No. 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

PETITION FOR REHEARING EN BANC

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INTRODUCTION

In the throes of the greatest national health crisis in a century, ensuring that the nation's food supply remained secure ranked high among the federal government's priorities. In our system of free enterprise and federalism, the federal government could not accomplish that critical task alone. It depended on the cooperation of meat-processing companies like Tyson Foods and the displacement of state and local regulators with conflicting priorities. Tyson provided that cooperation under the direction of federal officers from the earliest days of the pandemic, with federal guidance taking various forms, from close but informal coordination to eventual formalization in an executive order. Those actions entitle Tyson to a federal forum under the federal-officer removal statute, 28 U.S.C. §1442(a), as Tyson was "acting under" numerous federal officers from the President on down in keeping its meat-processing plants operational to the greatest extent possible as the pandemic threatened to spiral into a national food shortage.

The panel's contrary conclusion cannot be reconciled with decisions from the Supreme Court, this Court, or others. The panel insisted that Tyson cannot have been "acting under" a federal officer because the federal government does not "typically" produce meat for public consumption itself. But as this Court explained in *Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224 (8th Cir. 2012), it does not matter whether the task at hand is one that is typically conducted by the federal government,

by state and local officials, or by private industry. What matters is whether the private party acts at the behest of the federal government in accomplishing a task that, without that aid, "the Government itself would have had to perform." *Id.* at 1232; *see also Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 152-53 (2007). And no one can seriously think that the federal government would have stood idly by if private industry were not up to the task of maintaining the food supply.

The panel also faulted Tyson for its inability to point to a federal officer's coercive demand: "Keep your plants operating or else." But neither the federal-officer removal doctrine nor the Defense Production Act (DPA) demands coercion. A private driver who volunteers to assist federal officers is equally entitled to removal as one who is impressed into service. And, as the Fifth Circuit has held, the DPA does not require formal orders and is equally satisfied by informal "jawboning" because the whole point of the DPA is to "accord the Executive Branch great flexibility in molding its priorities and policies to the frequently unanticipated exigencies of national defense." *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 992-93 (5th Cir. 1976). Nothing in the law or common sense requires or even incentivizes private entities to resist government entreaties for assistance in the height of a crisis and to insist on a formal, coercive order. The panel's contrary

conclusion not only conflicts with decisions from the Supreme Court, this Court, and other circuits, but creates perverse incentives for the next crisis.

BACKGROUND

A. Factual Background

In February and March 2020, COVID-19 began its rapid spread across the United States, creating sudden, dramatic, and virtually unprecedented disruption. On March 13, 2020, the President declared a national state of emergency, retroactive to March 1, 2020. *Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, 85 Fed. Reg. 15,337 (Mar. 13, 2020). As the federal government mobilized to respond, one area of acute concern was protecting the nation's food supply, which suffered massive disruptions as stay-at-home orders prompted a potent combination of panic buying and decreased production stemming from labor constraints.

To respond to this impending crisis, the federal government promptly enlisted the help of major food industry companies, including Tyson. Just two days after declaring a national emergency, the President personally spoke with Tyson and other industry leaders to convey that henceforth they would be "working hand-in-hand with the federal government," "24 hours around the clock," to ensure that "food and essentials are constantly available." Matt Noltemeyer, *Trump Meets with Food Company Leaders*, Food Business News (March 16, 2020), https://bit.ly/3t2fiXQ.

Invoking the "critical infrastructure" framework developed for responding to national emergencies, 42 U.S.C. §§5195 et seq., numerous federal agencies proceeded to take whatever steps were necessary to ensure that Tyson could continue to operate, be that securing personal protective equipment and essential-worker designations for Tyson's employees, providing constantly evolving guidance on what health and safety measures should be taken in plants, or ensuring that the federal inspectors who must be present for a meat-processing facility to operate would not become a bottleneck. *See, e.g.*, A171-177, A352-360; A137-140, A314-317, A157, A338. And the President made clear from the outset that "[t]he 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 (Mar. 24, 2020), http://reut.rs/3rS3MN5.

Despite the federal directives to the meat-processing industry to continue operating in accordance with federal guidance, state and local officials began trying to shut down meat-processing plants. A48, A279. In response, the President again invoked the DPA and issued Executive Order 13917, which delegated 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." A28. On May 5, 2020, acting under Executive Order 13917, the Secretary of Agriculture instructed meat-processing plants to either remain open

or submit written plans to reopen. Letter from Sonny Perdue, *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).

B. Procedural Background

Plaintiffs represent the estates of four employees at Tyson's meat-processing facility in Waterloo, Iowa, who contracted COVID-19 and died of related complications. A42, A273-274. Plaintiffs filed suit in Iowa state court, alleging that Tyson failed to take adequate precautions and abide by federal guidance to prevent ensure employees from contracting COVID-19. A56-66, A286-297. Plaintiffs also alleged that Tyson executives and supervisors made fraudulent misrepresentations about the presence of COVID-19 at the plant, the efficacy of the safety measures Tyson implemented, and the need to keep the plant open to avoid national meat shortages. A53-55, A59, A63-66, A283-286, A289, A294-96.

Tyson removed the cases to the U.S. District Court for the Northern District of Iowa on federal-officer removal grounds. A22-37, A211-228. Plaintiffs moved to remand, and the district court granted their motions. ADD1-31, ADD32-60. The court determined that Tyson failed to show that it was acting under the direction of federal officers, that there was an insufficient "causal connection" between the

actions Tyson claims it took under federal direction and Plaintiffs' injuries, and that Tyson lacked colorable federal defenses. ADD25-28, ADD54-59.

Tyson appealed, and a panel of this Court affirmed, concluding that Tyson failed to establish that it was acting under the direction of federal officers. The panel recognized that a private entity is entitled to federal-officer removal when its actions "involve an effort to *assist*, or to help *carry out*" a "basic governmental task[]." Op.11 (quoting *Jacks*, 701 F.3d at 1230, and *Watson*, 551 U.S. at 153). But according to the panel, Tyson's activities did not qualify as a "basic government task" because "the fact that an industry is considered critical does not necessarily mean that every entity within it fulfills a basic governmental task." Op.14. Nor, according to the panel, was Tyson engaged in "an effort to *assist*, or to help *carry out*" any federal tasks because the federal government took a "cooperative approach" rather than expressly "direct[ing]" Tyson what to do. Op.15-16.

REASONS FOR GRANTING REHEARING

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). "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 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. *Watson*, 551 U.S. at 147; *Jacks*, 701 F.3d at 1230. The panel's conclusion that Tyson was not "acting under" federal officials in helping the federal government avert an impending national food shortage cannot be reconciled with decisions from the Supreme Court, this Court, or others, including numerous district courts that have permitted Tyson to remove in materially identical circumstances. Worse still, by denying private parties a federal forum unless they withhold assistance in an emergency until formally coerced, the decision creates perverse incentives for the next national crisis. For both reasons, this Court should grant rehearing en banc.

I. The Panel's "Basic Governmental Task" Analysis Conflicts With Supreme Court And Eighth Circuit Precedent.

The panel began by insisting that Tyson could not have been "helping" the federal government "fulfill [a] basic governmental task[]," *Watson*, 551 U.S. at 153, because, "while the federal government may have an interest in ensuring a stable food supply, it is not typically the 'dut[y]' or 'task[]' of the federal government to process meat for commercial consumption." Op.14. That misstates the governing legal principles. The "acting under" test does not require the task in which a private party was enlisted to be one the federal government "typically" performs itself. It simply requires the private party to have been operating under federal "subjection, guidance, or control." *Watson*, 551 U.S. at 151. The panel's misguided analysis has the perverse effect of denying federal-officer removal when it is needed most:

during a national emergency. It is precisely in a crisis—whether a war creating steel shortages, a hurricane forcing the FEMA to ensure provision of food and shelter, or an unprecedented pandemic—that the federal government undertakes responsibilities normally left to the private sector. It is precisely in an emergency that state law—especially tort law applied retroactively and with the benefit of hindsight—can threaten national priorities. And it is precisely in an emergency that the federal government needs unusual degrees of support from private industry, not demands for formal orders before they lend a hand.

To be sure, the nature of the conduct can inform the analysis. It is highly unlikely that the federal government, in an emergency or otherwise, would enlist private parties to test the nicotine levels in cigarettes for its own purposes, as the federal government has no particular interest in ensuring that cigarettes are manufactured; its interest is entirely regulatory—ensuring that *if* private parties *choose* to manufacture cigarettes, they manufacture them in accordance with governing law. But while the nature of the task matters, the relevant question is whether the task is one "the Government itself would have had to perform" *if no one else did*. *Watson*, 551 U.S. at 154. That is clear from this Court's decision in *Jacks*, which had no trouble finding that a private company providing health benefits to federal employees was entitled to federal-officer removal even though the provision of health benefits is largely left to the private sector. 701 F.3d at 1233-34. A contrary

rule would produce absurd results. In our system of free enterprise, the government routinely relies on private industry to help serve basic needs. A removal test that turned on what the government does itself versus leaving to private industry would thus be virtually impossible for private parties to satisfy.

The panel's reasoning not only conflicts with *Watson* and *Jacks*, but ignores the reality that both government objectives and the means of achieving them may change in a crisis. What normally is left to market forces and state law in untroubled times may become a federal priority necessitating extraordinary federal action in a crisis. And if someone assists federal officers in pursuing a suspect in an emergency, or FEMA enlists private industry to provide food and shelter in the wake of a hurricane, it is irrelevant that those matters are left to market forces or local governments in ordinary times. It is enough that the private party was enlisted to help federal officials achieve their objective (and then sued in state court for its efforts). Moreover, not only do national emergencies prompt the federal government to undertake activities normally left to market forces, but those same exigencies can expose fissures between national and state regulatory priorities, especially when it comes to state tort-law applied by juries after the worst of the crisis has passed. The panel's focus on whether the federal government *typically* undertakes a task thus has the effect of denying removal when the need for a federal forum is greatest.

The panel tried to distinguish *Jacks* on the ground that the federal government was statutorily required to establish a health benefits program for federal employees. Op.12. But the "acting under" analysis is a functional, not formal, inquiry. It would make little sense for that functional inquiry to turn on whether the government has a formal *obligation* to enlist private help. If that were the rule, then a private party ordered to aid a federal officer would lose its right to a federal forum should the officer turn out to have been acting outside the scope of its authority, which may well be when the protection of a federal forum is most valuable.

Moreover, even if such a statutory obligation is a useful indicator of government tasks in normal times, the more relevant indicators of essential governmental tasks in emergencies are the Critical Infrastructure Protection Act (CIPA), the DPA, executive orders, and the like, which all underscore that ensuring the food supply when an emergency threatens it is among the most important and basic government tasks. CIPA requires the federal government to "provide necessary direction, coordination, and guidance" to accomplish its objectives, which include preventing "any physical or virtual disruption of the operation of the critical infrastructures of the United States." 42 U.S.C. §§5195, 5195c(c)(1). The President has designated "Food and Agriculture" part of the nation's "critical infrastructure," *Presidential Policy Directive—Critical Infrastructure Security and Resilience*, The White House (Feb. 12, 2013), https://bit.ly/3t1vgRZ, and the Departments of

Agriculture and Health and Human Services have recognized their obligation 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. Indeed, even in ordinary times there are numerous programs through which the federal government helps ensure the provision of food where private industry alone may not suffice. *See, e.g.*, 7 U.S.C. §2013(a); 42 U.S.C. §1786(c)(1).[1] Even in ordinary times, then, supplying food is a federal obligation. And that obligation is only heightened during a crisis, as the USDA has recognized. *USDA Strategic Plan*, 2018-2022, 56, https://bit.ly/3AizFnv (noting USDA's objective of "ensuring that in difficult times, food is available to all people in need.").

The panel protested that "[i]t cannot be that the federal government's mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations." Op.13. But Tyson has never contended that the "critical" designation alone suffices to satisfy the "acting under" test. Even in a time of crisis, a private party in an industry designated part of the nation's "critical infrastructure"

[1] To the extent the panel suggested some distinction between the government's "interest in ensuring a stable food supply" and "process[ing] meat for commercial consumption," Op.14, that makes no sense. The government's interest in ensuring the availability of food for consumption and the availability of food for purchase are one and the same, and processing is an essential component in achieving that goal.

must still be acting under federal "'subjection, guidance, or control'" to qualify for federal-officer removal. *Watson*, 551 U.S. at 151. The nursing homes in *Maglioli v. All. HC Holdings LLC* failed to satisfy that test because they claimed only that they had been subject to greater regulation during the early days of the pandemic, not that they had been subject to federal direction or control. 16 F.4th 393, 405 (3d Cir. 2021). Indeed, no other critical industry was subjected to the kind of executive order the President issued regarding the meat-processing industry. Moreover, the designation does go a long way to dispelling the notion that Tyson was doing something other than assisting federal officers with a basic government task. By concluding otherwise, the panel's decision conflicts with *Watson* or *Jacks* and ignores that emergencies can shift the scope of government tasks while heightening the need for a federal forum.

II. The Panel's Demand For Formality And Coercion Conflicts With Decisions From The Supreme Court And Others And Will Hinder Future Responses To National Emergencies.

The panel strayed equally far afield in concluding that the federal government's actions here did not rise to the level of "subjection, guidance, or control" because of the absence of a coercive cooperate-or-else command. *Watson*, 551 U.S. at 151. The panel insisted that the federal government's extraordinary actions and statements "[a]t most … indicate that the federal government was encouraging Tyson—and other industries—to continue to operate normally." Op.15.

That remarkable claim ignores both the unique nature of the communications with the meat-processing industry and the critical context surrounding them.

The federal government did not simply "encourage" Tyson to keep operating. The President himself told industry leaders that they would now be "working hand-in-hand with the federal government" to ensure that "food and essentials are constantly available." Noltemeyer, *supra*. And hand-in-hand they proceeded to work tirelessly, with federal officers from USDA, FSIS, DHS, FEMA, and more, to ensure not just that meat-processing plants *could* remain operational should they choose to do, but that they *would* remain operational, in accordance with federal, not state, directives. All the while—and long before Executive Order 139187 issued — the President made clear 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*.

The panel nonetheless insisted that the federal government "did not direct or enlist Tyson to fulfill a government function or even tell Tyson specifically what to do." Op.15. Even setting aside the problems with the panel's "government function" analysis, *see supra* Part I, that blinks reality. The instruction was quite clear: Stay open if at all possible, in accordance with the operating guidance we are providing. Indeed, the Secretary of Agriculture dispelled any doubt when he issued his DPA-backed letter instructing meat-processing facilities to continue operating or submit written plans to reopen if they had closed. *See* Perdue Letter, *supra*. That

formal instruction did not reflect any seismic shift in the nature of the federal objective or the degree of the federal direction. To the contrary, it underscores that the federal instruction had always been "continue operating," as the federal government stepped in to confirm when state and local officials failed to get the message. *See* 85 Fed. Reg. at 26,313.

Ultimately, the panel's complaint seemed to be that Tyson cannot point to a communication in which a federal official said: "You must stay open or else." But as the Fifth Circuit has recognized, nothing in the DPA "gives any indication that the Government may not seek compliance with its priorities policies by informal means." *E. Air Lines, Inc.*, 532 F.2d at 993. 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.* By giving the President "broad authority" to command private parties as necessary should they refuse to cooperate, the DPA ensures that federal officials can accomplish critical objectives 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 times of national crisis, when "a cumbersome and inflexible administrative process is antithetical to the pressing necessities." *Id.* at 998. And the President made no secret he was applying just such an approach here.

The panel protested that the President did not single out "meat-processing or food supply" when he made clear that the DPA was "in full force." Op.6, 16. But the point is not that this statement alone sufficed. It is that communications made when the DPA is "in full force" cannot be dismissed as mere "encouragement." And that statement did not stand alone, but was part of a pattern of communications from a wide variety of government officials culminating in an executive order under the DPA. Given that the federal government *in fact* ultimately took the extraordinary step of overriding state and local efforts to shut down meat-processing facilities, there can be little doubt that similar formal exercises of coercive DPA authority would have come earlier had facilities refused to continue operating or states imposed in real-time the kind of conflicting duties plaintiffs would retroactively impose. The panel also suggested that even Executive Order 13917 and the Secretary's May 5 letter did not suffice because they did not invoke the DPA's contract prioritization provisions. Op.17 & n.6. But that is just a variation on the same flawed contention that nothing short of a formal, coercive order to prioritize a contract suffices as a DPA directive. *But see E. Air Lines*, 532 F.2d at 992-98.

In short, there is "no authority for the suggestion that a voluntary relationship"—whether voluntary in fact or merely in law—"somehow voids the application of the removal statute." *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 138 (2d Cir. 2008). The driver enlisted to assist federal officers in hot pursuit need

neither demand formal authorization from the FBI Director nor go through a refuse-in-order-to-be-compelled charade to qualify for federal-officer removal. The panel's contrary view "makes little sense in light of the statute's purpose." *Id.* Private actors who willingly come to the federal government's aid during a national emergency should be applauded, not told they should have protested until a formal compulsive command issued. The panel's contrary conclusion contravenes well-settled legal principles and creates perverse incentives that will come back to haunt the federal government in the next national emergency.

On top of all that, the panel decision here conflicts with numerous district court decisions allowing Tyson to remove tort claims in materially identical circumstances. *Fields v. Brown*, 519 F.Supp.3d 388, 395 (E.D. Tex. 2021); *Wazelle v. Tyson Foods, Inc.*, 2021 WL 2637335 at *5 (N.D. Tex. June 25, 2021); *Johnson v. Tyson Foods, Inc.*, 2021 WL 5107723, at *4 (W.D. Tenn. Nov. 3, 2021); *Reed v. Tyson Foods, Inc.*, 2021 WL 5107725, at *4 (W.D. Tenn. Nov. 3, 2021). Other courts have denied Tyson removal, often citing the panel's decision or the district court decision below, and those decisions are now on appeal, including in a consolidated Fifth Circuit appeal that is fully briefed. *Glenn v Tyson Foods, Inc.*, No. 21-40622 (5th Cir.). This conflict underscores that this case involves the kind of difficult questions that have divided jurists and would benefit from review by the full court.

CONCLUSION

This Court should grant the petition for rehearing.

Respectfully submitted,

s/Paul D. Clement

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January 31, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 35(b)(2)(A), I hereby certify that the textual portion of the foregoing brief (exclusive of the tables of contents and authorities, certificates of service and compliance, but including footnotes) contains 3,878 words as determined by the word counting feature of Microsoft Word 2016.

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

Dated: January 31, 2022

s/Paul D. Clement
Paul D. Clement

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Paul D. Clement
Paul D. Clement