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.,
Defendant-Appellants.

OSCAR FERNANDEZ,
Plaintiff-Appellee,

V.

TYSON FOODS, INC., ET AL.,
Defendant-Appellants.

On Appeals from the United States District Court
for the Northern District of Iowa
Nos. 20-cv-2055 & 20-cv-2079

BRIEF OF AMICUS CURIAE THE STATES OF CALIFORNIA, MARYLAND, DELAWARE, MINNESOTA, COLORADO, CONNECTICUT, HAWAII, ILLINOIS, MAINE, MICHIGAN, NEVADA, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, WASHINGTON, AND WISCONSIN AND THE DISTRICT OF COLUMBIA IN SUPPORT OF APPELLEE/APPELLEES

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INTRODUCTION AND INTERESTS OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29, the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin, and the District of Columbia respectfully submit this brief in support of Plaintiffs-Appellees. Defendants-Appellants Tyson Foods, Inc. and Tyson Fresh Meats, Inc. removed this case—which alleges several Iowa state-law causes of action—to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). Tyson now appeals the district court's order granting Plaintiffs-Appellees' motion to remand.

Plaintiffs-Appellees are representatives of the estates of three Tyson employees who died from COVID-19 complications following an outbreak at a Tyson pork-processing facility in Waterloo, Iowa. Although the entire American workforce has been affected by the COVID-19 pandemic in some way, the health and safety risks have been particularly acute for frontline workers employed in the meatpacking and processing industry. Within the first six months of the pandemic, more than 16,000 meat and poultry processing facility workers across 23 states were infected with COVID-19, and 86 died.[1] Outbreaks at meatpacking and processing

[1] *See* Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities — United States, April–May 2020*, 69 Morbidity & Mortality (continued…)

plants have also contributed to the spread of COVID-19 within the surrounding communities, with employees exposed in the workplace bringing the disease home to their families and loved ones.[2]

Tyson's arguments in favor of removal implicate at least two important interests of the *Amici* States. First, as the Supreme Court has long recognized, States have an interest in having state-law claims adjudicated in state court. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (emphasizing "the need to give due regard to the rightful independence of state governments—and more particularly, to the power of the States to provide for

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Wkly. Rep. 887-92 (July 10, 2020), https://bit.ly/3rIIDo8 ("Among 23 states reporting COVID-19 outbreaks in meat and poultry processing facilities, 16,233 cases in 239 facilities occurred, including 86 (0.5%) COVID-19–related deaths."). That same report indicated that "a disproportionate burden of illness and death" among animal slaughtering and processing workers fell on racial and ethnic minorities. *Id*. at 888.

[2] According to the U.S. Department of Agriculture (USDA), rural counties that were meatpacking-dependent had COVID-19 infection rates that were ten times higher than non-meatpacking counties by the middle of April 2020, and seven times higher in May. *See* Cromartie et al., *Rural America at a Glance* pp. 5-6 (USDA 2020) https://bit.ly/3woe5vH; Sternberg, *Chicken Plants – and the Food Supply – Take Center Stage in Delaware's COVID-19 Fight*, U.S. News (May 5, 2020), https://bit.ly/39wRyTs (reporting that in Sussex County, Delaware, a hub for the poultry industry, there were 2,500 reported COVID-19 cases during the early stages of the pandemic, representing almost half of all infections in the State); Pamela Wood, *Poultry industry coronavirus cases continue to increase on Maryland's Eastern Shore*, Baltimore Sun (May 1, 2020), https://bit.ly/3wv3sXQ (reporting that outbreaks at poultry plants in Wicomico County, Maryland caused the county's infection rate to rise to fourth in the state, surpassing the rates in the Baltimore area).

the determination of controversies in their courts" (brackets and internal quotation marks omitted)). That interest, rooted in federalism, has led the Supreme Court to adopt an interpretive rule against "constru[ing] federal jurisdictional statutes more expansively than their language, most fairly read, requires." *Id*. (explaining that this "interpretive stance serves, among other things, to keep state-law actions . . . in state court, and thus to help maintain the constitutional balance between state and federal judiciaries"). If adopted, Tyson's reading of the federal officer removal statute could impair state courts' power to adjudicate state-law claims by offering virtually any private actor operating in a critical infrastructure sector during a national emergency a possible pathway to removal.

Second, *Amici* States have a strong interest in protecting the health, safety, and welfare of our residents, including our workers. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 474 (1996) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens."); *Weems v. Little Rock Police Dep't*, 453 F.3d 1010, 1015 (8th Cir. 2006) (recognizing Arkansas's legitimate government interest in "protecting the health and welfare of its citizens"); *DeCanas v. Bica*, 424 U.S. 351, 356 (1976) (superseded by statute on other grounds) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State."). The States' interest in the robust enforcement of state laws and regulations designed to protect

their residents from harm would be seriously impaired if this Court were to embrace either Tyson's arguments for removal or its assertions that it has colorable federal defenses based on the Defense Production Act (DPA), 50 U.S.C. §§ 4501-4568, and the Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601-695.

ARGUMENT

Tyson's attempt to remove this quintessential state-law tort action from state court pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1), is premised on an impermissibly broad reading of the statutory phrase "acting under" the direction of a federal officer. That interpretation cannot be squared with the statute's text, history, and purpose; it also conflicts with both Supreme Court and Eighth Circuit precedent. This alone provides ample reason to affirm the district court's ruling. But this Court should also reject Tyson's assertion that it has colorable federal defenses under the immunity provision of the Defense Production Act (DPA), 50 U.S.C. § 4557, and preemption under the Federal Meat Inspection Act (FMIA), 21 U.S.C. § 678. Any other result would encourage a wide range of employers to seek removal on the precise theory Tyson advances here. It would improperly expand the federal courts' jurisdiction to entertain state-law claims to the exclusion of state courts. And it would threaten the States' ability to carry out one of their core missions: protecting the health and safety of their residents, including workers.

I. THE FEDERAL OFFICER REMOVAL STATUTE IS LIMITED TO CASES WHERE A STATE-LAW CLAIM WOULD INTERFERE WITH THE ACTIONS OF THE FEDERAL GOVERNMENT

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376 (1994) (citations and internal quotation marks omitted). The Supreme Court has applied a presumption against jurisdiction accordingly, and has insisted that "the burden of establishing the contrary rest upon the party asserting jurisdiction." *Id.* (citations and internal quotation marks omitted); *see also In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 620 (8th Cir. 2010) ("The defendant bears the burden of establishing federal jurisdiction by a preponderance of the evidence.").

Typically, removal is appropriate only if the action "originally could have been filed in federal court," either because the citizenship of the parties is completely diverse (and the amount in controversy is over $75,000), or because the "face of the plaintiff's properly pleaded complaint" reveals that the cause of action arises under federal law. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 & nn. 5-6 (1987). This rule makes the plaintiff the "master of the claim," and permits him or her to "avoid federal jurisdiction by exclusive reliance on state law." *Id.* at 392.

Outside of cases involving diverse parties or federal claims, removal is permitted only in certain narrow, well-defined circumstances. Congress carved out

one such limited exception when it enacted the federal officer removal statute. *See Jefferson Cty., Ala. v. Acker*, 527 U.S. 423, 430-31 (1999) (noting that removal of suits against federal officers is "exceptional" because it permits federal courts to entertain suits despite the "nonfederal cast of the complaint"). Under that provision, a defendant may remove a state-court action filed against "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). This Court has clarified that to establish removal under Section 1442(a)(1), a defendant must show that: (1) it acted under the direction of a federal officer, (2) there was a causal connection between the defendant's actions and the official authority, (3) it has a "colorable federal defense" to the plaintiff's claims, and (4) it is a "person" within the meaning of the statute. *Jacks v. Meridian Res. Co.*, 701 F.3d 1224, 1230 (8th Cir. 2012); *accord Acker*, 527 U.S. at 430-31.[3]

While the Supreme Court has "liberally construed" the federal officer removal statute, it has simultaneously emphasized that the provision's "broad language" is not "limitless." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147 (2007) (internal

[3] Although the *Amici* States focus on the far-reaching implications of concluding that Tyson was "acting under" a federal officer or that it has raised a colorable defense, the *Amici* States also agree with Plaintiffs-Appellees that Tyson has failed to demonstrate any connection between the alleged federal direction that Tyson received and the negligent acts of which Plaintiffs-Appellees complain. *See* Appellees' Br. 45-49.

quotation marks omitted) ("[A] liberal construction can nonetheless find limits in a text's language, context, history, and purposes."). As the Court explained in *Watson*:

> [T]he basic purpose of the statute is to protect the Federal Government from the *interference with its operations* that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Federal Government acting within the scope of their authority.

Id. at 150 (emphasis added; internal quotation marks omitted).

This targeted focus on interference with federal government operations is consistent with Section 1442(a)(1)'s history. *Id.* at 147-51. The original federal officer removal statute was adopted at the close of the War of 1812—a conflict "that was not popular in New England"—in response to a number of lawsuits filed in state-court by ship owners from that region against federal customs officials "charged with enforcing a trade embargo with England." *Id.* at 147-48. The initial removal statute was limited to "federal customs officers and 'any other person aiding or assisting'" them, and was "'obviously an attempt to protect federal officers from interference by hostile state courts.'" *Id*. at 148 (quoting Customs Act of 1815, ch. 31, § 8, 3 Stat. 198 and *Willingham v. Morgan*, 395 U.S. 402, 405 (1969) (alterations omitted)).

Over the next 150 years, Congress amended the statute several times, and eventually expanded its reach to officers outside the "revenue context." *Watson*, 551 U.S. at 148-49. But at no point did Congress "indicate[] any intent to change

the scope of the words, such as 'acting under,' that described the triggering relationship between a private entity and a federal officer." *Id*. at 149. On the contrary, Congress's focus remained the same: because "state courts might prove hostile to federal law, and hence those who enforced the law," the statute was needed to afford federal officers the opportunity to defend themselves in a court "'where the authority of the law was recognized.'" *Id.* (quoting Statement of Sen. Webster, 9 Cong. Deb. 451 (1833)); *see also id.* (explaining that an early amendment to the statute was adopted in response to South Carolina's Nullification Act, which declared federal tariff laws unconstitutional and authorized prosecution of federal agents who collected them).

The Supreme Court's interpretation of Section 1442(a)(1) confirms that Congress's intent was to "prevent hostile States from 'paralyzing' the Federal Government and its initiatives." *Watson*, 551 U.S. at 149-151. For example, in *Tennessee v. Davis*, 100 U.S. 257 (1879), the Court considered the case of a federal revenue officer who shot and killed a person during a raid on an illegal distillery in Tennessee. Tennessee indicted the officer for murder, and the officer removed the action to federal court. *Tennessee*, 100 U.S. at 263. The Court held removal proper under the federal officer removal statute. *Id.* It reasoned that the federal government can "act only through its officers and agents," who must "act within the States." *Id.* And if protection of those officers was left to the state courts, the "operation of the

general government may at any time be arrested at the will of one of its members." *Id.* As the Court explained, the "legislation of a State may be unfriendly" to federal purposes: it may "affix penalties done under the immediate direction of the national government, and in obedience to its laws"; or it "may deny the authority conferred by those laws." *Id.*

Since that time, the Supreme Court has interpreted the federal officer removal statute on several occasions. *See Watson*, 551 U.S. at 149-50 (collecting cases). And each time, it has confirmed that the statute's "'basic' purpose" is to prevent States that are hostile to the federal government from interfering with its ability to function. *Id*. (quoting *Willingham*, 395 U.S. at 406); *see also Willingham*, 395 U.S. at 406 (noting that the statute's purpose is "not hard to discern").

Consistent with the statute's text, history, and purpose, the Supreme Court has also made clear that a private party may invoke the statute only in limited circumstances. *Watson*, 551 U.S. at 152. To seek removal under Section 1442(a)(1), a private actor must demonstrate that it is involved in an effort to "*assist*, or to help *carry out*, the duties or tasks of the federal superior." *Id.* Mere compliance with federal law is not enough to support removal, "even if the regulation is highly detailed and the private party's activities are highly supervised and monitored." *Id*. Rather, removal is only proper if the private party is expressly authorized to act on behalf of the government, or is subject to the government's close supervision,

guidance, or control and enlisted to fulfill a basic government task. *Id.* at 148-49. And such delegations are usually quite explicit. *Cf. id.* at 157 ("[N]either Congress nor federal agencies normally delegate legal authority to private entities without saying that they are doing so.").

Like the Supreme Court, this Court and other federal courts of appeals have emphasized that "not all relationships between private entities or individuals and the federal government suffice to effect removal under the federal officer removal statute." *Jacks*, 701 F.3d at 1231; *see also City of San Mateo v. Chevron Corp.*, 960 F.3d 586, 599 (9th Cir. 2020), *pet. for cert. pending*, U.S. No. 20-884. It is "not enough that a private person or entity merely operates in an area directed, supervised, and monitored by a federal regulatory agency or other such federal entity." *Jacks*, 701 F.3d at 1230. Rather, to enjoy the benefit of federal officer removal, a private party must provide "'candid, specific and positive' allegations that [it was] acting under federal officers when" it engaged in the complained-of conduct. *In re MTBE Prods. Liab. Litig.*, 488 F.3d 112, 129 (2d Cir. 2007) (quoting *Willingham*, 395 U.S. at 408). The party must also demonstrate that it was operating under the federal government's "strict guidance and control" to help it "fulfill basic government needs, accomplish key government tasks, or produce essential government products." *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A) Inc.*, 965 F.3d 792, 823 (10th Cir. 2020), *pet. for cert. pending*, U.S. No.

20-783; *see also id.* (private party must "stand in for critical efforts that the federal superior would be required to undertake itself," citing "wartime production" as the "paradigmatic example").

II. TYSON'S INTERPRETATION OF THE FEDERAL OFFICER REMOVAL STATUTE WOULD CONTRAVENE THE STATUTE'S PURPOSE AND COULD ALLOW REMOVAL OF STATE-LAW CLAIMS BY A BROAD ARRAY OF PRIVATE ENTITIES ACTING WITHOUT GENUINE FEDERAL DIRECTION

Tyson argues that "repeated communications from all levels of the federal government" demonstrate that it has been operating "under the direction of federal officers" since the "earliest days of the COVID-19 crisis." Appellants' Br. 27, 29-30. Plaintiffs-Appellees explain why neither the President's general statements about the importance of feeding the Nation in the midst of a pandemic, nor any of the communications between federal agencies and Tyson, establish the kind of "strict guidance and control" that is a necessary predicate for removal under Section 1442(a)(1). *See* Appellees' Br. 23-26, 40-43; *see also Suncor Energy*, 965 F.3d at 823. *Amici* States write to emphasize how Tyson's expansive understanding of the phrase "acting under" would stretch the federal officer removal statute well beyond its intended purpose, and could allow removal by a wide range of private parties operating with virtually no federal supervision or control.

Tyson claims that the federal government enlisted it in a "paradigmatic 'basic governmental task': ensuring that the national food supply would not be interrupted during an unprecedented national crisis." Appellants' Br. 30. For support, it points

to "[p]hotographs of empty grocery shelves" and the President's statements that the federal government would be working with "food industry leaders" to make sure that "'food and essentials are constantly available.'" *Id.* That argument, if accepted, could open the door to an enormous number of companies seeking to remove state-law claims to federal court. The food and agriculture sector "accounts for roughly one-fifth of the Nation's economic activity."[4] That includes an "estimated 2.1 million farms, 935,000 restaurants, and more than 200,000 registered food manufacturing, processing, and storage facilities."[5] Under Tyson's view, *all* of these employers would be entitled to remove state-law claims arising out of the COVID-19 pandemic.

Other industries could make similar claims. The healthcare and public health sector employs over 14 million workers—more than 10 percent of America's workforce—and includes "publicly accessible healthcare facilities, research centers, suppliers, manufacturers, and other physical assets and vast, complex public-private information technology systems."[6] Throughout the pandemic, the federal government has made statements and engaged in communications similar to those

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[4] Food & Drug Admin. et al., *Food and Agriculture Sector-Specific Plan* 2 (2015), https://bit.ly/3domyGy.

[5] Cybersecurity & Infrastructure Sec. Agency (CISA), *Food and Agriculture Sector* (as of Apr. 7, 2021), https://bit.ly/3sMYHXq.

[6] Dep't of Health & Hum. Servs., *Healthcare and Public Health Sector-Specific Plan* 4, 6 (May 2016), https://bit.ly/2PudaJg.

that Tyson enlists in support of its position here. For example, in the "Coronavirus Guidelines for America" that Tyson points to, *see* Appellants' Br. 9-10, 30-31, the federal government stressed that healthcare services constituted a "critical infrastructure industry," and that workers in that field had a "special responsibility to maintain [their] normal work schedule."[7]

Under Tyson's theory, businesses in the transportation industry could also seek removal under Section 1442(a)(1). In the early days of the pandemic, the President said that the government did not "want the airlines going out of business."[8] And shortly after the Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law, Transportation Secretary Elaine Chao stated:

> We as a nation realize and appreciate the vital role the transportation infrastructure plays in the 'supply chain' to stock our grocery stores, get needed medicine and equipment to hospitals, and allow the rest of us to carry on our daily lives.[9]

Under Tyson's theory, the entire transportation sector—which employs 6% of the U.S. workforce and covers every mode of transportation imaginable—would seek to

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[7] *See, e.g.*, White House, *The President's Coronavirus Guidelines for America* 2 (Mar. 16, 2020), https://bit.ly/3melFEt.

[8] Dawn Gilbertson, *"We don't want airlines going out of business:" Trump says financial help on way as travel grinds to a halt*, USA Today (Mar. 17, 2020), https://bit.ly/3ucGDWR/.

[9] Dep't of Transp., *Secretary Elaine L. Chao's Statement Following the Passage of the Coronavirus Aid, Relief, and Economic Security (CARES) Act Into Law* (Mar. 27, 2020), https://bit.ly/3fy1KPr.

use statements like these as a basis for removing state-law actions arising out of the COVID-19 pandemic.[10]

Indeed, taken to its logical conclusion, Tyson's interpretation of the federal officer removal statute could allow *any* private industry actor to argue that it has been "acting under federal direction" since the pandemic began if it operates in a critical infrastructure sector and has been mentioned by (or has been in communication with) federal officials in connection with the COVID-19 crisis. That contention is entirely inconsistent with the statute's "basic purpose": to prevent hostile States from interfering with the federal government's ability to function. *Watson*, 551 U.S. at 150. Although feeding the Nation is surely an important task, nothing about the general statements cited by Tyson demonstrates that it has been "stand[ing] in for critical efforts" that the federal government "would be required to undertake itself." *Suncor Energy*, 965 F.3d at 823. And permitting removal under these circumstances would undermine the "rightful independence of state

[10] Dep't of Homeland Sec. et al., *Transportation Systems Sector-Specific Plan* 5 (2015), https://bit.ly/3cI5YlL; *see also* CISA, *Transportation Systems Sector* (as of Apr. 7, 2021), https://bit.ly/3rFfSsI (noting that just one sub-sector of the transportation industry "encompasses more than 4 million miles of roadway, more than 600,000 bridges, and more than 350 tunnels" and includes vehicles such as "trucks, including those carrying hazardous materials; other commercial vehicles, including commercial motorcoaches and school buses" as well as "vehicle and driver licensing systems; traffic management systems; and cyber systems used for operational management").

governments" and their power to "provide for the determination of controversies in their courts," and disrupt the "constitutional balance between state and federal judiciaries." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1573 (2016) (brackets and internal quotation marks omitted)).

Nor is there any reason to believe that Tyson's argument would be limited to the present pandemic. If federal officials communicated with or even discussed certain sectors of the economy in coordinating their response to future natural or human-made disasters, employers in those industries would presumably invoke arguments similar to the one Tyson makes here in an effort to remove state-law claims to federal court. *See, e.g.*, *LaCoste v. Pendleton Methodist Hosp., L.L.C.*, 966 So. 2d 519, 527 (La. 2007) (negligence claim brought against hospital alleging failure to maintain adequate emergency power during Hurricane Katrina). Nothing in the federal officer removal statute's text, history, or purpose supports such an expansive result. *See Watson*, 551 U.S. at 147 (Section 1442(a)(1) is not "limitless").

III. TYSON'S ASSERTION THAT IT HAS COLORABLE FEDERAL DEFENSES UNDER THE DPA AND THE FMIA WOULD IMPAIR STATES' ABILITY TO PROTECT WORKERS AND PUBLIC HEALTH

As discussed above, the federal officer removal statute also requires a defendant to establish it has a "colorable federal defense." *See supra* p. 7. Tyson asserts that it has such defenses under the Defense Production Act and the Federal

Meat Inspection Act. Appellants' Br. 47-56. For the reasons Plaintiff-Appellees explain, those assertions are incorrect. Appellees' Br. 49-54. *Amici* States write to underscore the far-reaching consequences of Tyson's argument.

The DPA gives the President certain powers to "maintain and enhance the domestic industrial base" in preparation for, or response to, "natural or man-caused disasters." 50 U.S.C. § 4502(a)(1). It also allows private parties to claim immunity when "compliance with a rule, regulation, or order issued pursuant to" the Act prevents the party from complying with a state law. *Id.* § 4557. Tyson seeks to invoke that protection here, based largely on the same statements and communications it cites in asserting that it has been acting "under the direction" of federal officers for the past 13 months. *See supra* pp. 12-13; Appellants' Br. 30-32, 54.

Tyson's view of the law is implausible, as it would severely impinge upon the States' police powers. It would insulate a wide range of employers (including many of those discussed above, *see supra* pp. 13-16) from a host of state laws and regulations, *without* requiring them to show that they were actually subject to a directive under the DPA or that the directive required them to take action that violated state law. That immunity would presumably apply in enforcement actions brought by States as well as lawsuits filed by private parties. And litigants, like

defendants here, will no doubt assert that immunity in enforcement actions brought by States as well.[11]

Recent and continuing experience with the COVID-19 pandemic underscores how private actors could abuse Tyson's proposed theory of DPA immunity to evade liability for wrongdoing. For example, a business that made misrepresentations in conjunction with the sale of counterfeit N95 masks could claim immunity from state consumer protection laws.[12] Other companies could claim that they operate in a critical industry and seek immunity from prosecution for violating various emergency orders governing public gatherings.[13] As these scenarios show, Tyson's theories, if accepted, could hamstring the States' ability to exercise their traditional police powers to protect the health and safety of their citizens. Nothing about the

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[11] See, e.g., *New Mexico ex rel. Balderas v. Monsanto Co*., 454 F. Supp. 3d 1132, 1145-46 (D.N.M. 2020) (rejecting DPA immunity in the context of an action brought by the State of New Mexico arising from alleged contamination of its natural resources); cf. Rachel Carson, *Maryland imposes $70,000 fine on nursing home where nearly all residents contracted covid-19*, Wash. Post (June 26, 2020), https://wapo.st/2Q99JaT (reporting on action taken by Maryland state agency against a nursing home for failing to properly isolate newly admitted residents).

[12] *See, e.g*., Exec. Order No. 14001, 86 Fed. Reg. 7219 (Jan. 26, 2021) (ordering the federal agencies to use all available legal authorities, including the Defense Production Act, to fill shortfalls of supplies necessary for fighting the pandemic); *White House Office of Trade & Manufacturing Policy Report* 4 (Aug. 2020), https://bit.ly/3cK5agm (noting that the federal government and the private sector had "jointly coordinated the delivery" of N95 respirators, surgical masks and other personal protective equipment).

[13] *Cf. Beshear v. Acree*, 615 S.W.3d 780 (Ky. 2020) (action for declaratory and injunctive relief by business owners challenging emergency orders).

DPA suggests that Congress wanted that result.

Tyson's assertion that FMIA preemption provides it with a colorable federal defense, Appellants' Br. 47-53, is similarly unsupported. Tyson points to no evidence that Congress intended the FMIA to displace state-law actions relating to workplace safety. On the contrary, the federal law regulating in these areas—the Occupational Safety and Health Act (OSHA), 29 U.S.C. §§ 651-678—expressly preserves a role for state-law regulation and common law claims, including those that relate to "injuries, diseases, or death of employees arising out of, or in the course of, employment." *Id.* § 653(b)(4).[14] In this regard, federal law recognizes that the States play the primary role in protecting their workers' health and safety.[15]

Tyson's view of the law, if accepted, would disrupt this carefully calibrated scheme. As explained above, meatpacking and poultry processing workers are

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[14] *See also* 29 U.S.C. § 667; OSHA, *Safety and Health Topics: Meatpacking*, (as of Mar. 30, 2021), https://bit.ly/3cHffKX (describing OSHA's meatpacking standards and noting that State Plans "may have different or more stringent requirements" than federal ones).

[15] Twenty-two States, including Iowa and several of the *Amici* States, have OSHA-approved state health and safety plans that cover the private sector and are enforced by State agencies. 29 C.F.R. §§ 1952.1–1952.22. In States without OSHA-approved State Plans, the federal government sets health and safety standards. *See* 29 U.S.C. § 667. All 50 States have common law remedies and workers compensation statutes that provide an important mechanism for protecting worker health and safety. *See, e.g.* U.S. Dep't of Lab., *Does The Workers' Compensation System Fulfill Its Obligations To Injured Workers?* 20-23 (2016), https://bit.ly/3cHkTNd; Nat'l Emp't Law Project, *State Workers' Compensation Laws and Administrations* (as of Apr. 1, 2021), https://bit.ly/2PLSwEy.

among the most impacted by the pandemic. *See supra* pp 1-2. State enforcement actions and lawsuits by private parties asserting state-law claims have been key lines of defense against the spread of COVID-19 in meatpacking workplaces and communities. Fourteen states have adopted workplace safety standards specifically related to COVID-19.[16] States have also inspected workplaces, prosecuted safety violations, and aided sick workers. For example, California has issued citations and ordered corrective action for state-law COVID-19 violations at multiple meatpacking facilities.[17] In one particularly egregious instance, local health officials in California, acting under local and state health and safety directives, closed a poultry processing plant where over 350 workers tested positive for COVID-19, and eight employees died from the disease.[18] Minnesota has issued occupational health and safety citations and ordered corrective action for state-law COVID-19 violations

[16] *See* Deborah Berkowitz, *Which States and Cities Have Adopted Comprehensive COVID-19 Worker Protections?*, Nat'l Emp't Law Project (Dec. 21, 2020), https://bit.ly/39wTeMK.

[17] Cal/OSHA, *Citations for COVID-19 Related Violations*, (as of Mar. 24, 2021), https://bit.ly/3sLQNxm (Cal/OSHA citations issued to Smithfield Foods, Inc. (Nov. 12, 2020) and Central Valley Meat (Dec. 11, 2020)).

[18] Press Release, Merced Cnty. Dept. of Pub. Health, *Statement Regarding COVID-19 Outbreak at Foster Farms Facility in Livingston* (Aug. 27, 2020), https://bit.ly/3sO9eBS.

at meatpacking facilities.[19] Delaware has issued guidance for COVID-19 safety in the workplace, set up COVID-19 testing sites for meatpacking workers, provided counseling to workers and their families, and provided access to medical care.[20] And in Illinois, local health departments, in coordination with the State, have ordered the temporary closure of workplaces (including meat-processing plants) in response to COVID-19 outbreaks.[21]

State-law has also empowered private parties to address COVID-19 health and safety matters in the meatpacking industry. In Pennsylvania, the family of a meatpacker who died from COVID-19 in April 2020 brought claims against the employer in state court for negligence and willful misrepresentation related to its failure to take proper safety precautions.[22] In Illinois, the family of a woman who

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[19] *See, e.g.*, Minn. OSHA Citation Issued to Pilgrim's Pride, Inc. (as of Apr. 1, 2021), https://bit.ly/3cEldfx; Minn. OSHA Citation Issued to Swift Pork Company (Dba JBS USA, LLC) (as of Apr. 1, 2021), https://bit.ly/2PIsUIx.

[20] *See* Steve Sternberg, *Chicken Plants – and the Food Supply – Take Center Stage in Delaware's COVID-19 Fight*, U.S. News (May 5, 2020), https://bit.ly/39wRyTs; Del. Dep't of Lab., *Delaware Return to Work Guidelines* (July 16, 2020), https://bit.ly/3sKzFIp.

[21] *See, e.g.*, Alexis McAdams, *St. Charles' Smithfield Foods plant closes due to COVID-19 concerns; at least 1 employee hospitalized with virus*, ABC 7 News (Apr. 25, 2020), https://abc7.ws/3m9CfW3; *Rochelle food plant shut down by Ogle County Health Department after COVID-19 outbreak*, ABC 7 News (Apr. 18, 2020), https://abc7.ws/3sJF1no.

[22] *Estate of Enock Benjamin v. JBS S.A et al.*, Philadelphia Court of Common Pleas, May Term 2020, E-filing No. 2005005845; *see also* Emily Czachor, *Wrongful Death*
(continued…)

died of COVID-19 brought a negligence and wrongful death suit against a meatpacking plant for failing to warn and protect employees from the virus.[23] In California, the United Farm Workers union filed a lawsuit against Foster Farms in state court, alleging that its failure to protect workers resulted in an outbreak and a public nuisance under California law.[24] And many other worker safety claims related to COVID-19 infections in the meatpacking industry are being pursued in the administrative state-law context, including workers compensation claims.[25]

FMIA preemption could substantially impair the types of state laws that ensure safe workplaces and provide remedies to those who are harmed by employer negligence. And not only could it shield Tyson from state-tort liability; it might interfere with the States' power to enforce workplace health and safety laws against employers in the meatpacking and processing industry. The end result would be to

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Lawsuit Filed Against Pennsylvania Meat Plant Over Coronavirus Deaths, Newsweek (May 7, 2020), https://bit.ly/3sHYSmF.

[23] Compl. at 2, *Iniguez v. Aurora Packing Co., Inc*., No. 20-L-000372 (Ill. Cir. Ct. Aug. 5, 2020); *see also Illinois Meatpacking Plant Sued After COVID-19 Death*, Associated Press (Aug. 14, 2020), https://bit.ly/3sK0Xyv.

[24] Compl. Inj. at 13–17, *United Farm Workers of America v. Foster Poultry Farms*, No. 20CV-03605 (Cal. Super. Ct. Dec. 17, 2020).

[25] *See* Lauren Weber, *Why So Many COVID-19 Workers' Comp Claims Are Being Rejected*, Wall St. J. (Feb. 14, 2021), https://on.wsj.com/3wgw1bn; Carisa Scott & Rob Low, *JBS Holds Vaccine Clinic While Denying Workers' Compensation Claims Related to COVID-19*, KDVR (Mar. 5, 2021), https://bit.ly/3fyJ6qA.

remove some of the most powerful workplace health and safety protections that workers have in industries that employ some of our society's most vulnerable workers. There is no reason to believe that Congress would have wanted such an extreme result.

CONCLUSION

The judgment of the district court should be affirmed.

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The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

s/ Pamela Hewitt
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