' claims. *See Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012).

The court first rejected Tyson's argument that it was acting under federal direction during the relevant period. The court noted that, although Tyson's notice of removal emphasized the President's delegation of DPA authority to USDA in the April 28, 2020, Executive Order, the "primary allegations in the [complaint] all took place prior to April 28, 2020," making the order irrelevant. Add. 25, 54. Three of plaintiffs' decedents died from complications related to COVID-19 prior to April 28, and the fourth was intubated prior to that date and remained in that condition until his death. Add. 24, 54. The court acknowledged the earlier government communications that Tyson cited but found that none entailed federal direction: "While Tyson may have been in regular contact with [the Department of Homeland Security] and USDA regarding continued operations of its facilities at the early stages of the COVID-19 pandemic," the court concluded that "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.'" Add. 25-26, 55 (quoting *Rhode Island v. Shell Oil Prods. Co.*, 979 F.3d 50, 59 (1st Cir. 2020)). The district court also held that Tyson failed to demonstrate a causal connection between its actions and the purported federal direction because no federal official directed Tyson to maintain its operations, much less to do so in a negligent manner or one that entailed fraudulent misrepresentations to employees. Add. 26-27, 56-57.

The district court additionally held that Tyson failed to assert a colorable federal defense to plaintiffs' claims. The court concluded that the FMIA does not preempt plaintiffs' claims because they have nothing to do with the "safety of meat and humane handling of animals," Add. 28, 57 (quoting *National Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012)), which is the FMIA's exclusive concern. And the court rejected Tyson's reliance on the DPA's immunity provision, 50 U.S.C. § 4557, because no federal official invoked the DPA in connection with Tyson's conduct during the relevant period, making the Act's immunity provision inapplicable. Add. 28, 57. Concluding that Tyson's argument for federal-question removal likewise failed, Add. 29-30, 58-59, the court granted plaintiffs' motion to remand to state court.

Tyson appealed the district court's remand order with respect to the federal-officer removal question, A189, A377,[1] and this Court granted Tyson's motion to stay the state-court proceedings pending appeal.

[1] The district court's ruling on federal-question removal is not currently reviewable, *see Jacks*, 701 F.3d at 1229, but the Supreme Court is considering whether, when a party appeals a remand order addressing federal-officer jurisdiction, the court of appeals may consider other bases for removal addressed in that order, *see BP PLC v. Mayor & City Council of Baltimore*, 141 S. Ct. 222 (2020) (Mem.). In a footnote to its opening brief, Tyson has reserved the right to raise the federal-question issue depending on the Court's decision in *BP*, Br. 19. n.2, but Tyson has not argued federal-question removal on the merits here, and this brief does not address that issue except to note that plaintiffs' claims sound emphatically in state law, as the district court concluded, *see* Add. 29-30, 58-59.

ARGUMENT

Removal Is Unwarranted Because Tyson Was Not Acting Under the Direction of the Federal Government and Has No Colorable Federal Defense.

Tyson is not entitled to a federal forum because it was not performing a federal function under the direction of a federal officer during the relevant period, and federal law provides no defense to plaintiffs' claims. The federal-officer removal statute provides for removal to federal court when an action is asserted against "[t]he United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office." 28 U.S.C. § 1442(a)(1). To fall within the statute, a private defendant must show that it is (1) a person, (2) acting under the direction of a federal officer, (3) that its alleged misconduct is related to the federal function being performed, and (4) that it has a colorable federal defense. *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012). The district court correctly held that Tyson was not acting under the direction of a federal officer in these circumstances and lacks a plausible federal defense to plaintiffs' claims.

A. Tyson was not performing a federal function or acting at the direction of the federal government.

Tyson's argument for removal fails at the outset because Tyson was not "acting under" a federal officer within the meaning of section 1442(a)(1). To fall within the scope of that phrase, "the private person's 'acting under' must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson v. Philip*

Morris Cos., 551 U.S. 142, 152 (2007) (emphases omitted). Thus, the tasks must be essentially federal in character, and they must be performed under the "subjection, guidance, or control" of a federal actor. *Id.* at 151 (quotation marks omitted). Tyson's actions in continuing to perform its usual business functions under existing private contracts during the early months of the pandemic do not support removal notwithstanding the federal government's acknowledgment of the importance of these functions.

1. The Supreme Court's decision in *Watson* confirms that Tyson's engagement with the federal government falls well short of that required to support removal. In *Watson*, Philip Morris alleged that the Federal Trade Commission (FTC) had delegated to the tobacco industry authority to test the tar and nicotine content of cigarettes, and that Philip Morris was thus acting under the FTC in performing that testing function. 551 U.S. at 154. The testing at issue had at one point been performed by the FTC itself, and the agency published the test results periodically and sent them annually to Congress. *Id.* at 155. When the FTC eventually stopped performing such tests due to cost considerations, the industry assumed that responsibility, "running the tests according to FTC specifications and permitting the FTC to monitor the process closely." *Id.* "The FTC continue[d] to publish the testing results and to send them to Congress," just as it had done with the FTC's own test results. *Id.*

Despite the close coordination alleged in that case, the Court unanimously held that Philip Morris was not "acting under" the FTC within the meaning of section

1442(a)(1), stressing that there was "no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf. Nor [wa]s there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." *Watson*, 551 U.S. at 156. Like Tyson in this case, Philip Morris pointed to numerous documents and communications in support of its claim that it was working with the FTC and acting under its direction in a relevant sense. But the Court "examined all of the documents" and found them lacking because none "establish[ed] the type of formal delegation that might authorize Philip Morris to remove the case." *Id.*

Watson makes this an easy case because, wherever the line for removal is ultimately drawn, Tyson's conduct falls much farther from it than the conduct found wanting in *Watson*. At the outset, Tyson was not performing a federal function during the relevant period. The allegations in this case concern Tyson's performance of its ordinary business functions—processing and delivering meat under preexisting private contracts. Although the pandemic brought the importance of these functions into the public consciousness, federal officials' acknowledgment of their importance and support for their continuance did not serve to federalize these fundamentally private actions.

There is no suggestion that Tyson, like Philip Morris, was performing a function previously performed by the federal government. And contrary to Tyson's suggestion, the government in no way mandated that Tyson maintain its production

or take specified actions. None of the communications to which Tyson points substantiate its contention that, "once COVID-19 hit, the federal government made emphatically clear that Tyson . . . was *obligated* to aid the federal government in preventing an unprecedented national emergency from spiraling into a national food shortage." Br. 30 (emphasis added). While Tyson asserts that "leaving the food supply to ordinary market forces and private decision-making was not an option" during this period, *id.*, these statements run counter to the facts. The food supply was indeed left to "ordinary market forces and private decision-making," and the government did not "obligate[]" Tyson to do anything. That Tyson closed its Waterloo plant for weeks beginning on April 22, 2020, belies its suggestion that it was under some legal obligation to continue its operations. *See* Add. 27, 56.

2. As in *Watson*, the communications to which Tyson points fail to establish the type of federal function or federal relationship necessary to support removal. 551 U.S. at 156. Tyson stitches together government statements confirming the national interest in the continued production of food during the pandemic. *See* Br. 9-13, 30-32. But mere encouragement to maintain private production under private contracts comes nowhere close to establishing federal direction to perform a federal task.

The specifics of the relevant communications underscore this point. Tyson cites (at 9, 30) a March 15 call between the President and food industry leaders, after which the President stated that companies were "committed to the communities where they're serving and which they serve so beautifully and have for a long time,"

and said they 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." Matt Noltemeyer, *Trump Meets with Food Company Leaders*, Food Business News (Mar. 16, 2020).[2] Tyson also points to a March 16 statement that USDA was committed to "maintain[ing] the movement of America's food supply from farm to fork" and was "working closely with industry to fulfill [its] mission of ensuring the safety of the U.S. food supply." Br. 10 (quoting A180, A365). And Tyson cites remarks by the Vice President acknowledging food industry workers' "great service to the people of the United States" and their contributions to "what we call our critical infrastructure." Br. 31 (quoting *Remarks by President Trump, Vice President Pence, and Members of the Coronavirus Task Force Press Briefing* (Apr. 7, 2020)). But each of these statements does nothing more than recognize the national importance of the food supply and the government's general support for the industry's continuing efforts—ideas that Tyson itself was promoting at that time through full-page advertisements in major newspapers touting the need to keep its facilities open. *See* A50-51, A281-82.

The food industry was not alone in receiving federal acknowledgment of its significance during this period. The circumstances of the pandemic brought the importance of many private functions into specific relief. As evidence of the special relationship between the government and the food industry, Tyson cites the

[2] https://www.foodbusinessnews.net/articles/15621-trump-meets-with-food-company-leaders.

President's March 16 "Coronavirus Guidelines for America," which advised that individuals should generally work from home when possible, except for workers in "critical infrastructure industries" with a "special responsibility to maintain [their] normal work schedule." Br. 31 (quoting A179, A363). But while "[f]ood manufacturer employees and their supplier employees" are among the critical infrastructure industry workers identified by the government, so too are workers in almost 130 other employment categories. *See* A163-70, A345-51. And it cannot plausibly be argued that every person in each of those industries was "acting under" the federal government as a result of statements acknowledging that "[f]unctioning critical infrastructure is imperative during the response to the COVID-19 emergency" and promoting "the ability of such workers to continue to work." A162, A344. If meat processors were acting under the federal government during this period based on the government's support of their continued operation, so too were grocery and convenience stores, hospitals and pharmacies, and farmers and energy-sector workers, among myriad other individuals and entities. There can be no serious contention that all such actors can avail themselves of a federal forum for state-law violations alleged during the pandemic simply because the federal government acknowledged the importance of these private functions.

Tyson fares no better in citing communications that it contends "implemented" federal support "at a granular level." Br. 32. Tyson asserts that various federal entities "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." *Id.* (citing A137-40, A157, A314-17, A338). But, again, this shows only that the government supported the continuation of Tyson's private business activities. Nothing about those designations served to federalize Tyson's historically private functions or establish federal direction or control. Similarly, nothing follows from Tyson's assertions that USDA and FEMA "coordinated closely with Tyson to address its needs for personal protective equipment and other critical supplies to continue operations." *Id.* (citing A171-77, A352-60). This coordination consists largely of emails from Tyson trying to secure federal assistance in obtaining personal protective equipment, A173-77, A354-60, and it in no way demonstrates federal oversight of a federal task.

Tyson also notes that USDA's Food Safety Inspection Service (FSIS) "supervised the operation of [its] plants . . . throughout the pandemic." Br. 32 (citing A141, A318). But as Tyson elsewhere acknowledges (Br. 13), FSIS officials were present at Tyson's plants long before the pandemic to ensure a safe food supply, and their continued role during the pandemic provides no evidence that Tyson was operating under government direction during that period. All this supervision demonstrates is that Tyson is a regulated entity, subject to federal oversight. That Congress may have "allocate[ed] additional funding to support [FSIS's] efforts" during this period (Br. 13, 32) did not alter the essence of that relationship.

3. While Tyson was subject to federal oversight as a regulated entity both before and during the pandemic, it is well established that "the help or assistance necessary to bring a private person within the scope of the [federal-officer removal] statute does *not* include simply *complying* with the law." *Watson*, 551 U.S. at 152. "It is not enough that a private person or entity merely operate in an area directed, supervised and monitored by a federal regulatory agency or other such federal entity," *Jacks*, 701 F.3d at 1230, "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored," *Watson*, 551 U.S. at 153. "[T]hat is not the sense of 'help' or 'assist' that can bring a private action within the scope of this statute." *Id.* at 152.

Instead, qualifying help or assistance has generally been found when a person "help[s] [an] official to enforce federal law" or "help[s] the Government to produce an item" or perform a service that is necessary to the completion of essential governmental tasks. *Watson*, 551 U.S. at 151, 153. While the cases do not establish that a contract with the federal government is either necessary or sufficient to establish federal direction, *see id.* at 154, such an agreement commonly helps distinguish between private functions and qualifying federal activity. *See, e.g.*, *Betzner v. Boeing Co.*, 910 F.3d 1010, 1015 (7th Cir. 2018) (holding that Boeing was acting under a federal agency when it contracted to manufacture heavy bomber aircraft for the Air Force under detailed and ongoing military control); *Lu Junhong v. Boeing Co.*, 792 F.3d 805, 809 (7th Cir. 2015) (holding that Boeing was not acting under the government in

self-certifying compliance with federal safety standards); *Jacks*, 701 F.3d at 1233 (holding that insurance provider was acting under the federal government in connection with a contract to provide coverage to federal employees); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398-99 (5th Cir. 1998) (holding that a chemical company was acting under the federal government when it was "compelled to deliver Agent Orange to the government under threat of criminal sanctions" and "the government maintained strict control over the development and subsequent production of Agent Orange"); *see also Washington v. Monsanto Co.*, 738 F. App'x 554, 556 (9th Cir. 2018) (holding that Monsanto was not acting under federal direction in fulfilling a DPA contract because it was not subject to "ongoing federal supervision").

Even assuming Tyson is correct that a formal order or agreement is not necessary to establish federal direction for purposes of section 1442(a)(1), the examples Tyson cites underscore the shortcomings of its position. Tyson asserts that, "[i]f 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." Br. 26. But Tyson is not similarly situated to the hypothetical driver. That scenario posits an express agreement to undertake a distinctly federal function, even if the agreement is not memorialized in a formal document. The example is thus more like *Maryland v. Soper*, 270 U.S. 9, 24 (1926), in which a chauffeur was allowed to remove to federal court a case that concerned his

work for federal prohibition officers because he was "employed by the federal prohibition director" and acting under his authority in transporting federal officers.

Tyson, by contrast, was acting under no agreement, formal or otherwise, to undertake a course of conduct for the government. And rather than being asked to perform a distinctly federal task, Tyson merely received federal encouragement to continue in the private activity in which it had long been engaged. A more apt analogy would thus be to a private detective agency that finds fugitives for its own profit. If the government acknowledged the importance of the company's work and encouraged it to continue in that pursuit, such recognition would not transform the nature of the company's work and entitle it to the protections Tyson now seeks.

In insisting that the lack of a formal order or contract is not dispositive in these circumstances, Tyson also cites *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976). *See* Br. 34-35, 54, 56. But that decision is inapposite for several reasons. First, unlike this case, *Eastern Air Lines* involved actual government orders for aircraft parts; the only aspect of the arrangement that was informal was the priority assigned to those contracts. *See* 532 F.3d at 982-83. Second, *Eastern Air Lines* was a private breach of contract case and did not raise the question whether companies were "acting under" a federal officer in giving priority to federal contracts outside a formal order. The case instead concerned the appropriateness of a jury instruction that "only delays resulting from the actual issuance of formal . . . directives could be deemed" excusable. *Id.* at 986. The court of appeals held that

"fundamentally coercive acts of Government, whatever their form, constitute an excuse for breach," and that a formal directive was not necessary for that purpose. *Id.* at 994. Thus, *Eastern Air Lines* did not present the question raised here. And there is in any event nothing in this case analogous to the coercion that was found dispositive in those circumstances, in which the government eschewed a formal order under the DPA at the airline industry's urging but "insisted that particular military orders be given preference on an individual and informal basis," *id.* at 983, and told companies that "any resistance to informal requests by representatives of the military would result in a formal directive being issued against them," *id.* at 984-85.

4. Tyson's brief also invokes a number of federal statutes as the basis for the government's alleged direction of Tyson's activities. But while Tyson frequently alludes to actions under the DPA or otherwise related to "critical infrastructure" designations, *see* Br. 27, 31, 32, 34, 35, the government exercised no such authority in connection with the conduct underlying this suit. The vagueness of Tyson's arguments is telling in this respect. Citing the Critical Infrastructures Protection Act of 2001, Tyson asserts that, "[w]hen 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." Br. 34 (citing 42 U.S.C. § 5195c(b)(3)). But this remarkably broad claim fails to identify any actual action taken by the government or any specific authority invoked, and it would

presumably apply equally to the myriad other industries and actors that have been designated part of the "critical infrastructure."

Tyson's invocation of the DPA is similarly vague. Tyson asserts that the DPA "giv[es] the President 'broad authority' to command private parties as necessary" "to protect the nation against threats to its safety and security," Br. 34, but Tyson fails to identify any actual exercise of that authority in these circumstances. While the authority provided by the DPA is significant, it is also specific, giving the government the ability to enter priority contracts for essential goods and services and to provide loans and loan guarantees for crucial activities. *See* 50 U.S.C. §§ 4511, 4531, 4532. The government has used that authority during the pandemic, as when the Secretary of Health and Human Services (HHS) exercised the authority delegated through Executive Order 13,909 to enter a priority contract for ventilators, HHS, *HHS Announces Ventilator Contract with GM Under Defense Production Act* (Apr. 8, 2020), https://go.usa.gov/xsAbQ, and to expedite materials and upgrade facilities used in vaccine production, HHS, *Biden Administration Announces Historic Manufacturing Collaboration Between Merck and Johnson & Johnson to Expand Production of COVID-19 Vaccines* (Mar. 2, 2021), https://go.usa.gov/xsAbp. But there has been no comparable exercise of authority by USDA in connection with food production generally or Tyson's activities in particular.

Although Tyson concedes that Executive Order 13,917, which delegated DPA authority to USDA, postdates the conduct alleged in this case, Tyson contends it is

nevertheless relevant because the order "marked the formalization of the unprecedented federal involvement in ensuring the national food supply that commenced with the declaration of a nationwide emergency" and "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." Br. 36-37. But the order does not constitute an exercise of DPA authority or suggest that prior statements to Tyson were made pursuant to such authority. And since the Executive Order issued, USDA has not invoked its delegated authority under the DPA in connection with Tyson's activities.

Had USDA actually exercised its authority under the DPA—for example, by entering priority contracts for meat and poultry to be allocated by the federal government—Tyson might well be able to assert that it had been acting under the direction of a federal agency in fulfilling those contracts. *See Watson*, 551 U.S. at 154. But there was no such contract, nor was there any order or directive—formal or otherwise—requiring Tyson to perform a federal task. The federal government's recognition of the importance of Tyson's activities and its stated hope that the activities would continue does not come close to establishing the type of federal direction needed to support removal under section 1442(a)(1).

B. Tyson also lacks a colorable federal defense.

Tyson's argument also fails at the final step of the removal analysis because neither the FMIA nor the DPA plausibly precludes plaintiffs' claims. While the

colorable-federal-defense prong of the removal inquiry does not establish a high bar, *see United States v. Todd*, 245 F.3d 691, 693 (8th Cir. 2001), Tyson's arguments fall short of that standard.

1. The FMIA does not govern worker safety and does not preempt plaintiffs' claims.

The FMIA "regulates the inspection, handling, and slaughter of livestock for human consumption" "to ensure both safety of meat and humane handling of animals." Add. 28, 57 (quoting *National Meat Ass'n v. Harris*, 565 U.S. 452, 455 (2012)). These provisions "prevent[] a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations." *Harris*, 565 U.S. at 459-60; *see* 21 U.S.C. § 678. USDA, through FSIS, is responsible for administering the FMIA and implementing regulations to promote its goals of safe meat and humane slaughter. *Harris*, 565 U.S. at 456. The FMIA does not give USDA "authority to regulate issues related to establishment worker safety." *Modernization of Swine Slaughter Inspection*, 84 Fed. Reg. 52,300, 52,305 (Oct. 1, 2019). Instead, "[the Occupational Safety and Health Administration (OSHA)]" is the Federal agency with statutory and regulatory authority to promote workplace safety and health," *id.*, and there is no suggestion that the provisions OSHA administers could preempt plaintiffs' claims.

Tyson's preemption argument is premised on a misunderstanding of the FMIA's breadth. According to Tyson, USDA has for decades promulgated FMIA

regulations "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." Br. 49. Tyson further urges that these safety requirements preempt any competing state-law standards governing workplace safety. But the regulatory examples Tyson cites confirm that the FMIA's concern is with food safety, not worker safety. Tyson notes that "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.'" *Id.* (alterations in original) (quoting 9 C.F.R. § 416.5(c)). But this provision underscores the FMIA's specific concern with conditions leading to "product adulteration," not the spread of disease among workers. Likewise, in noting that regulations promulgated under the FMIA govern worker protective equipment and require that it "be changed during the day as often as necessary to prevent adulteration of product and the creation of insanitary conditions," *id.* (quoting 9 C.F.R. § 416.5(b)), Tyson's argument again demonstrates the FMIA's concern with the "adulteration of product." Because the FMIA does not govern worker safety, it does not preempt plaintiffs' claims that Tyson negligently failed to protect workers and misrepresented certain risks.

2. The DPA's immunity provision underscores the Act's inapplicability in these circumstances and provides no defense to plaintiffs' claims.

There is likewise no merit to Tyson's assertion that it has a colorable defense "based on the DPA and the federal directions under which Tyson operated." Br. 53. Because the government did not direct Tyson's actions through an exercise of authority under the DPA, the Act's immunity provision—which states 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," 50 U.S.C. § 4557—affords Tyson no defense.

The terms of the DPA's immunity provision underscore its inapplicability in these circumstances, as it extends only to liability "for any act or failure to act resulting directly or indirectly from compliance with *a rule, regulation, or order* issued pursuant to this chapter." 50 U.S.C. § 4557 (emphasis added). Even if these terms are understood to encompass less formal directives, Tyson was not subject to anything that could plausibly be termed a "rule, regulation, or order" relevant to the conduct alleged in this suit, making this provision inapplicable by its terms. Tyson makes no attempt to reconcile its position with the text of the statute.

As this Court has held, the immunity provided by section 4557 must be construed in context of section 4511(a), with which it was enacted. *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 812 (8th Cir. 1995). Section 4511(a) authorizes the United States to enter priority contracts that must be filled ahead of other contracts

for the same materials, equipment, or services. Agreeing with the Federal Circuit's analysis in *Hercules Inc. v. United States*, 24 F.3d 188, 203-04 (Fed. Cir. 1994), *aff'd*, 516 U.S. 417 (1996), this Court has held that "the protection afforded by section [4557] extends no further than the risk imposed by section [4511(a)]." *Vertac*, 46 F.3d at 812 (quotation marks omitted). The Federal Circuit in *Hercules* elaborated on that risk: Section 4511 creates the possibility that "a contractor may have to re-prioritize its outstanding contracts in order to give the required preference to a compelled DPA contract," and section 4557 provides a corresponding "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." 24 F.3d at 203-04. Because Tyson was not given any priority contracts and did not assume any corresponding risk, the DPA does not plausibly give Tyson immunity from suit.

Tyson also contends that it has a colorable defense based on "federal directions" that "required Tyson to continue operating in compliance with [Centers for Disease Control and Prevention (CDC)]—not state and local—guidance" and that "preempt any conflicting obligations Plaintiffs may attempt to derive from state tort law." Br. 55 (citing *Brooks v. Howmedica, Inc.*, 273 F.3d 785, 798 (8th Cir. 2001)). But, as discussed above, Tyson was not operating pursuant to any relevant "federal directions." And the CDC guidance that Tyson cites (at 41) is expressly that—guidance. *See* U.S. Dep't of Labor, *U.S. Department of Labor's OSHA and CDC Issue Interim Guidance to Protect Workers in Meatpacking and Processing Industries* (Apr. 26, 2020),

https://go.usa.gov/xH4f5, ("outlin[ing] steps employers can take"). It is not binding on any party, and does not preempt any state laws.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,930 words. This brief also complies with the typeface and type-style requirements of Rule 32(a)(5)-(6) because it was prepared in Garamond 14-point font, a proportionally spaced typeface.

Pursuant to Circuit Rule 28A(h)(2), I further certify that this document was scanned for viruses, and no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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