No. 22-192

IN THE

Supreme Court of the United States

GLENHAVEN HEALTHCARE LLC, a California corporation; CARAVAN OPERATIONS CORP., a California corporation; MATTHEW KARP, an individual; BENJAMIN KARP, an individual,
Petitioners,

v.

JACKIE SALDANA; CELIA SALDANA; RICARDO SALDANA, JR.; MARIA SALDANA, as individuals and as successors and heirs to Ricardo Saldana, deceased,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Public Readiness and Emergency Preparedness Act of 2005, 42 U.S.C. §§ 247d-6d, 247d-6e, imposes limitations on liability for claims based on injuries caused by the "administration to or use by an individual" of certain "countermeasures" designated by the Secretary of Health and Human Services, subject to conditions imposed by the statute and by the Secretary.

The question presented is:

Whether, contrary to the holdings of four courts of appeals and dozens of district courts nationwide, the Act's limits on liability "wholly displace" any state-law claims related to inadequate infection control measures in the context of a pandemic and, thus, divest state courts of the power to adjudicate any tort claims arising out of the COVID-19 pandemic under the doctrine of complete preemption.

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INTRODUCTION

Four courts of appeals, in unanimous opinions, have agreed that the Public Readiness and Emergency Preparedness Act of 2005 (PREP Act) does not completely preempt state-law claims like those brought by Respondents, the survivors of Ricardo Saldana, and, therefore, that such claims cannot be removed to federal court on the basis that they arise under federal law. The result in this case would be the same under the analysis in each of those opinions: a remand to state court for lack of federal subject-matter jurisdiction.

Despite this unanimity, and the multiple independent bases for affirmance reflected in the four appellate opinions (and dozens of district court opinions) rejecting complete preemption, Petitioners claim there is a conflict among the circuits requiring this Court's resolution. That claim is based entirely on language in an opinion of the Third Circuit—an opinion *rejecting* complete preemption—which suggests, at most, that that court *might* find complete preemption in a hypothetical future case involving claims unlike those asserted in either that case or this one. This Court, though, "does not review lower courts' opinions, but their judgments." *Jennings v. Stephens*, 574 U.S. 271, 277 (2015). That language in courts of appeals' opinions could lead to conflicting judgments in hypothetical cases is not a basis for review, particularly when the judgments actually issued by those courts are in harmony.

Specifically, Petitioners' asserted conflict is based on an incorrect description of the Third Circuit's holding in *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 400 (3d Cir. 2021), *pet. for reh'g & en banc*

denied (3d Cir. Feb. 7, 2022). There, contrary to Petitioners' suggestion, the Third Circuit stated that it was *not* holding that any claim that was justiciable under the PREP Act's "willful misconduct" cause of action, 42 U.S.C. § 247d-6d(d)(1), would be completely preempted. Rather, it left open questions that would need to be answered before making such a determination. Until that court (or another court of appeals) answers those questions, no conflict is ripe for review. In any event, the Third Circuit's discussion of the PREP Act's "willful misconduct" cause of action is not implicated here. Like the plaintiffs in *Maglioli*, Respondents do not allege "willful misconduct" *as defined by the PREP Act*.

Indeed, no part of the PREP Act applies to claims such as the ones in this case, as two courts of appeals have recognized. Both the statute's immunity provision and its carveout from immunity for claims that allege "willful misconduct" apply only to claims based on injuries "that ha[ve] a causal relationship with the administration to or use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(2)(B). Here, Respondents allege that Ricardo Saldana contracted and died of COVID-19 because Glenhaven completely failed to take measures to protect its residents from infection by the coronavirus—not because it administered or used any covered countermeasure.

Although Petitioners make much of the need for uniformity in determining which claims are within the scope of the PREP Act, they ignore the remarkable degree of uniformity reflected in state and federal court decisions holding that claims like Respondents' lack the requisite relationship with the

administration or use of covered countermeasures and, therefore, fall outside the scope of the statute. Given the complete inapplicability of the PREP Act, this case provides no occasion for examining whether or when that statute might completely preempt claims within its scope, or for addressing the larger questions about complete preemption raised by the Petition.

Finally, the decision below is correct. Medical malpractice and elder abuse actions like this one are traditionally the province of state courts. As the Third Circuit stated in *Maglioli*, "[t]here is no COVID-19 exception to federalism." 16 F.4th at 400. And while the PREP Act reflects Congress's intent to limit liability under state law by providing an ordinary preemption defense when certain entities comply with public health officials' recommendations, the statute does not so wholly displace state-law claims as to convert them into federal ones, as required for complete preemption under this Court's precedent. Unlike complete preemption statutes, the PREP Act provides no substantive federal law. Even in the context of the willful-misconduct cause of action, the statute explicitly provides that *state* law provides the substantive rules for decision—a regime inconsistent with complete preemption. And the court of appeals in this case did not, as Petitioners suggest, hold that complete preemption of a single claim would be insufficient to create federal jurisdiction over an entire action. Rather, in response to Petitioners' muddled arguments below, which failed to distinguish between ordinary preemption and complete preemption, the court of appeals simply recognized the uncontroversial principle that ordinary preemption of a claim is not the same as complete preemption.

STATEMENT

The PREP Act

Initially enacted in 2005 "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency, the [PREP Act] authorizes the Secretary of Health and Human Services (HHS) to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines." Cong. Res. Serv., *The PREP Act and COVID-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures* 1 (updated April 13, 2022).[1] The purpose of the bill was to ensure that a pandemic flu "vaccine gets developed and to make sure doctors are willing to give it." 151 Cong. Rec. H12244-03 (daily ed. Dec. 18, 2005) (statement of Rep. Deal). Likewise, a 2020 amendment to the PREP Act expanding the scope of potential covered countermeasures to include certain respiratory protective devices, Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3101, 134 Stat. 281, 361, was designed to "boost the availability and supply of critically needed respirator [masks]." 166 Cong. Rec. H1675-09 (daily ed. Mar. 13, 2020) (statement of Rep. Walden).

The Secretary triggers the PREP Act by issuing a declaration determining that a public health emergency exists and "recommending" the "manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures," under certain conditions. 42 U.S.C. § 247d-6d(b)(1). The Secretary may designate only

[1] https://crsreports.congress.gov/product/pdf/LSB/LSB10443.

certain drugs, biological products, and devices authorized or approved for use by the Food and Drug Administration or the National Institute for Occupational Safety and Health as "covered countermeasures." 42 U.S.C. §§ 247d-6d(i)(1)(A)–(D).

Subsection (a) of the PREP Act provides "covered persons" with immunity from liability under state or federal law for "any claim for loss that has a causal relationship with the administration to or use by an individual of a [designated] covered countermeasure," *id.* §§ 247d-6d(a)(1), (a)(2)(B), so long as certain statutory conditions, and additional conditions that may be imposed by the Secretary, are met, *id.* §§ 247d-6d(a)(3), (b)(2).

Subsection (d) creates a carve-out from that immunity, allowing plaintiffs to proceed with suits brought against covered persons "for death or serious physical injury proximately caused by willful misconduct" in the administration or use of a covered countermeasure. *Id.* § 247d-6d(d)(1). Where a plaintiff has made allegations that fulfill the special statutory definition of "willful misconduct," the statute allows plaintiffs to bring such a claim via an "exclusive Federal cause of action" in the United States District Court for the District of Columbia, subject to unique procedural requirements. *Id.* §§ 247d-6d(d)(1), (e).[2] Although the cause of action is federal and has federal *procedural* elements, state law provides "[t]he

[2] The statute defines willful misconduct as "an act or omission that is taken (i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification; *and* (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit." 42 U.S.C. § 247d-6d(c)(1)(A) (emphasis added).

substantive law for decision" for any claim brought pursuant to that cause of action. *Id.* § 247d-6d(e)(2).

The PREP Act also creates an administrative compensation scheme that, like subsection (d), is available only to those who suffered injuries "directly caused by the administration or use of a covered countermeasure" subject to a PREP Act declaration. *Id.* § 247d-6e(a).

On March 10, 2020, HHS Secretary Azar issued a Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID–19. 85 Fed. Reg. 15,198 (published Mar. 17, 2020). The Declaration recommended the "manufacture, testing, development, distribution, administration, and use" of certain countermeasures to combat COVID-19: "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product." *Id.* at 15,202. It specified that the PREP Act's limitations on liability were in effect with respect to claims relating to the administration or use of these countermeasures, where those countermeasures were used consistent with specific conditions. *Id.* at 15,201–03.

Factual background

In 2014, Ricardo Saldana suffered a stroke that left him in need of care beyond what his family could provide. Pet. App. 36a. He moved to Elms Convalescent Hospital, a skilled nursing facility later

acquired by Petitioner Glenhaven Healthcare LLC (Glenhaven). *Id.* 36a–37a. Ricardo was dependent on Glenhaven for all activities of daily life, including feeding, clothing, hydration, hygiene, and mobility, as well as for medical care. *Id.* 37a. But until March 2020, he was stable and able to interact with his wife Celia and his children, Jackie, Maria, and Ricardo, Jr., Respondents here. *Id.*

The Saldanas allege that, despite a range of guidance issued by state and federal agencies, and well-publicized COVID-19 outbreaks in nursing homes throughout the country, Glenhaven failed to take basic safety measures throughout February and March 2020 to protect Ricardo and other residents from the serious risk posed by COVID-19. *Id.* 37a–38a. The Saldanas' complaint focuses on two such failures.

First, the Saldanas allege that Glenhaven failed to provide *any* employees with personal protective equipment (PPE) in the relevant time period and even went so far as to prohibit staff from wearing face coverings. *Id.* 32a, 38a–39a. Under this "no facial covering" policy, one Glenhaven manager repeatedly told staff to take off any masks and bandanas they brought to the facility—including a nurse who pleaded to keep her mask on because she was sick. *Id.* 39a. When a local fire department delivered boxes of masks to the facility, Glenhaven management locked the masks in a cabinet and barred staff from using them. *Id.*

Second, the Saldanas allege that Glenhaven failed to take any steps to isolate staff and residents that it knew had been exposed to, or infected by, the coronavirus. *Id.* 31a–32a, 39a, 41a. Glenhaven allowed at least one staff member who it knew had

been exposed to continue to work. *Id.* 31a–32a, 39a. And without adopting any precautions, Glenhaven allowed exposed residents to have close contact with other residents. *Id.* 32a, 41a. Fearing positive results that it would need to report, Glenhaven failed to conduct any COVID-19 testing until April 7, 2020. *Id.* 40a–41a.

Ricardo Saldana was a victim of these policies. In late March, Glenhaven transferred a resident who it knew had been exposed to the coronavirus into a shared room with Ricardo. *Id.* 41a. Shortly after, Ricardo developed COVID-19. *Id.* 41a. His condition quickly degraded, and he died of COVID-19 on April 13, 2020. *Id.* 41a.

Procedural background

A. District court proceedings

The Saldanas commenced this action against Glenhaven and related entities (together, Glenhaven) in Los Angeles County Superior Court on May 21, 2020, alleging that Glenhaven's failure to take appropriate measures to stop the spread of COVID-19 led to Ricardo's death. The operative complaint contains four state-law claims. First, pursuant to California Welfare and Institutions Code § 15657, the Saldanas allege that Glenhaven's failure to protect Ricardo from health and safety hazards, and its intentional and/or reckless acts exposing him to the coronavirus while he was in its care, constituted elder neglect. Pet. App. 41a–43a. Second, the Saldanas allege that Glenhaven committed willful misconduct, as that term is used in California law, in forbidding staff from wearing appropriate PPE, failing to provide any staff with PPE, and failing to take steps to prevent

exposed staff and residents from infecting others. *Id.* 44a–46a. Third, they allege that Glenhaven's failure to implement policies, procedures, and safety measures necessary to prevent Ricardo's exposure to the coronavirus constituted custodial negligence. *Id.* 46a–47a. Finally, they allege wrongful death based on Glenhaven's acts. *Id.* 47a–48a.

Glenhaven removed the action to the U.S. District Court for the Central District of California on June 24, 2020. 9th Cir. ER 206. The notice of removal asserted that that court had federal-question jurisdiction pursuant to 28 U.S.C. § 1331 based on the PREP Act, and because the Saldanas' action assertedly raised a "significant federal question" under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). 9th Cir. ER 208–12. Alternatively, Glenhaven asserted that the district court had jurisdiction under 28 U.S.C. § 1442(a)(1), because Glenhaven was being sued for actions purportedly taken under the direction of federal officers. *Id.* 212–18.

The Saldanas moved to remand the action to state court. Rejecting each of Glenhaven's asserted bases of federal subject-matter jurisdiction, the district court granted the motion on October 14, 2020. Pet. App. 20a–27a. Of relevance here, with respect to Glenhaven's argument that the district court had federal-question jurisdiction based on complete preemption, the court ruled that the PREP Act is not among the rare statutes with the "extraordinary preemptive force" necessary for complete preemption. *Id.* at 24a (quoting *City of Oakland v. BP PLC*, 969 F.3d 895, 907 (9th Cir. 2020)). The court explained that Glenhaven's complete preemption theory

conflated the scope of the PREP Act's substantive immunity with the jurisdictional question, even though "mere immunity against state law or preemption of state law is not the equivalent of complete preemption and does no[t] provide removal jurisdiction." Pet. App. 24a (quoting *Martin v. Serrano Post Acute LLC*, 2020 WL 5422949 (C.D. Cal. Sept. 10, 2020) and citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987)). Additionally, the court noted that the Saldanas did not allege that Ricardo's death resulted from Glenhaven's administration or use of a covered countermeasure. Pet. App. 23a n.1.

B. Court of appeals proceedings

Glenhaven appealed to the Ninth Circuit. As to complete preemption, Glenhaven argued that the breadth of the immunity conferred by the PREP Act, its federal cause of action for willful misconduct, and its administrative compensation fund "together [] show Congress intended to completely preempt all state law claims." Appellants' Br. 47; *see also* Appellants' Reply 20. Glenhaven also argued that the Saldanas' claims "concern Defendants' administration and use of 'Covered countermeasures.'" Appellants' Br. 51–56. Contrary to the assertion in the petition, Glenhaven did not make any "alternative argument, that, at minimum the PREP Act completely preempted the Saldanas' claim for willful misconduct [under California state law]." Pet. 12. The Saldanas' answering brief even noted that "the Court need not decide if [subsection (d)] claims are completely preempted, because [in its opening brief] Glenhaven does not argue the Saldanas have brought subsection (d) claims." Appellees' Br. 49. Glenhaven's reply brief also did not make any such alternative argument;

rather, it continued to assert that the subsection (d) cause of action was evidence that *all* claims relating to inadequate treatment or preventive measures in the context of a public health emergency were completely preempted. In a footnote, it asserted, without discussion, that "subsection (d) undoubtedly applies" to the Saldanas' willful misconduct claim. Appellants' Reply 24, 24 n.9.

The court of appeals unanimously affirmed the district court's remand order, rejecting each of the theories of federal jurisdiction offered by Petitioners. Pet. App. 1a. As to complete preemption, the court invoked its well-established two-prong test: "(1) did Congress intend to displace a state-law cause of action and (2) did Congress provide a substitute cause of action?" Pet. App. 16a. The court answered both questions in the negative. First, it held that Congress's decision to create a cause of action to be exclusively litigated in federal court for *some* claims as to which the PREP Act otherwise provides a defense undermined the argument that Congress intended that federal courts had jurisdiction to hear *all* claims as to which the PREP Act might provide for ordinary preemption. *Id.* Second, for claims other than those that meet the willful misconduct prerequisites to suit, the court recognized that the PREP Act provides only an administrative claims process, not a substitute cause of action that could provide Article III jurisdiction. *Id.*

The court noted that Glenhaven appeared to argue that the fact "that the PREP Act may preempt one of the Saldanas' claims—the second cause of action under state law for willful misconduct"—is sufficient to establish complete preemption. *Id.* The court

rejected this argument based on the distinction between ordinary preemption and complete preemption, citing *Caterpillar*, 482 U.S. at 393, and Ninth Circuit precedent recognizing this distinction. *Id.* 17a.

The court of appeals did not address the Saldanas' alternative argument that their claims do not relate to injuries caused by the administration to or use by an individual of a covered countermeasure, and are thus outside the scope of the PREP Act, making the question whether the statute completely preempts claims within its scope irrelevant.

Glenhaven petitioned for panel and *en banc* rehearing. No judge requested a response to or vote on the petition, and the panel unanimously denied the petition. Pet. App. 29a.

REASONS FOR DENYING THE WRIT

I. The courts of appeals agree that cases like this one should be remanded to state court.

"Complete preemption" is the label that this Court has given to the scenario where a federal statute creates a right of action and so wholly displaces state law that an attempt to plead a claim under state law must be deemed to invoke the federal right of action. *See Caterpillar*, 482 U.S. at 393. In such cases, the federal statute transforms a claim pleaded solely under state law into one arising under federal law for purposes of 28 U.S.C. § 1331, as state law simply does not exist. *Id.* at 393–94.

Four courts of appeals, including the court of appeals here, have considered arguments advanced by care facilities that the PREP Act completely preempts state-law claims like those brought here. *See*

Manyweather v. Woodlawn Manor, Inc., 40 F.4th 237 (5th Cir. 2022); *Martin v. Petersen Health Ops., LLC*, 37 F.4th 1210 (7th Cir. 2022); *Perez v. Se. SNF, L.L.C.*, No. 21-50399, 2022 WL 9876187 (5th Cir. Mar. 31, 2022); *Mitchell v. Advanced HCS, LLC*, 28 F.4th 580 (5th Cir. 2022); *Maglioli*, 16 F.4th 393; *see also Martin v. Filart*, 2022 WL 576012 (9th Cir. Feb. 25, 2022) (nonprecedential decision resolving appeal argued in tandem with this case). In each case, families of nursing home residents who died of COVID-19 brought state-law claims alleging that their loved ones died because of a failure to take adequate infection control measures to minimize the transmission of COVID-19. All four courts of appeals held that the claims before them were not completely preempted. Dozens of district courts agree.[3] None of these courts,

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[3] *See*, *e.g.*, *Nemeth v. Montefiore*, 2022 WL4779035, at *4–10 (N.D. Ohio Oct. 3, 2022); *Krol v. Cottages at Garden Grove*, 2022 WL 3585766, at *5–6 (N.D.N.Y. Aug. 22, 2022); *Gerber v. Forest View Ctr.*, 2022 WL 3586477, at *6–7 (E.D.N.Y. Aug. 22, 2022); *Cagle v. NHC Healthcare-Md. Heights, LLC*, 2022 WL 2833986, at *6–8 (E.D. Mo. July 20, 2022); *Massamore v. RBRC, Inc.*, --- F. Supp. 3d ---, 2022 WL 989178, at *2–4 (W.D. Ky. Mar. 31, 2022); *Yarnell v. Clinton No. 1, Inc.*, --- F. Supp. 3d ---, 2022 WL 1716244, at *3–5 (W.D. Mo. Mar. 16, 2022); *Rosen v. Montefiore*, 582 F. Supp. 3d 553, 559–61 (N.D. Ohio 2022); *Mason v. Loris Rehab & Nursing Ctr., LLC*, 2021 WL 7541157, at *3–6 (D.S.C. Dec. 16, 2021); *Hudak v. Elmcroft of Sagamore Hills*, 566 F. Supp. 3d 771, 781–88 (N.D. Ohio 2021); *Persons v. CP/AIG-Pensacola Dev., LLC*, 2021 WL 5034377, at *4–6 (N.D. Fla. Sept. 8, 2021); *Dorsett v. Highlands Lake Ctr., LLC*, 557 F. Supp. 3d 1218, 1228–35 (M.D. Fla. 2021); *Leroy v. Hume*, 554 F. Supp. 3d 470, 476–80 (E.D.N.Y. 2021); *Colpits v. NHC Healthcare Clinton, LLC*, 2021 WL 5332436, at *2–4 (D.S.C. July 1, 2021); *Schleider v. GVDB Ops., LLC*, 2021 WL 2143910 (S.D. Fla. May 24, 2021); *Shapnik v. Hebrew Home for the Aged at Riverdale*, 535 F. Supp. 3d 301, 313–22 (S.D.N.Y. 2021); *Wright v. Encompass Health*

(*Footnote continued*)

or any other court of appeals, has found *any* claim to be completely preempted by the PREP Act.[4] And in the two courts of appeals where nursing homes sought rehearing and rehearing en banc, those requests were denied without a single judge even calling for a response. *See* Pet. App. 29a; Order, *Martin v. Filart*, No. 20-56067 (9th Cir. Apr. 18, 2022); Order, *Maglioli*

Rehab. Hosp. of Columbia, Inc., 2021 WL 1177440, at *2–5 (D.S.C. Mar. 29, 2021); *Lopez v. Life Care Ctrs. of Am., Inc.*, 2021 WL 1121034, at *7–15 (D.N.M. Mar. 24, 2021); *Khalek v. S. Denver Rehab., LLC*, 543 F. Supp. 3d 1019, 1025–28 (D. Colo. 2021); *Gwilt v. Harvard Sq. Ret. & Assisted Living*, 537 F. Supp. 3d 1231, 1238–42 (D. Colo. 2021); *Bolton v. Gallatin Ctr. for Rehab. & Healing, LLC*, 535 F. Supp. 3d 709, 718–22 (M.D. Tenn. 2021); *Cowan v. LP Columbia KY, LLC*, 530 F. Supp. 3d 695, 701–04 (W.D. Ky. 2021); *Saunders v. Big Blue Healthcare, Inc.*, 522 F. Supp. 3d 946, 958–64 (D. Kan. 2021); *Gunter v. CCRC OPCO-Freedom Sq., LLC*, 2020 WL 8461513, at *3–4 (M.D. Fla. Oct. 29, 2020); *Eaton v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1184, 1189–95 (D. Kan. 2020). Respondents are only aware of one district court that has found any claims completely preempted by the PREP Act, in a decision that, as that court has acknowledged, has been abrogated by the court of appeals decision in this case. *See Garcia v. Welltower OpCo Grp., LLC*, 522 F. Supp. 3d 731 (C.D. Cal. 2021), *abrogation recognized by Aguilera-Cubitt v. AG Seal Beach, LLC*, 2022 WL 1171028, at *4–5 (C.D. Cal. Apr. 20, 2022).

[4] Appeals from district court remand orders rejecting the same argument in similar cases are currently pending in four other circuits. *See Leroy v. Hume*, 2d Cir. No. 21-2158/2159 (oral argument scheduled Oct. 31, 2022); *Rivera-Zayas v. Our Lady of Consolation Geriatric Care Ctr.*, 2d Cir. No. 21-2164 (oral argument scheduled Oct. 31, 2022); *Hudak v. Elmcroft of Sagamore Hills*, 6th Cir. No. 21-3836 (oral argument scheduled Dec. 7, 2022); *Cagle v. NHC Healthcare*, 8th Cir. No. 22-2757 (awaiting briefing); *Schleider v. GVDB Ops., LLC*, 11th Cir. No. 21-11765 (argued Apr. 8, 2022).

v. Alliance HC Holdings, LLC, No. 20-2833 (3d Cir. Feb. 7, 2022).

All four courts of appeals based their decisions, at least in part, on the well-established principle that a state-law claim cannot be completely preempted unless it comes within the scope of a substitute, exclusive federal cause of action. *See Manyweather*, 40 F.4th at 244; *Martin*, 37 F.4th at 1213–14; *Maglioli*, 16 F.4th at 410; Pet. App. 16a. In considering complete preemption arguments based on other statutes, other courts of appeals have similarly found this principle dispositive. *See*, *e.g.*, *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.), Inc.*, 25 F.4th 1238, 1263 (10th Cir. 2022); *Skidmore v. Norfolk S. Ry. Co.*, 1 F.4th 206, 216–17 (4th Cir. 2021); *Miller v. Bruenger*, 949 F.3d 986, 995 (6th Cir. 2020); *Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 251 (8th Cir. 2012); *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 47–48 (1st Cir. 2008); *Dial v. Healthspring of Ala.*, 541 F.3d 1044, 1047–48 (11th Cir. 2008); *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305–08 (2d Cir. 2004). This principle is central to the doctrine of complete preemption, which recognizes that a federal court has "arising under" jurisdiction pursuant to 28 U.S.C. § 1331 over a claim "pleaded in terms of state law" only when it "is in reality based on federal law." *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 8 (2003); *see also Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004) (holding that complete preemption under ERISA § 502(a)(1)(B) only exists "if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B)"). As the Fifth Circuit explained, "complete preemption can't exist unless the federal courts have been granted jurisdiction over the

purportedly preempted claims." *Manyweather*, 40 F.4th at 244.

In *Maglioli*, the Third Circuit based its holding solely on this ground. That court limited its analysis to the question "whether the [plaintiffs'] claims *could have* been brought under" the PREP Act's exclusive cause of action for claims that allege willful misconduct in the use of a covered countermeasure. 16 F.4th at 411 (quoting *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 452–53 (3d Cir. 2003)). The court held that, because allegations of "conduct that was grossly reckless, willful, and wanton" implicate different causes of action than allegations that conduct was taken with "intent 'to achieve a wrongful purpose,' or with knowledge that [defendants'] actions lacked 'legal or factual justification,'" the plaintiffs' claims could not have been brought under the PREP Act subsection (d) cause of action, and thus there could be no complete preemption. *Id.* at 410–11 (quoting 42 U.S.C. § 247d-6d(c)(1)(A)).

The other circuits that have addressed the question have provided *additional* reasons why the PREP Act does not completely preempt claims like those raised here. In its first two encounters with cases like this one, the Fifth Circuit confined itself to reasoning similar to that in *Maglioli* and rejected nursing homes' complete preemption arguments because, "assuming—without deciding—that the willful-misconduct cause of action is completely preemptive," the negligence-based causes of action asserted could not have been brought under that cause of action and thus could not be completely preempted. *Mitchell*, 28 F.4th at 586–87; *see Perez*, 2022 WL 987187, at *2. Then in *Manyweather*, the Fifth Circuit

held that the nursing home defendant's complete preemption argument failed for an additional reason: Even if the plaintiffs *had* pleaded the intent and knowledge-related elements of "willful misconduct" as defined by the PREP Act, and even if the PREP Act *did* completely preempt claims within the scope of the willful-misconduct cause of action, the claims at issue still would not fall within the scope of the PREP Act cause of action because they did not allege willful misconduct *in the administration or use of a covered countermeasure*. 40 F.4th at 245–46. In that case, the plaintiffs claimed their mother's death from COVID-19 was the result of a nursing home's failure to conduct adequate screening and isolation of residents and staff, and to provide adequate protective gear to staff. *Id.* at 241. Such claims, the court held, did not have a "'causal relationship with the administration … or use' of a covered countermeasure" as necessary for the PREP Act to apply. Rather, the plaintiffs alleged that the nursing home "did not deploy those measures at all." *Id.* at 246. Accordingly, the court could not conclude that the plaintiffs "assert[ed] willful misconduct *under the Act*, even if they do assert willful misconduct of some kind," and thus there could be no complete preemption. *Id.*

In *Martin*, the Seventh Circuit also adopted this additional basis for rejecting complete preemption. As Judge Easterbrook put it, claims about inadequate staffing and failures to isolate sick nurses and residents "are not even arguably" within the scope of the PREP Act. 37 F.4th at 1213. And a claim that a nursing home "*failed to use* masks and other protective equipment" is not a claim that use of those countermeasures caused a resident's death. *Id.* at 1214. Rather, it is "the opposite of a contention that a

covered countermeasure caused harm." *Id.* Like the Ninth Circuit here, the Seventh Circuit also explained that the narrowness of the PREP Act's willful-misconduct cause of action weighed against concluding that the statute completely preempts state-law claims. *Id.* at 1213. Even where the PREP Act applies, the court stated, rather than "wholly replace[]" such claims with a "claim for relief under federal law," the statute simply provides "a defense, to be asserted in state court." *Id.* at 1214.

Glenhaven's petition does not suggest any relevant difference between the claims the Third, Fifth, and Seventh Circuits held were properly remanded and those at issue here. There are none. Because the claims in this suit would be treated the same by every court of appeals to have considered the question, there is no conflict warranting review.

II. Dicta in *Maglioli* is not a basis for this Court's review.

The petition confines its recognition of the decisions by the Fifth and Seventh Circuits in nearly identical cases to a footnote, Pet. 16 n.2, and ignores the Fifth Circuit's *Manyweather* decision entirely. Rather, it focuses exclusively on the Third Circuit's decision in *Maglioli*, asserting that *Maglioli* and the decision below present a conflict warranting review. That assertion rests on a misstatement of *Maglioli*'s holding and a distinction not implicated by this case.

A. *Maglioli* does not hold that the PREP Act completely preempts any claims.

Glenhaven contends that, in *Maglioli,* the Third Circuit held that the PREP Act "completely preempt[s] state-law claims for willful misconduct

related to the use of covered countermeasures during a public health emergency." Pet. 14. That is not the Third Circuit's holding, as that court took care to make clear in "a note on the limits of [its] holding." 14 F.4th at 412. Although the court left open the possibility that "[c]onceivably" some state-law claims could be completely preempted by the PREP Act, *id.*, it "h[e]ld *only* that (1) the estates' negligence claims based on New Jersey law do not fall under the PREP Act's narrow cause of action for willful misconduct, and (2) the PREP Act's compensation fund is not an exclusive federal cause of action triggering removal jurisdiction." *Id.* at 413 (emphasis added). And as to these two holdings, there is no disagreement among the courts of appeals.

As the petition notes, *Maglioli* states that "[t]he PREP Act's language easily satisfies the standard for complete preemption of particular causes of action." 16 F.4th at 409, *partially quoted in* Pet. 14. But the court did not state that the plaintiffs' claims *would* have been completely preempted had they alleged the elements of willful misconduct under the PREP Act. For one, it noted that claims that could be brought under the PREP Act might not be completely preempted where they are supported by "an independent legal duty," although the court found it unnecessary to resolve that question. 16 F.4th at 410 n.11 (citing *Davila*, 542 U.S. at 210; *Hawaii ex rel. Louie v. HSBC Bank Nevada, N.A.*, 761 F.3d 1027, 1037–38 (9th Cir. 2014); *N.J. Carpenters & the Trustees Thereof v. Tishman Constr. Corp. of N.J.*, 760 F.3d 297, 303 (3d Cir. 2014)). In addition, the Third Circuit did not address the alternative grounds for remand on which the district court had relied: that the claims at issue did not relate to injuries caused by the

administration to or use by an individual of a covered countermeasure. *See Maglioli v. Andover Subacute Rehab. Ctr.*, 478 F. Supp. 3d 518, 532 (D.N.J. 2020). That issue would have to be addressed before finding any claim completely preempted because, as one district court in the Third Circuit has noted, a lack of such a relationship precludes a finding of complete preemption even if a plaintiff "assert[s] willful misconduct of some kind." *Milan v. Shenango Presbyterian Seniorcare*, --- F. Supp. 3d ---, 2022 WL 3647826, at *3 (W.D. Pa. Aug. 23, 2022) (quoting *Manyweather*, 40 F.4th at 246).

Whether the Third Circuit might find some claim completely preempted under the PREP Act in some future case is unknown. More than two-and-a-half years into the pandemic, no claims that relate to injuries caused by the administration of covered countermeasures and are based upon willful misconduct as defined by the PREP Act have made their way to that court, or to any other court of appeals. That the Third Circuit left the possibility of complete preemption of such a hypothetical claim open is not a reason for this Court to grant review in this case.[5] "[T]his Court does not sit to satisfy a

[5] In the year since *Maglioli* was decided, no district court in the Third Circuit has found any claim completely preempted by the PREP Act under the *Maglioli* analysis. *See Milan*, 2022 WL 3647826 at *1–3 (rejecting complete preemption argument); *Testa v. Broomall Op. Co.*, --- F. Supp. 3d ---, 2022 WL 3563616, at *7 (E.D. Pa. Aug. 18, 2022) (same); *Morra v. 700 Marvel Rd. Ops., LLC*, 2022 WL 2915639, at *2 (D. Del. July 25, 2022) (same); *Le Carre v. Alliance HC 11 LLC*, 2022 WL 2805639, at *3 (D.N.J. July 18, 2022) (same); *Battista v. Broomall Op. Co.*, 2022 WL 1774262, at *1 (E.D. Pa. June 1, 2022) (same); *Hansen v. Brandywine Nursing & Rehab. Ctr., Inc.*, 2022 WL 608968, at *2

(*Footnote continued*)

scholarly interest" in questions "that, abstractly considered … may present an interesting and solid problem." *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955).

B. This case does not implicate any suggestion in *Maglioli* that some willful misconduct claims might be completely preempted.

Even if the Third Circuit *had* held that a claim is completely preempted where a plaintiff pleads the elements of willful misconduct that allow them to proceed under the federal cause of action, that holding would not be implicated by this case. Under the Third Circuit's analysis in *Maglioli*, the Saldanas' claims are not completely preempted by the PREP Act. Although the claims use the term "willful misconduct" as defined in state law, they do not allege willful misconduct as the PREP Act defines it for purposes of the exclusive federal cause of action it permits. That is, the Saldanas do not "allege or imply that the nursing home[] acted 'intentionally to achieve a wrongful purpose,'" nor "do they claim that the nursing home[] acted 'knowingly without legal or factual justification.'" *Maglioli*, 16 F.4th at 411 (quoting 42 U.S.C. §§ 247d-6d(c)(1)(A)(i) & (A)(ii)). Accordingly, like the claims in *Maglioli*, the Saldanas' claims cannot be completely preempted because they

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(D. Del. Jan. 19, 2022) (same); *Boyle v. Meyer*, 2021 WL 6051439, at *3 (W.D. Pa. Dec. 20, 2021) (same); *Hereford v. Broomall Op. Co.*, 575 F. Supp. 3d 558, 561–62 (E.D. Pa. 2021) (same); *Guyer v. Milton Nursing & Rehab. Ctr., L.P.*, 2021 WL 5112269, at *2–3 (M.D. Pa. Nov. 3, 2021) (same).

do not assert a claim within the scope of the PREP Act's exclusive cause of action.

Below, Petitioners' only argument on this point was in a footnote in their reply brief, where they asserted, without discussion, that a claim for "willful misconduct" under California law is "undoubtedly" equivalent to a PREP Act willful misconduct claim. Appellants' Reply 24 n.9. Under the Third Circuit's reasoning, however, that assertion is incorrect. Although both California law and the PREP Act use the same words, the elements of "willful misconduct" are different in each. And the Saldanas did not plead the elements of PREP Act willful misconduct, as is necessary to open the door to the PREP Act cause of action.

Indeed, the petition does not suggest the Third Circuit would hold that the Saldanas' claims are completely preempted—and it surely would not, because it held in *Maglioli* that claims indistinguishable from the Saldanas were not completely preempted. Petitioners thus seek certiorari to resolve a claimed split among the courts of appeals, under which they lose either way. But "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959). If any conflict existed, its resolution could "await a day when the issue is posed less abstractly." *Id.*; *see also Allen-Bradley Loc. No. 1111, United Elec., Radio & Mach. Workers of Am. v. Wisc. Emp. Rels. Bd.*, 315 U.S. 740, 746 (1942) ("We deal, however, not with the

theoretical disputes but with concrete and specific issues raised by actual cases."). In short, the conflict on which the petition is based is both illusory and irrelevant to the outcome of this case.

III. The alternative bases for affirmance recognized by the Fifth and Seventh Circuits make this case unsuitable for review.

This case is also a poor one to address the question whether the PREP Act completely preempts claims within its scope because claims like the Saldanas' fall outside the scope of the PREP Act, as the Fifth and Seventh Circuits have held. Both the immunity provision and the carveout from that immunity provided for claims based on willful misconduct apply only to "claim[s] for loss that ha[ve] a causal relationship with the administration to or use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(2)(B). The Saldanas do not allege that Ricardo died as a result of such administration or use. Rather, they allege that Ricardo died because Glenhaven allowed infected and exposed staff to care for nursing home residents, did not isolate exposed residents, and prohibited the use of protective facial coverings. Staffing and isolation policies are not covered countermeasures. And the only countermeasures even referenced in Glenhaven's petition are facial coverings and COVID-19 diagnostic tests—both of which the Saldanas alleged Glenhaven did not use *at all* until April 2020, after the exposure to the coronavirus that caused Ricardo's death. *See* Pet. App. 31a–32a, 39a–41. "[T]his is the opposite of a contention that a covered countermeasure caused harm." *Martin*, 37 F.4th at 1214.

The text of the statute cannot logically be read to cover claims based on injuries that are only connected to covered countermeasures via their wholesale *non*-use. *See*, *e.g.*, 42 U.S.C. § 247d-6d(a)(3) (specifying that immunity only applies where" the countermeasure was administered or used" in compliance with certain conditions). Thus, among courts that have considered claims based on allegations of total non-use of covered countermeasures, there is a broad consensus that such claims are not within the scope of the PREP Act, and thus that they cannot be completely preempted by the Act. *See*, *e.g.*, *Manyweather*, 40 F.4th at 245–46; *Martin*, 37 F.4th at 1213–14*; Arbor Mgmt. Servs., LLC v. Hendrix*, 875 S.E.2d 392, 397–98 (Ga. Ct. App. 2022); *Whitehead v. Pine Head Op. Co.*, 75 Misc. 3d 985, 991–92 (N.Y. Sup. Ct. 2022); *Cagle*, 2022 WL 2833986, at *8; *Rosen*, 582 F. Supp. 3d at 560; *Fox v. Cerritos Vista Healthcare Ctr. LLC*, 2021 WL 4902464, at *2 (C.D. Cal. Oct. 20, 2021); *Khalek*, 543 F. Supp. 3d at 1027; *Gwilt*, 537 F. Supp. 3d at 1240–42; *Lopez*, 2021 WL 1121034, at *8–12; *McCalebb v. AG Lynwood, LLC*, 2021 WL 911951, at *5 (C.D. Cal. Mar. 1, 2021); *Lyons v. Cucumber Holdings, LLC*, 520 F. Supp. 3d 1277, 1285–86 (C.D. Cal. 2021); *Sherod v. Comprehensive Healthcare Mgmt. Servs.*, 2020 WL 6140474, at *7–8 (W.D. Pa. Oct. 16, 2020); *Eaton*, 480 F. Supp. 3d at 1261.

As reflected by this consensus, regardless of whether the PREP Act completely preempts claims alleging willful misconduct that can be brought pursuant to the federal cause of action, the result in this case would be the same: The Saldanas' claims belong in state court. Accordingly, this case is particularly unsuitable not only for addressing

Petitioners' arguments about the PREP Act, but also for considering their request that the Court use this case to revisit complete preemption doctrine more broadly. *See* Pet. 26–30.

IV. Hypothetical conflicts in state courts' ordinary preemption analysis do not justify review.

Respondents also contend that this Court should grant review "to ensure the development of a uniform body of law interpreting the PREP Act to limit liability and prevent the continued litigation of meritless claims," because of the *possibility* that state courts may interpret the scope of the PREP Act's substantive provisions differently from one another. Pet. 34–35. Such a possibility is not a reason to grant review. Anytime Congress enacts a federal statutory defense, there is the possibility that different lower courts—whether they be state courts or lower federal courts—will interpret that defense differently. That possibility is insufficient to justify federal jurisdiction, because state courts "are presumed competent to resolve federal issues," including the applicability of federal defenses. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *see also McKesson v. Doe*, 141 S. Ct. 48, 51 (2020) ("[O]ur system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law." (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Instead, this Court's ability to review federal questions decided in state-court cases over which there is no original federal jurisdiction adequately serves the function of assuring uniform application of federal law. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 816 (1986).

In any event, no lack of uniformity in application of PREP Act immunity has arisen. To the contrary, Respondents are aware of only one state appellate court that thus far has considered the applicability of the PREP Act to claims like those brought here, and that decision is consistent with the decisions of the Fifth and Seventh Circuits—finding the PREP Act does not apply. *See Arbor Mgmt.*, 875 S.E.2d at 397–98. At the same time, state courts have faithfully applied the statutory immunity defense to claims, unlike those here, that *do* relate to injuries caused by the administration to or use by an individual of a covered countermeasure.[6] And even if this Court were to hold that federal district courts are the exclusive appropriate venue to adjudicate PREP Act defenses to state-law claims, that decision would not eliminate the possibility of conflict among the 94 federal district courts and thirteen courts of appeals.

V. The decision below is correct.

Complete preemption exists when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar*, 482 U.S. at 393 (quoting *Met. Life Ins. Co. v. Taylor*, 481 U.S. 58,

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[6] *See*, *e.g.*, *Parker v. St. Lawrence Cty. Pub. Health Dep't*, 102 A.D.3d 140 (N.Y. App. Div. 2012) (holding PREP Act barred claims relating to administration of vaccine to plaintiff's child); *De Becker v. UHS of Del., Inc.*, 2022 WL 4587481, at *2–3 (Nev. Dist. Ct. July 6, 2022) (dismissing claim related to administration of remdesivir to treat decedent as barred by PREP Act); *Mills v. Hartford Health Care Corp.*, 2021 WL 4895676, *4–5 (Conn. Super. Ct. Sept. 27, 2021) (dismissing claims based on administration of COVID-test to decedent under PREP Act).

65 (1987)). In such extraordinary instances, the state-law cause of action is "wholly displaced." *Beneficial*, 539 U.S. at 8. To create complete preemption, a federal law must do more than narrow the situations in which state-law causes of actions may be brought. Rather, as Petitioners conceded below, complete preemption exists only when "Congress has occupied the field so thoroughly as to leave no room for state law causes of action at all." Appellants' Reply 19 (citing *Caterpillar*, 482 U.S. at 389)); *see also Miller*, 949 F.3d at 994 (holding that, for complete preemption to apply, "the statute must engulf an entire area of state law"). As numerous courts have held, including the court below, the PREP Act does not meet this standard. Pet. 16a–17a.

Complete preemption is rare. This Court has recognized only three statutes with the requisite force to give rise to it: section 301 of the Labor Management Relations Act (LMRA), section 502(a) of the Employee Retirement Income Security Act (ERISA), and sections 85 and 86 of the National Bank Act. *Beneficial*, 539 U.S. at 6–8.[7] Where these statutes completely preempt state-law claims, those claims are transformed into ones for a violation of federal law. A state-law claim that is completely preempted by ERISA, for example, is based on a violation of duties imposed by ERISA—and not any other independent legal duty. *See Davila*, 542 U.S. at 210. A state-law claim that is completely preempted by the LMRA is

[7] Justice Scalia, joined by Justice Thomas, opined that the doctrine "cannot be squared with bedrock principles of removal jurisdiction," lacks "a theoretical foundation," and should not be expanded to additional statutes. *See Beneficial*, 539 U.S. at 17, 21 (Scalia, J., dissenting).

one "controlled by [the] federal substantive law" that exclusively governs covered collective bargaining agreements. *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557, 560 (1968). And a state-law claim that is completely preempted by the National Bank Act is one governed by federal "substantive limits on the rates of interest that national banks may charge." *Beneficial*, 539 U.S. at 9.

The PREP Act does not impose any federal substantive standards on anyone. It is, "at its core, an immunity statute; it does not create rights, duties, or obligations." *Dorsett*, 557 F. Supp. 3d at 1230 (citation omitted); *Gwilt*, 537 F. Supp. 3d at 1249 (same). Unlike ERISA, the LMRA, and the National Bank Act, the PREP Act creates no substantive standards whose violation gives rise to a cause of action independent of state law. Even where a plaintiff brings a claim under the federal willful misconduct cause of action, the Act explicitly provides that *state* law is the source of "the substantive law for decision," barring a conflict with federal law. 42 U.S.C. § 247d-6d(e)(2). The elements of PREP Act willful misconduct allow a plaintiff to escape the ordinary preemption defense, but the affirmative elements of the claim derive from state law.

The PREP Act is thus incompatible with complete preemption, which rests on the notion that "Congress intended the scope of a federal law to be so broad as to entirely replace any state-law claim." *Franciscan Skemp Healthcare, Inc. v. Cent. States Joint Bd. Health & Welfare Tr. Fund*, 538 F.3d 594, 596 (7th Cir. 2008) (quoted in *Marin Gen. Hosp. v. Modesto & Empire Traction Co.*, 581 F.3d 941, 945 (9th Cir. 2009)

and *Montefiore Med. Ctr. v. Teamsters Loc. 272*, 642 F.3d 321, 328 (2d Cir. 2011)). "By incorporating state law into the federal action, the Act does not entirely displace state law, making the Act unlike other instances of complete preemption." *Matthews v. Centrus Energy Corp.*, 15 F.4th 714, 721 (6th Cir. 2021) (discussing similar feature of the Price-Anderson Act). Rather, it restricts the circumstances in which state-law claims are available to remedy injuries caused by covered countermeasures to those involving "willful misconduct" as defined by the statute, and it provides a federal district court jurisdiction, and a procedural device (the "exclusive Federal cause of action"), for adjudicating claims in those scenarios.[8] The PREP Act thus expressly preserves state-law claims that meet the willful-misconduct requirement. As to all other claims within its scope, the statute "does not transform the plaintiff's state-law claims into federal claims but rather extinguishes them altogether," *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998). Since no state-law claims are ever transformed into purely federal ones, the statute cannot create complete preemption. *See* Pet. App. 16a (concluding that these features demonstrate that "the PREP Act is not a complete preemption statute").

[8] The jurisdiction explicitly provided for in subsection (d) is different from the federal-question jurisdiction that arises from complete preemption. *See Beneficial*, 539 U.S. at 8 (distinguishing between expressly provided jurisdiction over state-law claims, as in the Price-Anderson Act, and complete preemption); *see also Matthews*, 15 F.4th at 721 (making same distinction); *Cook v. Rockwell Int'l Corp.*, 790 F.3d 1088, 1097 (10th Cir. 2015) (Gorsuch, J.) (same).

The petition critiques the Ninth Circuit's observation that Glenhaven's argument "that the PREP Act may preempt one of the Saldanas' claims—the second cause of action under state law for willful misconduct" was insufficient to establish complete preemption. Pet. App. 16a–17a. Petitioners equate this observation with a "holding that the PREP Act would have to completely preempt all state-law claims in order to completely preempt claims alleging willful misconduct." Pet. 17. But neither the words of the Ninth Circuit nor their context support this reading.

The Ninth Circuit did not say that "complete preemption" of one of the Saldanas' claims would be insufficient to establish jurisdiction under the doctrine. It stated only that "preemption" of one of those claims would be insufficient to establish jurisdiction, explaining that a "finding that one claim *may* be preempted is different than finding that the 'federal statutory scheme is so comprehensive that it *entirely supplants* state law causes of action.'" Pet. App. 17a (quoting *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 947 (9th Cir. 2014)). The citations that follow this sentence are instructive—citing *Caterpillar* for "distinguishing between complete preemption and raising a federal defense," and citing *Toumajian v. Frailey*, 135 F.3d 648, 654 (9th Cir. 1998), for "distinguishing between complete preemption and 'conflict preemption' of a particular claim." Pet. App. 17a. The court was plainly correct that ordinary preemption of a single claim is insufficient to establish federal jurisdiction under a theory of complete preemption. *See, e.g.*, *Taylor*, 481 U.S. at 66; *City of Hoboken v. Chevron Corp.*, 45 F.4th 699, 707 (3d Cir. 2022) (noting that complete preemption "lets courts recast a state-law claim as a

federal one," but "ordinary preemption defenses cannot work this alchemy").

That the court of appeals' holding was limited to this point is further confirmed by Petitioners' failure even to argue below that any of the Saldanas' claims were completely preempted *because they were willful misconduct claims*. *See supra* at 10–11. Instead, Petitioners' argument was that the PREP Act indiscriminately provided complete preemption as to all claims alleging that they wrongfully failed to protect residents against COVID-19, and they never suggested a theory under which complete preemption might apply to one claim but not others. Thus, the court of appeals would have had no reason to hold that complete preemption of one claim but not others would be insufficient for federal jurisdiction.

VI. Glenhaven's assertion of a meritless federal-officer removal argument is not a reason for review.

Finally, Petitioners are wrong to suggest that the Court should review the decision below, despite the remarkable consensus of the lower courts, because the Court is likely to have few opportunities to address the issue. *See* Pet. 36. Petitioners' argument rests on the circumstance that appellate review of the otherwise unappealable remand order in this case was available only because Petitioners' notice of removal included a meritless federal-officer removal claim (the lower courts' rejection of which Petitioners do not challenge). *See BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1538 (2021). Four courts of appeals, however, have already decided appeals in similar procedural postures, and appeals are pending in four others. *See supra* n.4. And although the Third, Fifth,

Seventh, and Ninth Circuits have rejected the federal-officer theory raised by Petitioners, and no party has yet asked this Court to review those holdings, nursing homes and similar facilities continue to assert that theory as a basis for federal jurisdiction in removing similar cases to courts—even within circuits that have already rejected the theory. *See*, *e.g.*, *Kiernan v. E. Northport Res. Health Care Facility Inc.*, E.D.N.Y. No. 2:22-cv-05853 (removed Sept. 30, 2022); *Acebes v. Residences at Royal Bellingham Inc.*, C.D. Cal. No. 2:22-cv-6936 (removed Sept. 27, 2022); *Morra*, 2022 WL 2915639 (remanding case removed on federal officer grounds in May 2022); *Dillard v. Blue Island SLF, LLC*, N.D. Ill. No. 1:22-cv-03244 (removed June 21, 2022); *Hearden v. Windsor Redding Care Center LLC*, E.D. Cal. No. 2:22-cv-00994 (removed June 6, 2022). Thus, if the question posed in the petition may at some point warrant review, there is no reason to believe that cases presenting the issue will not be subject to appellate review, and potential review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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