Nos. 21-1010 & 21-1012

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

HUS HARI BULJIC, et al.,
Plaintiffs-Appellees,

v.

TYSON FOODS, INC., et al.,
Defendants-Appellants.

OSCAR FERNANDEZ,
Plaintiff-Appellee,

v.

TYSON FOODS, INC., et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Iowa
Case Nos. 20-cv-02055 & 20-cv-2079
Hon. Linda E. Reade

BRIEF OF *AMICUS CURIAE* PUBLIC JUSTICE, P.C. IN SUPPORT OF PLAINTIFFS-APPELLEES AND IN SUPPORT OF AFFIRMANCE

Karla Gilbride
Randolph T. Chen
PUBLIC JUSTICE, P.C.
1620 L Street NW, Suite 630
Washington, D.C. 20036
(202) 797-8600
kgilbride@publicjustice.net
rchen@publicjustice.net

Counsel for Amicus Curiae Public Justice, P.C.

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DISCLOSURE STATEMENTS

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), Public Justice, P.C. certifies that it does not have a parent corporation and that no publicly held corporation owns stock in it.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Public Justice, P.C., states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than amicus, its members, or its counsel—contributed money that was intended to fund preparation or submission of this brief.

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STATEMENT OF AMICUS CURIAE[1]

Public Justice, P.C. is a national legal advocacy organization. It works to ensure that all sorts of plaintiffs can access the courts and hold corporate wrongdoers accountable. Through its Food Project, Public Justice focuses especially on the ways in which corporate consolidation in the animal agriculture industry harms producers, workers, consumers, animals, and the environment. And through its Access to Justice Project, Public Justice focuses on the overreaching use of procedural doctrines, such as federal preemption, that would limit plaintiffs' ability to pursue justice in the forum of their choice.

Public Justice has served as plaintiffs' counsel or amicus curiae in numerous cases involving federal preemption defenses, including under the Federal Meat Inspection Act. For example, Public Justice represented the plaintiffs in *Hardeman v. Monsanto Co.*, Ninth Circuit Case Nos. 19-16636 and 19-16708, a case involving claims of preemption under the Federal Insecticide, Fungicide, and Rodenticide Act; represented the plaintiffs in *Animal Legal Defense Fund v. Hormel Foods Corp.*, D.D.C. Case No. 1:16-cv-01575, a case involving claims of preemption under the Federal Meat Inspection Act; and served as amicus curiae in *Thornton v. Tyson Foods Inc.*, Tenth Circuit Case No. 20-2124, also involving claims of preemption under the Federal Meat Inspection Act.

[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2).

Finally, Public Justice has litigated the proper scope of federal removal authority in *Home Depot USA, Inc. v. Jackson*, 139 S. Ct. 1743 (2019), where Public Justice represented the respondent. Public Justice has an interest in ensuring that the balance between the federal and state sovereigns and the federal and state court systems enshrined in the U.S. Constitution and by Congress is preserved against attempts by corporations to manipulate federal jurisdictional statutes for their perceived advantage.

INTRODUCTION

Defendants-Appellants Tyson Foods, Inc., its managers, and executives (collectively, "Tyson") can only avail themselves of a federal forum in this state tort action if they can mount a colorable federal defense that arises out of actions taken under the direction of a federal officer. 28 U.S.C. § 1442(a)(1); *Mesa v. California*, 489 U.S. 121, 133-35 (1989). Tyson fails to meet these requirements.

First, Tyson's asserted federal defense relies on the Federal Meat Inspection Act ("FMIA" or the "Act"), a law that is expressly purposed to protect consumers from unsafe meat. The FMIA, Tyson contends, preempts its common-law duty to maintain a reasonably safe workplace. This is not a plausible argument. For one thing, it is atextual, as it ignores the FMIA's plain language expressly cabining the Act's preemptive scope. It also doesn't pass the smell test, inviting the absurd result of transforming a meat inspection statute enacted to protect consumers into a

workplace safety statute that protects slaughterhouses. Tyson's argument relies upon a distorted reading of the Act divorced from both its text and its purpose. It cannot form the basis for a colorable preemption defense.

Second, Tyson's FMIA preemption defense also fails to meet the requirement that it arise out of the purported actions done under a federal officer's direction. Put simply, there is no link between Tyson's FMIA preemption defense and any federal direction. That defense is no different from what any private party could assert in an action devoid of any allegations about federal officers whatsoever. These are the kinds of garden-variety defenses routinely adjudicated by state courts and lack the necessary federal connections to justify removal.

LEGAL BACKGROUND

A. The Federal Meat Inspection Act

The Federal Meat Inspection Act ("FMIA" or the "Act") was enacted in 1906 to protect the consuming public from the dangers of unsafe and adulterated meat. *See* 21 U.S.C. § 601 *et seq.* Congress expressly codified this intent within the FMIA at 21 U.S.C. § 602 (captioned "Congressional Statement of Findings")—which reiterates this consumer-facing purpose as follows (all emphases added):

- It is essential in the public interest that the *health and welfare of consumers be protected* by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.

- Unwholesome, adulterated, or misbranded meat or meat food products . . . are *injurious to the public welfare* . . . .

The FMIA's express preemption clause (which includes a savings clause) is found at 21 U.S.C. § 678, which provides:

> Requirements within the scope of [the FMIA] with respect to premises, facilities and operations of any [meat-processing] establishment . . . which are in addition to, or different than those made under [the FMIA] may not be imposed by any State [. . . .]
>
> This chapter shall not preclude any State . . . from making requirement [sic] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

B. Express Preemption

Federal preemption of state law is "grounded in the Constitution's command that federal law 'shall be the supreme Law of the Land.'" *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Practices Litig.*, 621 F.3d 781, 791 (8th Cir. 2010) (quoting U.S. Const. art. VI, cl. 2). However, courts begin with the presumption that "Congress does not cavalierly pre-empt state-law causes of action," especially in areas traditionally regulated by the state's police power. *Id.* at 792 (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). Thus, in "every preemption case," discerning "congressional purpose is the 'ultimate touchstone.'" *Id.* (quoting *Medtronic*, 518 U.S. at 485-86). This Court has held that it "will not find a [state] law preempted unless it 'was the clear and manifest purpose of Congress,' which 'may be indicated through a statute's express language or through its structure and

purpose.'" *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1022 (8th Cir. 2015) (quoting *Medtronic*, 518 U.S. at 485 and *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008)).

The only federal defense Tyson has raised with respect to the FMIA involves an argument of express preemption.[2] In such cases, the Supreme Court instructs to "focus first on the statutory language, which necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013). The Court has warned that courts "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992). This admonition to consider the entire statute guards against applying preemption with "uncritical literalism, else for all practical purposes pre-emption would never run its course." *Pelkey*, 569 U.S. at 260.

C. Plaintiffs' Claims

In this consolidated appeal, Plaintiffs-Appellees ("Plaintiffs") represent the estates of workers employed by Tyson who contracted COVID-19 at a Tyson pork processing facility in Waterloo, Iowa and succumbed to the disease. *See* A41-42, A273-74. As relevant to federal preemption, there are two common-law claims at

[2] Federal preemption may be either express or implied. *See Aurora Dairy*, 621 F.3d at 792. Here, as relevant to the FMIA, Tyson has only asserted an express preemption defense. *See* Appellant Br. at 47-48.

issue here—one for fraudulent misrepresentation (that alleges Tyson misrepresented the workplace's safety conditions) and the other for gross negligence (that alleges Tyson failed to maintain a safe workplace). *See* A53-67; A283-298. These common-law claims implicate two legal duties: the duty to not deceive and the duty to maintain a reasonably safe workplace.

ARGUMENT

I. TYSON'S FMIA PREEMPTION DEFENSE IS NOT COLORABLE.[3]

Tyson argues that the FMIA preempts its common-law duties. In effect, this argument would have a federal law that has nothing to do with workplace safety entirely displace state workplace safety rules. With state workplace safety protections displaced, the net result is an absence of workplace safety rules altogether because the FMIA does not actually regulate workplace safety. For Tyson (and slaughterhouses nationwide), this would amount to a risk management bonanza—virtual immunity from workplace injury torts.

While advancing this argument may make business sense for Tyson, it is implausible and does not make legal sense. Most fundamentally, it ignores the plain language of the FMIA's preemption clause that expressly limits its

[3] Tyson has also asserted a separate federal defense that the Defense Production Act preempts Plaintiffs' tort claims. *See* Appellant Br. at 53-56. This amicus curiae brief does not respond to this argument, which is addressed in Plaintiffs' brief. *See* Appellee Br. at 50-51.

preemptive scope to the ambit of the Act. That ambit covers protecting consumer health from unsafe meat—and is very far afield from general duties, applicable to all Iowa employers, to refrain from deceiving their employees and to maintain safe workplaces. In addition, Tyson's argument ignores the FMIA's savings clause, which evinces a solicitude for not preempting common-law duties unrelated to the Act. Finally, Tyson's argument invites the absurd result of turning a meat inspection statute enacted to protect consumers into a workplace safety statute that protects meatpacking companies. By any measure, this argument doesn't pass muster and cannot form the basis for a colorable defense.

A. Plaintiffs' tort claims are not "within the scope" of the FMIA's preemption clause.

The FMIA's preemption clause contains an express limitation on its reach: "*Requirements within the scope of* [the FMIA] with respect to premises, facilities and operations of any [meat-processing] establishment . . . which are in addition to, or different than those made under [the FMIA] may not be imposed by any State[.]" 21 U.S.C. § 678 (emphasis added). Thus, for a state rule to be preempted by the FMIA, it must be "within the scope" of the Act. To define the "scope" of the FMIA (and in turn, its preemptive effect), courts examine the "statute's express language" and "its structure and purpose." *Aurora Dairy*, 621 F.3d at 792. This inquiry is guided by the "ultimate touchstone" of discerning Congress's preemptive intent. *Id.*

Here, Congress has aided this inquiry by expressly codifying its intent in the FMIA itself: to protect consumers from the dangers of unsafe meat. *See* 21 U.S.C. § 602. For example, in a provision of the Act captioned "Congressional Statement of Findings," Congress articulated this very purpose: "It is essential in the public interest that the *health and welfare of consumers be protected* by assuring that meat . . . [is] wholesome, not adulterated, and properly marked, labeled, and packaged." *Id.* (emphasis added). The FMIA's consumer-facing purpose defines its scope and places corresponding limits on its preemptive reach.

This Court reached this very conclusion in *United States v. Stanko*, where it restricted the preemptive effect of the FMIA in line with its purpose. 491 F.3d 408 (8th Cir. 2007). In *Stanko*, an individual had been previously convicted for distributing adulterated meat in violation of the FMIA; he was later charged for a separate offense under a statute prohibiting convicted felons from possessing firearms. *Id.* at 410-11. That statute contained an exception for state offense convictions pertaining to "unfair trade practices." *Id.* at 411. Stanko argued he qualified for this exception, contending that his FMIA conviction amounted to a state "unfair trade practices conviction" because the Act "preempted all state unfair-trade-practices laws." *Id.* at 416.

The Court rejected this argument. It first discerned congressional intent from the FMIA's plain language, concluding that the FMIA was a consumer-facing law

whose "primary" purpose is "protecting consumers from unsafe meat." *Id.* at 416-17 (citing 21 U.S.C. § 602). And because preemption does not happen without the "clear and manifest purpose of Congress," this limited purpose narrowed the FMIA's preemptive reach. *Id.* at 418. The Court concluded there was no preemption because "nothing in the text of the FMIA indicates an intent to preempt state unfair-trade-practices laws in general, nor have we found any cases supporting Stanko's claim that it does so." *Id.*

Tyson's argument arrives at the same dead end. The FMIA only preempts requirements within its scope—and for a duty to fall within that scope, there must be some evidence that Congress intended to preempt that duty. But as in *Stanko*, Tyson has failed to point to a single provision of the FMIA that indicates any intent to preempt the common-law duties at issue here—the duty to not deceive employees and the duty to maintain a reasonably safe workplace. This paucity is not surprising. The FMIA is a consumer-facing statute, so it is hardly remarkable that it has nothing to say about these worker-facing duties. And if the FMIA does not address a duty whatsoever, it follows that the duty is not within its scope and therefore is not preempted. If anything, the acute disconnect between the FMIA's focus (consumers) and that of the duties implicated in this case (workers) only further highlights the implausibility that the former preempts the latter.

B. The Supreme Court's decision in *National Meat Association v. Harris* undermines Tyson's argument.

Unable to find anything in the FMIA regarding worker-facing duties, Tyson resorts to citing a couple of sanitation regulations made pursuant to the Act that touch upon workplace safety. *See* Appellant Br. at 49. Tyson selectively quotes *National Meat Association v. Harris* to contend that these stray regulations are enough to evince preemptive intent: "If the federal government 'could issue regulations under the FMIA' governing a particular area, then that area 'must fall within the FMIA's scope[.]'" *Id.* at 48 (quoting *Harris*, 565 U.S. 452, 466 (2012)). This choice quotation is misleading. To start, scouring the Code of Federal Regulations in search of congressional purpose cannot possibly substitute for the FMIA's plain language, "which necessarily contains the best evidence of Congress' pre-emptive intent." *Pelkey*, 569 U.S. at 260.

Moreover, *Harris* undermines Tyson's argument because its preemption analysis focused on the plain language of the FMIA. At issue in *Harris* was whether the FMIA preempted a California animal humane treatment law regulating how slaughterhouses dealt with nonambulatory pigs (i.e., those unable to walk). *Harris*, 565 U.S. at 458-59. The Court found that the law was within the FMIA's scope (and thus preempted) precisely due to *specific provisions of the Act* that "required slaughterhouses to follow prescribed methods of humane handling" and authorized the Food Safety and Inspection Service ("FSIS") to "issue[] detailed

regulations" on humane handling issues. *Id.* at 466 (citing 21 U.S.C. § 603(b) (authorizing regulations to "prevent[] the inhumane slaughtering of livestock").) The complete passage from *Harris* that Tyson selectively quotes is provided in full below (Tyson's quotation in underline):

> Even California conceded at oral argument that the FSIS could issue regulations under the FMIA, similar to [the California law], mandating the euthanasia of nonambulatory swine. If that is so—and it is, because of the FSIS's authority over humane-handling methods—then [the California law's] requirements must fall within the FMIA's scope.

Id. Tyson's quotation distorts this passage's meaning. Critically, it omits the Court's underlying conclusion that humane-handling methods were within the scope of the FMIA because FSIS's "authority" over that issue was *grounded in the express provisions of the Act*. *See id.* (citing 21 U.S.C. §§ 603(b), 610(b)). Put another way, what brought the issue within the FMIA's scope was not the regulation itself, but the Act's statutory language that authorized that regulation. Tyson's cherry-picking gets this exactly backwards.

Therefore, notwithstanding Tyson's reliance on excerpting *Harris*, the case actually undercuts its argument. Specifically, *Harris* and *Stanko* provide consistent interpretations of the FMIA's preemptive effect on different laws—and the results are instructive for this case. In *Harris*, a humane-handling law fell within the FMIA's preemptive scope because the *Act contained express provisions regulating humane handling*. But in *Stanko*, an unfair trade practices law did not fall within

the FMIA's preemptive scope because the *Act had nothing to say about unfair trade practices whatsoever*. Here, Tyson has not cited a single FMIA provision that would cover the workplace safety duties that Plaintiffs allege it violated. That approach tracks *Stanko*, not *Harris*. Thus, there is no preemption here.

C. The FMIA's "savings clause" further clarifies that it does not preempt Plaintiffs' claims.

Further weighing against preemption is the "savings clause" within the FMIA's preemption clause, which provides: "This chapter shall not preclude any State [. . .] from making requirement [sic] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter." 21 U.S.C. § 678. In *Harris*, the Supreme Court acknowledged that under this savings clause, "state laws of general application (*workplace safety regulations*, building codes, etc.) will usually apply to slaughterhouses." *Harris*, 565 U.S. at 467 n.10 (emphasis added). This Court has also held that the presence of an express savings clause reflects a "solicitude for state law" that "counsels hesitation before we conclude that a subject matter governed by state law is substantially subsumed by federal regulations." *Chapman v. Lab One*, 390 F.3d 620, 626-27 (8th Cir. 2004).

The FMIA's savings clause should thus further clarify that Plaintiffs' claims are not preempted by the FMIA. This is because Plaintiffs' tort claims involve common-law rules that are "state laws of general application" that extend to all employers. For example, there can be no question that the duty to maintain a safe

workplace is a law of "general application" covered by the savings clause—that is what the Supreme Court said in *Harris*. Nor can there be much dispute that the duty to not deceive is likewise a generally applicable common-law rule.

Tyson does not have a good response here. As to whether the duty to not deceive is a general rule, Tyson does not address that argument at all. And as to the duty to maintain a safe workplace, Tyson asserts that this is not a general rule, contending that Plaintiffs "seek to impose additional state-law requirements" by alleging a host of protective things that Tyson did not do, like develop sanitation practices and provide protective equipment. Appellant Br. at 52. But this conflates the rule underlying a claim with the evidence provided to sustain it. The duty to provide a safe workplace is a general rule—and that plaintiffs might advance differing evidence to show the breach of the duty does not change its general applicability.

D. Tyson's interpretation of the FMIA's preemptive scope leads to absurd results.

Finally, Tyson's argument falters on untenable absurdities. The FMIA does not regulate workplace safety—so if it preempts state workplace safety rules, this would leave plaintiffs with little recourse to vindicate workplace safety breaches. This is preemption by regulatory vacuum, which has the effect of immunizing employers from common-law workplace safety claims. And if this immunizing federal law happens to only regulate a particular type of employer (like

slaughterhouses), that grant of immunity gets awfully specific. These are the predictably weird results of applying preemption with "uncritical literalism"—which the twin guardrails of congressional intent and statutory language are designed to prevent. *See Pelkey*, 569 U.S. at 260.

This Court's decision in *Watson v. Air Methods Corp.*, 870 F.3d 812 (8th Cir. 2017), provides an instructive example of how textualism guards against such extreme results. In *Watson*, the Court interpreted a broadly worded preemption clause in the federal Airline Deregulation Act ("ADA") that prohibited a state from enforcing laws "related to a price, route, or service of an air carrier." *Id.* at 815 (quoting 49 U.S.C. § 41713(b)(1).) An air carrier's employee brought a common-law claim for wrongful discharge, alleging he was terminated for reporting a safety violation—and the employer argued that the claim was preempted because it was "related to" the air carrier's "service." *Id.* at 817.

The Court found no preemption. *See id.* at 818-20. First, it reasoned that the preemption clause was not limitless—rather, its broad language was "highly elastic and so of limited help" and thus "should be understood in light of [the ADA's] *purpose to promote competition in the industry*." *Id.* at 817, 819 (emphasis added). So because the worker's claim had only a "tenuous, remote, or peripheral" effect on the air carrier's services, it did "not frustrate the ADA's primary economic objectives" of promoting competition and was therefore not preempted. *Id.* 818-19.

In the same vein, laws like those "regulating minimum wages, worker safety, and discrimination" also operated "one or more steps" away from an air carrier's services and were likewise not preempted. *Id.*

Tyson's argument should be rejected on the same grounds. Its underlying gambit is the same. Exploit a preemption clause in a law that regulates a *specific aspect* of an industry (in *Watson*, airline competition; here, food safety) to argue that preemption erases that industry's obligations under a host of *generally applicable* laws governing such areas as workplace safety, wages, and discrimination—none of which the federal law in question actually regulates. But allowing this blunderbuss approach to preemption would interpret a law designed to regulate an industry in one respect to extinguish its duties in all others. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) ("[I]t seems unlikely that Congress considered a relatively obscure [preemption] provision . . . to give pesticide manufacturers virtual immunity from certain forms of tort liability."). It would be, to say the least, a tremendous defensive windfall that the meatpacking industry would have an obvious interest in asserting—yet, despite the FMIA's decades-long existence, Tyson has not cited a single case that so much as entertains this notion.

All this points to an argument that is just too good to be plausible. It relies on sweeping aside the statute's plain language and the express intent of Congress

in favor of a blinkered and single-sentence literalism that would achieve widespread—but selective—immunity for a single industry. This cannot be the basis for a colorable defense.

II. TYSON'S FMIA PREEMPTION DEFENSE DOES NOT ARISE OUT OF ITS ACTIONS ON BEHALF OF A FEDERAL OFFICER.

Plaintiffs explain at length in their brief why the federal officer removal statute codified at 28 U.S.C. § 1442 requires a nexus between the acts allegedly done under a federal officer and the claims at issue in the action being removed, and why that nexus is absent here. But the Supreme Court has long required the same nexus between the colorable federal defense asserted by the removing defendant and its federal-officer activities. *See* Appellee Br. at 49 (quoting *Willingham v. Morgan*, 395 U.S. 402, 406-07 (1969)). That nexus is equally lacking in this case.

Instead, Tyson's FMIA preemption defense, wrongheaded as it is, is a garden-variety express preemption defense based on the text of the FMIA and its implementing regulations. None of the reasons underlying federal officer removal authority require that garden-variety preemption defense to be adjudicated in federal as opposed to state court.

A. Federal-officer removal is premised on the need for a federal forum to adjudicate immunity defenses arising out of federal authority to which state courts might be hostile.

In explaining the scope of federal-officer removal, the Supreme Court has often referred to the unique defenses that federal officers and those acting on their behalf may have by virtue of their official government status, and the importance of being able to pursue those defenses in a federal court. For example, in *Willingham v. Morgan*, the Court agreed with the federal government that one purpose of the federal-officer removal statute "was to provide a federal forum for cases where federal officials must raise defenses arising from their official duties." *Willingham*, 395 U.S. at 405. In that case, the petitioners were officials of a federal penitentiary in Kansas who were sued by an inmate for various alleged abuses. Though the Tenth Circuit recognized that they might have a viable official immunity defense, that court maintained that they needed to assert it in state court. The Supreme Court reversed, concluding that "one of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court" and that in such cases, "Congress has decided that federal officers, and indeed the Federal Government itself, require the protection of a federal forum." *Id.* at 407.

The Court reiterated this holding twelve years later in *Arizona v. Manypenny*, 451 U.S. 232 (1981), in which a federal Border Patrol agent was

prosecuted under Arizona law for shooting and injuring a man he suspected of attempting to cross the border illegally. Again, an official immunity defense was at issue, and the Court explained that "removal under § 1442(a)(1) and its predecessor statutes was meant to ensure a federal forum in any case where a federal official is entitled to raise a defense *arising out of* his official duties." *Id.* at 241 (emphasis added). This congressional desire to ensure a federal forum for litigating such defenses stemmed from a concern that state courts might be infected by "local interests or prejudice" against the federal government or those acting on its behalf. *Id.* at 242. *See also Willingham*, 395 U.S. at 405 (discussing history of federal-officer removal statutes dating back to 1815, where the first such statute was based on regional hostility to the federal government's position in the War of 1812).

The federal government has tried to expand the scope of federal-officer removal to encompass all cases brought against federal officers in state court, even where no federal defense was pled, and the Supreme Court rejected this proposed expansion. *See Mesa*, 489 U.S. at 123-24 (state criminal prosecutions for traffic violations committed by federal postal employees while on duty). In so doing, the Court situated the federal-defense requirement in two phrases in the federal-officer removal statute: "under color of office" and "in the performance of his duties." *Id.*

at 134-35. Both of these phrases explicitly invoke the performance of federal duties as the basis for the federal defense.

And while the Court in *Mesa* referred to "other federal defenses" besides official immunity, the only other defense discussed in *Mesa* was the self-defense averment of the revenue officer who shot and killed an assailant while raiding a still in *Tennessee v. Davis*, 100 U.S. 257 (1879), one of the earliest cases involving federal officer removal. The *Mesa* Court noted that had Davis not been acting on behalf of the federal government when the fatal altercation took place, he would have been a thief with no rights to be at the still and not entitled to argue self-defense. 489 U.S. at 127-28. Thus, rather than encompassing all federal defenses of any sort, the Court in *Mesa* reinforced the notion that the protection of a federal forum was only necessary to avoid state-court hostility "specifically directed against federal officers' efforts to carry out their federally mandated duties." *Id.* at 139.

B. Tyson's garden-variety FMIA preemption defense does not arise out of its supposed federally directed activities.

Putting aside the many problems with Tyson's FMIA preemption defense discussed in Section I, *supra*, there is nothing linking it to Tyson's supposed status as a deputy of the federal government. Indeed, according to Tyson's view, any private employer sued for failing to maintain a safe workplace or for deceiving workers would be able to make the same preemption arguments so long as the

workplace and workers at issue were involved in meat processing. This is at odds with the requirement enunciated in *Willingham*, *Manypenny*, and *Mesa* that the colorable federal defense arise out of the actions taken "under color of" federal authority.

This Court has previously entertained the possibility that a federal preemption defense could satisfy the "colorable federal defense" requirement of 28 U.S.C. § 1442(a). *See Jacks v. Meridian Res. Co., LLC*, 701 F.3d 1224 (8th Cir. 2012). But the preemption argument advanced in *Jacks* was very different from Tyson's argument here. *Jacks* involved the Federal Employees Health Benefits Act of 1959 ("FEHBA"), which established a scheme under which private insurance companies like the defendants in *Jacks* would contract with the federal government to sell insurance to federal employees, under the supervision of the Office of Personnel Management. 701 F.3d at 1227. Moreover, the express preemption provision of FEHBA provided that the terms of those federal contracts superseded state law. *Id.* at 1235. Thus, the express preemption defense invoked by the *Jacks* defendants did arise out of their federal activities as authorized and dictated by FEHBA. *Id.* at 1228, 1235.

Here, by contrast, the express preemption defense advanced by Tyson focuses exclusively on the fact that the claims at issue arose in the context of a meatpacking plant. Any private employer operating a meatpacking plant could

advance the same (ill-fated) preemption defense without first cloaking themselves in the trappings of federal authority. And such preemption defenses without the gloss of federal authority are brought, and resolved, in state courts as a matter of course, including state courts in Iowa. *Se,, e.g.*, *Wermerskirchen v. Can. Nat'l R.R.*, 955 N.W.2d 822, 832 (Iowa 2021) (negligence action involving train traveling at excessive speed preempted by Federal Railroad Safety Act); *Freeman v. Grain Processing Corp.*, 848 N.W.2d 58, 94 (Iowa 2014) (common-law nuisance, trespass, and negligence claims of residents living near milling operation not preempted by Clean Air Act); *Wright v. Am. Cyanamid Co.*, 599 N.W.2d 668, 670 (Iowa 1999) (farmer's products liability and warranty claims were preempted by Federal Insecticide, Fungicide, and Rodenticide Act). Tyson's preemption claims should be resolved in Iowa state court as well, for the federal courts are without jurisdiction to do so.

CONCLUSION

For these reasons, amicus curiae urges the Court to affirm the decision below.

Dated: April 12, 2021

Respectfully submitted,

/s/ Karla Gilbride
Karla Gilbride
Randolph T. Chen
PUBLIC JUSTICE, P.C.

1620 L Street NW, Suite 630
Washington, D.C. 20036
(202) 797-8600
kgilbride@publicjustice.net
rchen@publicjustice.net

Counsel for Amicus Curiae Public Justice, P.C.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because this brief contains 4,876 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5)-(6) because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman font.

Pursuant to Local Rule 28A(h), this brief has been scanned for viruses and is virus-free.

Dated: April 12, 2021

/s/ Karla Gilbride
Karla Gilbride
Counsel for Amicus Curiae
Public Justice, P.C.

CERTIFICATE OF SERVICE

On April 12, 2021, I electronically filed the foregoing Brief of Amicus Curiae Public Justice, P.C. on counsel for all parties electronically via the CM/ECF system, which will notify all counsel of record.

Dated: April 12, 2021

/s/ Karla Gilbride
Karla Gilbride
Counsel for Amicus Curiae Public Justice, P.C.