No. 20-56194

In the United States Court of Appeals For the Ninth Circuit

JACKIE SALDANA, ET AL.
Plaintiffs and Appellees,

v.

GLENHAVEN HEALTHCARE LLC, ET AL.
Defendants and Appellants.

Appeal from the United States District Court
for the District of California – Western Division
Case No. 2:20-cv-05631-FMO-MAA
The Honorable Judge Fernando M. Olguin

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INTRODUCTION

Plaintiffs' response that federal officer jurisdiction does not exist because Glenhaven was not under "detailed federal supervision," performing "federal government functions" ignores the realities of the role Glenhaven played in responding to the national public health emergency posed by the coronavirus pandemic, and at whose behest. Glenhaven was enlisted by the federal government as a critical infrastructure business under the federal government's direction and

intensely close supervision to aid the federal government in ensuring continued provision of critical services during the public health crisis. Glenhaven has shown all of the requirements for federal officer jurisdiction over plaintiffs' claims exist.

The United States Supreme Court recently resolved a circuit split and held that a court of appeal has jurisdiction to review all of the grounds for removal under 28 U.S.C. § 1447, subdivision (d) raised by defendants.[1] Consequently, the merits of Glenhaven's claim that the PREP Act is a complete preemption statute must be addressed and once again compels the conclusion that federal question jurisdiction exists. The PREP Act completely encompasses plaintiffs' claims. Each of the elements giving rise to federal question jurisdiction under Ninth Circuit jurisprudence are met by the PREP Act.

Finally, plaintiffs' claims, even if characterized as state-law claims, necessarily raise a federal issue which is actually disputed, substantial, and capable of resolution in federal court without disrupting the federal-state balance, as established under the *Grable* doctrine.[2] This Court should find federal jurisdiction exists and reverse the District Court's order remanding the case to state court.

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[1] *BP P.LC. v. Mayor and City Council of Baltimore, No. 19-1189, decided May 17, 2021.*

[2] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308 (2005).

LEGAL ARGUMENT

I. Federal Officer Jurisdiction Exists.

A. The "acting under" requirement for federal officer jurisdiction is broadly construed.

Plaintiffs argue that for a private entity to qualify for federal officer removal, the entity must be "essentially acting as an arm of the federal government." (Ans. Brf. at 25.) Amicus Justice For Aging claims the federal officer doctrine does not apply because under *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142, 153 (2007), Glenhaven simply complied with federal rules, laws and regulations and thus was not "acting under" a federal official. (Amicus Brf. at 19.)

The *Watson* test is not so narrow. As *Watson* explains, the "acting under" relationship test requires only that there be some "subjection, guidance, or control" on the part of the federal government and that the private person's conduct amounts to an effort "to assist, or to help carry out, the duties or tasks of the federal superior." 551 U.S. at 151-52. The "acting under" requirement is broad and is also to be liberally construed. *Watson*, 551 U.S. 142, at 147.

The Supreme Court has provided clear instructions about removals under the federal officer removal statute. "Although Defendants bear the burden of establishing jurisdiction as the party seeking removal, the federal officer removal statute must be 'liberally construed.'" *Watson*, 551 U.S. at 150 (internal citation omitted); *see also Willingham*, 395 U.S. at 407 (noting that the liberal

policy in favor of federal officer removal "should not be frustrated by a narrow, grudging interpretation of § 1442(a)(1)"). "As such, the ordinary 'presumption against removal' does not apply." *Id.* (quoting *Betzner v. Boeing Co.*, 910 F.3d 1010, 1014 (7th Cir. 2018)).

B. Glenhaven was "acting under" a federal officer as part of the critical infrastructure responding to the pandemic.

Plaintiffs contend Glenhaven has merely shown it was complying with ordinary regulatory guidance. (Ans. Brf. at 26-27.) According to Plaintiffs, the guidance did not change the relationship between the federal government and Glenhaven "from one of regulation to one of delegation." (*Id.*) Plaintiffs are mistaken. Glenhaven has established it was more than just highly regulated or subject to general oversight by the federal government.

Prior to COVID-19, regulation of nursing facilities was general in nature, even if prodigious in volume, as Amicus suggests. However, as a direct result of the COVID-19 pandemic, there was a clear and sudden paradigm shift as skilled nursing facilities were designated "critical infrastructure" by the federal government.[3] Since then, through the federal directives issued by the CDC, CMS, and the California Department of Public Health surveyors contracted by CMS, federal authorities have explicitly guided operational decisions related to the clinical pandemic response in skilled nursing facilities.

[3] https://files.covid19.ca.gov/pdf/EssentialCriticalInfrastructureWorkers.pdf

Facilities were ordered to restrict visitation, cancel communal dining, and implement active screening of staff for fever and respiratory symptoms. Facilities were instructed on, among other things, which patients and staff to test for COVID-19, under what circumstances to use and how to conserve PPE, when to permit staff who had COVID-19 to return to work, how to mitigate staff shortages including when to permit COVID-19 positive but asymptomatic staff to return to work, and how to handle the isolation of residents infected with COVID-19 and those under investigation for COVID-19. *Id.* These very detailed clinical directives and instructions represented a marked departure from the regulatory structure which existed before the pandemic. Designating the activities of certain businesses as "critical infrastructure" enabled the federal government to enlist the aid of private parties to ensure the continued operation of any infrastructure "so vital to the United States that [its] incapacity or destruction … would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters." 42 U.S.C. § 5195c(e).

When the federal government instructs private parties on how to carry on their business during a national emergency it is enlisting those parties to carry out the duty of the government itself to ensure the continued provision of "services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States." 42 U.S.C. § 5195c(b)(3).

In arguing Glenhaven was not "acting under" a federal officer, Plaintiffs and Amicus ignore the central role of CDC in the pandemic. Given the shortages of PPE, the federal government was telling nursing homes to disregard the usual standard of care in favor of a crisis standard. Crisis standards of care are designed to provide cover for doctors and other health care workers who are forced by circumstances to provide less than the highest quality of care.[4] Thus, on March 17, 2020, CDC provided that during periods of known PPE shortages, nursing homes were not required to comply with the commensurate standards of care. [RJN-210-223.]

These strategies can hardly be viewed as optional. Nursing homes were not free to ignore these guidelines. CDC was guided by the need to protect the public health in an emergency and was less concerned with protecting the health of individual patients in any given situation. While Plaintiffs and Amicus insist nothing changed in the relationship between Defendants and the federal government, their claim rings hollow in the context of a response to a public health emergency affecting the entire nation.

The assertion that federal jurisdiction under *Watson* does not apply to highly regulated industries is misguided. Critically, *Watson*

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[4] "Crisis standards of care guide decision-making designed to achieve the best outcome for a group of patients rather than focusing on an individual patient." https://www.aamc.org/coronavirus/faq-crisis-standards-care.

simply holds federal regulation *by itself*—even if highly detailed—cannot establish a federal officer relationship with a private party. *Id*. at 152. As *Watson* explains, the relationship "typically involves 'subjection, guidance, or control,'" but at a minimum, "must involve an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Id*. at 151. Defendants certainly assisted and helped carry out the duties or tasks of the federal agency as part of the nation's critical infrastructure and, as such, acted on behalf of the federal government for purposes of federal officer removal jurisdiction, which soundly distinguishes this case from *Watson*.[5]

Plaintiffs argue Glenhaven's view of federal officer jurisdiction would bring all COVID-19 related claims against all entities complying with CDC guidelines into federal court. (Ans. Brf. at 28-29.) The assertion of federal jurisdiction over the claims at issue in this case does not pose the imaginary threat conjured by Plaintiffs. Nursing facilities have a different role to play than do amusement parks, airlines or homeless shelters. They bear a critical infrastructure designation, are closely and extensively monitored, and were allocated additional funding under the CARES Act and additional resources to address the need for critical supplies to continue operations in

[5] Skilled nursing facilities have been designated as a critical infrastructure industry by the Cybersecurity and Infrastructure Security Agency. https://www.cisa.gov/sites/default/files/publications/ECIW_4.0_Guidance_on_Essential_Critical_Infrastructure_Workers_Final3_508_0.pdf

accordance with CDC guidance. *See Fields v. Brown,* No. 6:20-cv-00475, 2021 U.S. Dist. LEXIS 26946 (E.D. Tex. Feb. 11, 2021)(meatpacking plant acted under federal officer and removal was appropriate where meatpacking plant designated as critical infrastructure, was closely monitored by the Department of Agriculture, and Congress allocated additional funding to assure they had the resources to adequately supervise meatpacking plants).

Furthermore, nursing homes were enlisted by the federal government to fulfill the government's task of ensuring that these facilities could assist in the safe transfer and admission of patients from maxed out hospitals to free up beds for the presumed influx of COVID-19 patients. Nursing homes played a special and unique role in addressing the public health emergency under close monitoring and directives of the federal government that warrant the conclusion they were "acting under" a federal officer for removal jurisdiction.

C. A causal nexus exists between plaintiffs' claim and the actions taken by Glenhaven pursuant to federal direction.

As established, Glenhaven was acting under federal direction in conducting its operations at the time of the events alleged in Plaintiffs' complaint. Plaintiffs engage in semantic gymnastics to avoid the clear causal nexus demonstrated here by labelling Defendants' conduct regarding PPE and testing as a "policy" of inaction. (Ans. Brf. at 33.)

Defendant satisfies the "nexus" or "causation" requirement for federal officer jurisdiction, despite Plaintiffs' semantics. The causal connection requires the conduct to have been undertaken "for or relating to" a federal office. To meet this requirement, "it is sufficient for there to be a connection or association between the act in question and the federal office." *In re Commonwealth's Motion to Appoint Couns. Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 471 (3rd Cir. 2015). Plaintiffs' complaint specifically alleges a deficiency in Glenhaven's response to the pandemic and their actions concerning use, allocation, and administration of PPE, as well as infection control procedures to prevent the transmission and spread of COVID-19. There is a clear causal nexus between Plaintiffs' claims and the actions taken by Defendant pursuant to federal direction.

D. Glenhaven has a colorable defense based on federal law.

Plaintiffs contend the third and fourth elements of the four requirements for application of the PREP Act are not met to establish Glenhaven has met the "low, 'colorable' [defense] threshold." (Ans. Brf. at 34.) Plaintiffs incorrectly argue Glenhaven has not shown Plaintiffs' claims arise out of, relate to, or result from the administration to or the use by an individual of a covered countermeasure. (Ans. Brf. at 34.)

Plaintiffs first contend their claims do not relate to "covered countermeasures." (Ans. Brf. at 35.) But, they do. Plaintiffs allegations concern covered countermeasures such as facemasks and testing as part of the alleged failures to protect Mr. Saldana. The January 8, 2021

Advisory Opinion 21-01 provides that "[a] program planner is someone who is involved in providing or allocating covered countermeasures. Program planning inherently involves the allocation of resources and when those resources are scarce, some individuals are going to be denied access to them. Therefore, decision-making that leads to the non-use of covered countermeasures by certain individuals is expressly covered by the PREP Act." Although Advisory Opinion 21-01 states that claims of "nonfeasance . . . that [] result[] in non-use" re not subject to subsection (a)(1), Plaintiffs' allegations reference an alleged affirmative action regarding facemasks, testing and other conduct, not a mere nonfeasance.

The "use" versus "non-use" argument resurrected by Plaintiffs has been put to rest by the Fourth Amendment and OGC Advisory Opinion, and as confirmed by the Biden Administration in the more recent amendments to the PREP Act. By its plain terms, the PREP act reaches "all claims for loss caused by, *arising out of, relating to*, or resulting from the administration to or the use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(1)(emphasis added). By comparison, in the ERISA context, the words "relates to" have been interpreted to apply to circumstances where there is "a connection with or reference" to an employee benefit plan. *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 96-97 (1983). ERISA preemption, therefore, has been held to apply where there is a failure to provide a promised pension plan, and not just to the affirmative enforcement or administration of a pension plan. *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1076-77

(7th Cir. 1992). Had Congress intended the narrower construction advanced by Plaintiffs, it would have written the PREP Act to encompass loss only "caused by" the administration or use of a covered countermeasure and would have deleted the words "arising out of, relating to." It is a fundamental rule of statutory interpretation that courts are required to "give effect to every clause and word of a statute and be reluctant to treat statutory terms as mere surplusage." *Free Speech Coalition, Inc. v. Attorney General of the United States*, 677 F.3d 519, 539 (3d Cir. 2012) (citation omitted).

The Fourth Amendment adopts the correct construction and makes clear "there can be situations where not administering a covered countermeasure to a particular individual can fall within the PREP Act and this Declaration's liability protections." 85 Fed. Reg. 79194. The Fourth Amendment also clarifies "not administering a covered countermeasure" can fall within the PREP Act. 85 Fed. Reg. 79191. As just one example, the non-use of a covered countermeasure, such as PPE in the face of a shortage, "relates to" the administration of a covered countermeasure. Plaintiffs allegations confirm that they at least arguably fall within the PREP Act.

Advisory Opinion 20-04 point blank states that "'administration' is broader than the 'physical provision' [and] encompasses 'activities related to management and operation of programs and locations for providing countermeasures to recipients…." [RJN-142.]

Plaintiffs' position is also based on a heightened proof standard that is not applicable. First, a colorable defense need only be *plausible*. *Defender Ass'n*, 790 F.3d at 474. A colorable defense based on federal law must only be "colorable," and need not be "clearly sustainable," as the purpose for the removal statute is to assure that the validity of the defense is tried in federal court. *Willingham v. Morgan*, 395 U.S. 402, 407 (1969). In making a colorable federal defense analysis, courts do not make final merits decisions, but must view the defense most favorably for the defendants. *Jefferson County v. Acker*, 527 U.S. 423, 432 (1999). "[O]ne of the most important reasons for removal is to have the validity of the defense of official immunity tried in a federal court;" for this reason, the Supreme Court has ". . . rejected a narrow, grudging" approach when analyzing whether a defendant had raised a colorable federal defense. *Jefferson Cty. v. Acker*, 527 U.S. 423, 431 (1999).

Second, whether certain PPE are, or are not, covered countermeasures is not controlling. Plaintiffs allege the facilities negligently administered and allocated PPE to individuals within the facility. ER-221. The use of countermeasures, such as PPE and testing, is inextricably intertwined with any and all responses to COVID-19.[6]

[6] The March 17, 2020 Declaration expanded the categories of "covered countermeasures" eligible for immunity to include any device used to treat, diagnose, cure, prevent or mitigate COVID-19 or its spread. The Declaration was subsequently amended to add respiratory

II. The PREP Act Completely Preempts Plaintiffs' Claims.

A. Federal jurisdiction exists over Plaintiffs' claims under the PREP Act.

In interpreting the PREP Act, the HHS Secretary has repeatedly emphasized the need for complete preemption to promote a uniform interpretation of the PREP Act and provide a consistent pathway to address the national pandemic, as Congress intended. Viewing the PREP Act as a complete preemption statute is particularly appropriate where, as here, what is at stake is a national, integrated response to a public health emergency requiring uniform regulation to advance its purposes.

Plaintiffs argue assertion of the PREP Act as a defense does not provide a basis for removal to federal court. (Ans. Brf. at 45.) Plaintiffs misunderstand Glenhaven's contentions. The question for complete preemption purposes is whether the PREP Act has the effect of "transform[ing]" a state-law cause of action into one arising under federal law because Congress has occupied the field so thoroughly as to leave no room for state law causes of action at all. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987). The proper analysis requires an examination of all of the PREP Act's moving parts, as whole, to determine whether Congress left any causes of action to the states. Indeed, federal preemption "may be either express or implied, and

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protective devices like N95 masks to the list of covered countermeasures. 85 Fed. Reg. 21012, 21014 (Apr. 15, 2020).

'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In the absence of explicit statutory language, complete preemption "may be inferred from a 'scheme of federal regulation … so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

Reading the statute as a whole, the PREP Act provides for broad immunity, preempts conflicting state laws, creates an exclusive federal cause of action for willful misconduct to be heard in an exclusive federal venue, and establishes an administrative remedy supported by a no-fault benefits compensation fund. 42 U.S.C. §§ 247d-6d(a)(1)-(2), (d)(1), (e)(1), (e)(5), § 247d-6e(d)(1). Together, these provisions show Congress intended to completely preempt all state law claims. *Parker v. St. Lawrence Cnty. Pub. Health Dep't,* 102 A.D. 3d 140, 143-45 (N.Y. App. Div. 2012). The PREP Act is one of the federal statutes that have such "extraordinary pre-emptive power" that they "convert an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.,* 768 F.3d 938, 947 (9th Cir. 2014) (quoting *Met. Life Ins. Co. v. Taylor,* 481 U.S. 58, 65 (1987)).

Despite Plaintiffs' assertion there is a "growing consensus" against finding complete preemption under the PREP Act, several courts have concluded the PREP Act is such a completely preemptive statute. In *Garcia v. Welltower OpCo Group LLC*, No. 8:20-CV-02250, at *8-9 (C.D. Cal. Feb. 10, 2021), the court concluded the PREP Act is a complete preemption statute because it agreed with the agency's interpretation of the PREP Act as a complete preemption statute set forth in Advisory Opinion 21-01. *Id.*

Likewise, in *Rachal v. Natchitoches Nursing & Rehabilitation Center LLC,* No. 1:21-cv-00334-DCJ-JPM, at *3, fn. 3 (W.D. La. Apr. 30, 2021) ("*Rachal*"), the court acknowledged the varying conclusions reached by district courts across the country and concluded the PREP Act is a complete preemption statute that creates a federal cause of action.[7] The court illustrated its conclusion that the PREP Act meets the elements of a complete preemption statute by comparing the PREP Act to the analogous statutory scheme in the Air Transportation Safety and System Stabilization Act of 2001 ("ATSSSA"), which the Second Circuit held was a complete preemption statute in *In re WTC Disaster Site,* 414 F.3d 352 (2d Cir. 2005). *Id*. *Rachal* pointed out both statutes provide a Fund for relief without litigation, an immunity

[7] While Plaintiffs characterize the various district court rulings on the subject of complete preemption as a "growing consensus" (Ans. Brf. at 45), the *Rachal* decision (and the earlier *Garcia* decision) is further evidence of the yet unsettled nature of the issue and that quantity does not prevail over quality.

provision, a federal cause of action as the exclusive judicial remedy, and an exclusive venue for all federal suits. *Id.* The court found it significant that the PREP Act's composition is:

> [V]ery similar in that it: (i) creates a Covered Countermeasure Process Fund to provide relief, without litigation, to eligible individuals for 'covered injuries' directly caused by the administration or use of a 'covered countermeasure;' (ii) provides immunity to 'covered persons,' except in the case of 'willful misconduct;' (iii) creates an exclusive federal cause of action for damages against a covered person for willful misconduct; and (iv) provides that the federal court in the District of Columbia is the exclusive federal venue for suits on the federal cause of action.
> *Rachal,* at *3, fn. 3.

Accordingly, the court in *Rachal* concluded the PREP Act's explicit provisions, taken together, "demonstrate Congress's intent that the PREP Act exclusively encompass 'claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure.'" *Id.*

Plaintiffs incorrectly argue neither of the requirements for complete preemption articulated by this Court in *Hansen v. Grp. Health Coop.,* 902 F.3d 1051, 1057 (9th Cir. 2018)—preemption of a state-law cause of action and substitution with a federal cause of action—are met here. (Ans. Brf. at 47.) As the *Rachal* case illustrates, both requirements are met by the PREP Act.[8] As previously addressed,

[8] Plaintiffs' assertion only three statutes give rise to federal jurisdiction via complete preemption (Ans. Brf. at 47) ignores cases in which

Plaintiffs' claims are causally connected to the use or administration of a covered countermeasure.

Furthermore, Plaintiffs incorrectly argue Congress has provided in the PREP Act only an "immunity statute" but not a federal cause of action "for the vast majority of claims to which subsection (a)(1) applies." (Ans. Brf. at 48.) Plaintiffs argue simplistically that the PREP Act preempted certain claims "but replaced them with nothing." (*Id.* at 49.) However, as noted, explicit statutory language is *not* required. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (An intent may be inferred from a "scheme of federal regulation... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.").

Plaintiffs argue the federal cause of action created for willful misconduct in 42 U.S.C. § 247d-6d(d), somehow weighs against the completely preemptive effect of the PREP Act. (Ans. Brf. at 49.) Not so.

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numerous statutes have been found to be completely preemptive, including *In re WTC Disaster Site,* 414 F.3d 352 (2d Cir. 2005)(the ATSSSA); *Hoskins v. Bekins Van Lines,* 343 F.3d 769 (5th Cir. 2003) (Carmack Amendment to Interstate Commerce Act); *Bastien v. AT&T Wireless Servs., Inc.,* 205 F.3d 983 (7th Cir. 2000) (Federal Communications Act); *see also* 14C Charles Alan Wright et al., *Federal Practice and Procedure* § 3722.2, nn. 47-57 (2018) (collecting cases under various statutes).

The creation of an exclusive federal cause of action for willful misconduct is a compelling indication the PREP Act is a complete preemption statute.[9]

So, too, does the existence of an administrative compensation fund comport with the completely preemptive effect of the PREP Act. Plaintiffs point to *Moore-Thomas v. Alaska Airlines, Inc.,* 553 F.3d 1241, 1245-46 (9th Cir. 2009), as instructive, but the case is inapposite.

In *Moore-Thomas,* the court concluded the Railway Labor Act does not provide an exclusive federal cause of action because it did not allow disputes to be filed initially in federal court, but instead required use of first, an internal dispute-resolution process and then by a adjustment board before exclusive federal jurisdiction rests with the federal court. *Id.* at 1245.[10]

The Railway Labor Act scheme, however, does not parallel that contained in the PREP Act. Further, Plaintiffs myopically cherry-pick certain provisions of the PREP Act without considering all of its

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[9] Plaintiffs' contention the Court need not decide if willful misconduct claims are completely preempted "because Glenhaven does not argue the Saldanas have brought subsection (d) claims" (Ans. Brf. at 49) is mistaken. Plaintiffs' complaint specifically alleges a separate willful misconduct cause of action to which subsection (d) undoubtedly applies. [ER-221, 230-233.]

[10] Whether the RLA has complete preemptive effect is the subject of an unresolved circuit split. *Sullivan v. Am Airlines, Inc.,* 424 F.3d 267, 277 & n. 9 (2d Cir. 2005).

components. Complete preemption rests on the fact the PREP Act creates an exclusively federal cause of action, has an exhaustion requirement for claims involving willful misconduct, contains a strong preemption provision, and a creates a special administrative compensation fund for claims for injuries—all of which *in toto* entirely displace Plaintiffs' state law claims.

After mischaracterizing subsection (a)(1) as an "ordinary immunity defense," Plaintiffs rely on *Parker v. St. Lawrence County Public Health Department,* 102 A.D.3d 140 (N.Y. App. Div. 2012), as an example of a state court being "competent" to decide the applicability of such an "ordinary immunity defense." According to Plaintiffs, this somehow undermines the broad power Congress granted HHS to declare the application of the PREP Act as a complete preemption statute. (Ans. Brf. at 51 & n. 16.)

Parker, one of the few published cases actually addressing the PREP Act's preemptive effect considered "the breadth of the preemption clause together with the sweeping language of the statute's immunity provision" to conclude Congress intended to preempt all state law tort claims arising from the administration of covered countermeasures. *Parker,* 102 A.D.3d at 143-44. *Parker* relied on the express preemption clause, § 247d-6d(b)(8), as providing further confirmation of complete preemption. Support for this view is found in the Department of Justice's Statement of Interest filed in *Bolton v. Gallatin Center for Rehabilitation, LLC,* No. 3:30-cv-00683 (M.D. Tenn. Jan. 19. 2021), which sets forth the official position of the United States with respect to

the enforcement of the PREP Act as a complete preemption statute. [RJN-19.]

The mere fact a state court correctly concluded the PREP Act completely preempted the claims asserted does not undermine the extraordinarily broad power Congress granted HHS, which has concluded "[t]he plain language of the PREP Act makes clear that there is complete preemption of state law" and "preemption of State law is justified to respond to the nation-wide public health emergency caused by COVID-19. . . ." 86 Fed. Reg. 7873; RJN-168.

B. The HHS Secretary's Declarations and the United States' Position on Complete Preemption Are Entitled to Deference.

Seeking to ignore all contrary authority supporting the completely preemptive nature of the PREP Act, Plaintiffs contend nothing the HHS Secretary, its Office of General Counsel or the United States say about the PREP Act as a complete preemption statute is entitled to deference, or really to any consideration at all. (Ans. Brf. at 52-57.)

In *Garcia v. Welltower OpCo Group*, No. SACV 20-02250JVS(KESx), 2021 U.S. Dist. LEXIS 25738 (C.D. Cal. Feb. 10, 2021), the court gave deference to the HHS's interpretation in Advisory Opinion 21-01, issued January 8, 2021, which affirmed that the PREP Act is a complete preemption statute. *Id.* at *17. The court concluded it agreed with the agency's interpretation of the PREP Act and it was entitled to at least some deference. *Id.* at 16. And, as the court correctly

noted, just because the Advisory Opinions are not binding law or formal rules "does not render them irrelevant." *Id.*

In *Rachal, supra* (at p. 11), the court found it appropriate to give some deference to the HHS's interpretation of the PREP, "given: (i) the PREP Act's broad grant of authority to the HHS Secretary; (ii) the Secretary's express incorporation of the OGC's Advisory Opinions into the Declarations for purposes of construing the PREP Act; (iii) the complexity of the relevant statutory provisions; (iv) the technical nature of the subject matter; and (v) the need for uniformity in the judiciary's interpretation of the PREP Act across the United States," citing *Chevron, Inc. v. NDRC, Inc.,* 467 U.S. 837, 843 (1984) and *United States v. Mead Corp.,* 533 U.S. 218, 220 (2001). The court also found the HHS's interpretation of the PREP Act and its scope to be reasonable, and thus it carries "at least some added persuasive force" and may "seek a respect proportional to [their] power to persuade," where *Chevron* deference is inapplicable, citing *Kornman & Associates, Inc. v. United States,* 527 F.3d 443, 455 (5th Cir. 2008). *Id.*

Plaintiffs cite several cases for the proposition that an agency's position on jurisdiction is not entitled to deference under *Chevron.* (Ans. Brf. at 53.) However, Congress delegated to the Secretary the authority to issue declarations and to specify conditions for covered countermeasures and how they are effectuated to address threats to health that constitute a public health emergency. 42 U.S.C. § 247d-6d(b)(1). Congress expressly made the Secretary's determinations non-reviewable. *Id.* at § 247d-6d(b)(7) ("No court of

the United States, or of any State, shall have subject matter jurisdiction to review, whether by mandamus or otherwise, any action by the Secretary under this subsection."). The cases cited by Plaintiffs are inapplicable under this statutory scheme.

Plaintiffs' criticism of Advisory Opinion 21-01, the Fifth Amendment to the Declaration, and the Statement of Interest filed by the United States in *Bolton*—each of which affirm the PREP Act is a complete preemption statute—is also unavailing. (Ans. Brf. at 54-57.) Advisory Opinion 21-01 recognized the legal prerequisites to a completely preemptive statute, likened the PREP Act's provisions to those found to be completely preemptive in cases cited in the opinion, and concluded the application of the legal principles set forth in the cited authorities compelled the conclusion the PREP Act is a complete preemption statute because it "establishes [] a federal cause of action, administrative or judicial, as the only viable claim [and] vests exclusive jurisdiction in a federal court." [RJN-162.] The opinion's reasoning is clearly set forth. Plaintiffs' criticisms are merely Plaintiffs' disagreements with the opinion.

The Fifth Amendment to the Declaration reiterates the Secretary's position that "the plain language of the PREP Act makes clear there is complete preemption of state law as described above." 86 Fed. Reg. at 7874. Plaintiffs ask the Court to ignore this part of the Secretary's Declaration without articulating a valid reason to do so.

Finally, Plaintiffs attack the United States' Statement of Interest filed in the *Bolton* case. [RJN-25.] Plaintiffs criticize the Statement of Interest because of its refusal to take a position on whether the claims in that case or any other case are completely preempted by the PREP Act. (Ans. Brf. at 56.) As the federal government explained, the United States was not a party to the litigation and thus took no position on whether the Act applies to the claims in that case. "However, the United States has an interest in having the PREP Act applied uniformly across jurisdictions and across public health emergencies." [RJN-20.] As did the HHS Secretary and the Office of General Counsel, the United States concluded the PREP Act completely preempts state law claims and reading the PREP Act as completely preemptive "accords with the reasons Congress enacted the law. An effective response to national health emergencies depends on the prompt and willing cooperation of private partners" to aid in "the nation's ability to protect itself from epidemics and pandemics." [*Id.* at 27.]

III. Federal Jurisdiction Is Conferred By the *Grable* Doctrine.

Grable explains that state law claims containing substantial embedded federal issues should be litigated in federal court. "The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable,* 545 U.S. at 314.

The Secretary's Fourth Amended Declaration explicitly invokes *Grable* and confirms, after due analysis, that "there are substantial federal legal and policy issues . . . in having a unified, whole-of-nation response to the COVID-19 pandemic among federal, state, local, and private-sector entities." 85 Fed. Reg. 79194. OGC Advisory Opinion 21-04 confirms the Secretary's position as the underlying basis for invoking the *Grable* doctrine to the claims asserted here. [RJN-164-165.]

In accordance with *Grable,* the Secretary analyzed the "congressionally approved balance of state and federal judicial responsibilities," 545 U.S. at 314, and determined that an exclusive federal forum was warranted given the unprecedented health emergency.

For these reasons, Plaintiffs' assertion (Ans. Brf. at 58) that their complaint does not "necessarily raise" any issues of federal law is incorrect. At a minimum, by pleading a "willful misconduct" cause of action and seeking punitive damages, Plaintiffs have placed their claims squarely and exclusively in the United States District Court for the District of Columbia pursuant to 42 U.S.C. § 247d-6d(e)(1). More broadly, Plaintiffs' claims are premised exclusively on the COVID-19 outbreak and directly implicate federal directives to nursing homes as members of the nation's critical infrastructure on how to combat the pandemic sweeping the nation.

The analysis in *Dennis v. Hart,* 724 F.3d 1249, 1253 (9th Cir. 2013), relied on by Plaintiffs (Ans. Brf. at 60), is inapposite. Plaintiffs' claims raise significant federal issues and the PREP Act is not merely raised as a "defense." *Grable's* embedded federal issue doctrine creates an exception to the well-pleaded complaint rule that Plaintiffs' artful pleading cannot avoid. *Mikulski v. Centerior Energy Corp.,* 501 F.3d 555, 560 (6th Cir. 2007); *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.,* 693 F.3d 1195, 1203-04 (10th Cir. 2012); *New York v. Shinnecock Indian Nation,* 686 F.3d 133, 141 (2d Cir. 2012). Under *Grable,* all that is required is for a federal issue to be "necessarily raised," not that a federal issue must actually be an "essential element" of plaintiff's claims. *Grable,* 545 U.S. at 318. Contrary to plaintiffs' assertion (Ans. Brf. at 58), the question is whether the federal issue is substantial and embedded, not whether it is an "essential" element of the plaintiff's claim.

The Secretary's informed judgment regarding the need for a consistent, nationwide approach in addressing COVID-related state law claims is grounded in the Secretary's decision-making authority conferred by Congress to strike the appropriate Federal-state balance through PREP Act declarations. [RJN-159] This overriding federal interest raises a substantial question of federal law and rests on the advantages to having these issues decided in a federal forum, thus supporting federal jurisdiction consistent with *Grable. Grable,* 545 U.S. at 313 [*Grable* jurisdiction requires "a serious federal interest in claiming the advantages thought to be inherent in a federal forum"].

The *Dupervil* decision Plaintiffs rely on to discredit the Secretary's and Office of General Counsel's determination that cases arising under the PREP Act belong in federal court (Ans. Brf. at 61), misconstrued *Grable* in ruling that the PREP Act was not an "essential element" of any of Plaintiff's claims. As discussed above, *Grable* does not impose such a requirement. Furthermore, *Dupervil* refused to give any deference to Advisory Opinion 21-01, largely based on boilerplate language at the end of the Advisory Opinion that it "does not have the force or effect of law." 2021 U.S. Dist. LEXIS 20257, at *27-28. In addition, *Dupervil* gave the Advisory Opinion no weight stating incorrectly the opinion cited no cases "for [the] proposition that an exclusive federal administrative remedy is sufficient for complete preemption." *Dupervil,* at *29. The Advisory Opinion *did* cite case law and provided an analytical framework. None of the reasons given in *Dupervil* or by Plaintiffs for ignoring the Secretary's determination that federal question jurisdiction exists pursuant to *Grable* are accurate or proper.

As a parting shot, Plaintiffs unsurprisingly raise the specter of a "flood of cases" arriving in federal court that would upset the federal-state balance. (Ans. Brf. at 62.) But, Plaintiffs' generalizations carry no weight in light of the Secretary's considered and correct determination that there are "substantial federal legal and policy issues, and substantial federal legal and policy interests within the meaning of *Grable* . . . in having a unified whole-of-nation response to the COVID-19 pandemic. . . ." 85 Fed. Reg. at 79197; [RJN-158].

Plaintiffs desire to control the narrative and avoid federal jurisdiction through artful pleading cannot overcome the substantial federal legal policy issues and interests in having these cases decided in a uniform and consistent manner to encourage an effective response to the global COVID-19 pandemic.

CONCLUSION

Appellants request that this Court reverse the district court's order granting Plaintiffs' motion to remand.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
FRAP 27-1(d) and FRAP 32-3
FOR CASE NUMBER 20-56194

Pursuant to Federal Rules of Appellate Procedure, rules 27-1(d) and 32-3, I certify that the Appellants' Reply Brief is proportionately spaced, has a typeface of 14-point or more and contains 6,149 words.

DATED: May 19, 2021

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No. 20-56194

In the United States Court of Appeals for the Ninth Circuit

JACKIE SALDANA, ET AL.
Plaintiffs and Appellees,

v.

GLENHAVEN HEALTHCARE LLC, ET AL.
Defendants and Appellants.

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

REPLY BRIEF OF APPELLANTS GLENHAVEN HEALTHCARE LLC, CARAVAN OPERATIONS CORP., MATTHEW KARP and BENJAMIN KARP

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Janis Kent
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