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March 21, 2023

**VIA ECF**

Ms. Catherine O'Hagan Wolfe
Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: *Rivera-Zayas v. Our Lady of Consolation Geriatric Care Center, et al.,* No. 21-2164-cv
Argued October 31, 2022

Dear Ms. Wolfe:

Pursuant to this Court's Order dated November 14, 2022, Appellee Lilian Rivera-Zayas writes to address the effect of this Court's decision in *Solomon v. St. Joseph Hospital*, No. 21-2729, __ F.4th __, 2023 WL 2376207 (2d Cir. Mar. 7, 2023), on this appeal.

In *Solomon*, the Court unanimously held that (1) the PREP Act, 42 U.S.C. §§ 247d-6d et seq., cannot completely preempt state law claims for negligence, gross negligence, or malpractice; (2) neither federal regulations and guidance relating to care, nor the role played by health care institutions during the COVID-19 pandemic, established that the hospital defendant was "acting under" a federal officer for purposes of jurisdiction pursuant to 28 U.S.C. § 1442(a)(1); and (3) a defendant's

attempt to invoke immunity under the PREP Act does not create "arising under" jurisdiction pursuant to 28 U.S.C. § 1331. In so holding, the Court reached the same conclusions as the five other courts of appeals that have rejected similar arguments in similar cases. *See Hudak v. Elmcroft of Sagamore Hills,* 28 F.4th 845 (6th Cir. 2023); *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210 (7th Cir. 2022); *Manyweather v. Woodlawn Manor*, 40 F.4th 237 (5th Cir. 2022); *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580 (5th Cir. 2022); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679 (9th Cir. 2022); *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393 (5th Cir. 2021).

There is no meaningful distinction between this case and *Solomon*. Under *Solomon* and this Court's "longstanding rule" regarding the precedential effect of panel decisions, *United States v. Peguero*, 34 F.4th 143, 158 (2d Cir. 2022), the district court's remand order should be affirmed.

## I. *Solomon* bars appellant OLOC's complete preemption argument.

In *Solomon*, this Court held that state-law "claims for medical malpractice, negligence, and gross negligence" could not be completely preempted by the PREP Act, because they "are plainly not 'within the scope'" of the statute's only exclusive

federal cause of action—a cause of action for willful misconduct, created by 42 U.S.C. § 247d-6d(d)(1). 2023 WL 2376207, at *4.[1]

Like the claims in *Solomon*, Ms. Rivera-Zayas's claims also are grounded in negligence, as explained in her principal brief. *See* Appellees' Br. 42–43. For the first time on appeal, OLOC argued that Ms. Rivera-Zayas's state-law gross negligence claim should be read as "a colorable claim for willful misconduct." *See* OLOC Reply Br. 13. This argument, in addition to being waived, fails both for the reasons identified in Ms. Rivera-Zayas's principal brief and in light of *Solomon*, which rejected a similar attempt to convert a gross negligence claim into a willful misconduct claim. *See Solomon*, Appellant Br., Dkt. 130 at 16–17 (making the same argument). Rejecting policy arguments that its holding would lead to "artfully pled complaints" that omitted the elements of willful misconduct under the statute, the Court recognized that such cases would properly proceed in state courts, where "[t]he immunity provision of the PREP Act would still apply." 2023 WL 2376207,

[1] *Solomon* did not definitively resolve whether claims that *are* within the scope of the statute's exclusive cause of action are completely preempted, and, if so, in what circumstances. *Compare* 2023 WL 2376207, at *4 (noting elements of subsection (d) that resemble elements of statutes that have been found to be completely preemptive) *with id.* at *5 (declining to defer to the Department of Health and Human Services' "view [that] the PREP Act [is] a complete preemption statute"). Because Ms. Rivera-Zayas's claims are likewise not within the scope of the statutory cause of action, there is no need to resolve that question here either. *Cf. Hudak*, 58 F.4th at 854 ("declin[ing] to decide whether § 247d-6d(e)(1) is completely preemptive" in light of its holding that the plaintiff's "claims do not fall within the scope of the federal cause of action"); *Mitchell*, 28 F.4th at 586 (similar).

at *5; *see also Hudak*, 58 F.4th at 854 (holding that a claim cannot be completely preempted by the PREP Act absent allegations as to each of the elements of willful misconduct); *Manyweather*, 40 F.4th at 245 (holding a claim cannot be completely preempted as a PREP Act willful misconduct claim if the plaintiff's pleading does not "advance[] that theory"); *Maglioli*, 16 F.4th at 411 (declining to "infer" willful misconduct elements from negligence allegations).

In addition to the fact that Ms. Rivera-Zayas's complaint did not allege the elements of willful misconduct, 42 U.S.C. § 247d-6d(c)(1)(A), her claims are not completely preempted for an independent reason not addressed in *Solomon*: She does not allege that her mother's death has a causal relationship with OLOC's "administration to or use by an individual of a covered countermeasure," 42 U.S.C. § 247d-6d(a)(2)(B). Her claims therefore do not fall within the scope of the PREP Act at all. *See* Appellees' Br. 24–41 (discussing 42 U.S.C. § 247d-6d(a)(2)(B)); *see also Hudak*, 58 F.4th at 855–57 (holding that similar claims lie outside the scope of the PREP Act); *Manyweather*, 40 F.4th at 245–46 (same); *Martin*, 37 F.4th at 1213–14 (same). Because her claims "do not fall within [the] narrow scope" of the PREP Act cause of action, *Solomon*, 2023 WL 2376207, at *3, the PREP Act is not implicated by her claims and, thus, cannot completely preempt them.

## II. *Solomon* precludes OLOC's federal-officer removal jurisdiction argument.

OLOC's federal-officer removal jurisdiction argument is not factually distinguishable from that deemed "meritless" in *Solomon*. 2023 WL 2376207, at *6. The agency documents that OLOC argues required it "to comply with detailed infection control procedures," Appellants' Br. 51–52, show no more than that OLOC was "subject to federal regulations and guidance governing the care [it] provide[s] (including in connection with COVID-19)." *Solomon*, 2023 WL 2376207, at *6. *Solomon* confirms that, under the Supreme Court's decision in *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007), such regulations and guidance do not show that a defendant was "acting under" a federal officer. *See also* Appellees' Br. 63–65.[2]

*Solomon* is also incompatible with OLOC's suggestions that its role as "critical infrastructure," or its claimed performance of "the job of containment,"

[2] OLOC also points to the fact that it (like the defendant in *Solomon*) qualifies as a "program planner" under the PREP Act, but that has nothing to do with the federal-officer inquiry. "Program planner" is one of the categories of entities included in the PREP Act's definition of the term "covered person." 42 U.S.C. § 247d-6d(i)(2). While "program planners" may qualify for PREP Act immunity, *id.* § 247-d-6d(a)(1), no statutory provision, or anything else, delegates authority or otherwise places all "program planners" into a subservient relationship with the federal government. Given the broad statutory definition of "program planner" to include virtually every state, local, and tribal government and public health employee thereof, such a delegation would be a massive disruption of our federal scheme.

meant it was "acting under" federal officers. Appellants' Br. 53–55. As *Solomon* explains, "[i]t cannot be that the federal government's mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction." 2023 WL 2376207, at *6 (citing *Saldana*, 27 F.4th at 685 (quoting *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 740 (8th Cir. 2021))). *See also* Appellees' Br. 65–68.[3]

## III. *Solomon* bars OLOC's "arising under" argument.

Finally, the Court's decision in *Solomon* resolves OLOC's argument that this case lies within the "special and small category of cases in which arising under jurisdiction still lies" despite the absence of a federal-law claim. *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

Such jurisdiction can exist only where "a right or immunity created by the Constitution or laws of the United States is an element, and an essential one, of the plaintiff's cause of action." *Solomon*, 2023 WL 2376207, at *6 (quoting *Tantaros v. Fox News Network, LLC*, 12 F.4th 135, 141 (2d Cir. 2021)).[4] In this case, as in *Solomon*, the only federal-law question raised by OLOC as a basis for arising under

[3] Although not addressed in *Solomon*, OLOC also lacks a colorable federal defense, as is required to invoke federal-officer removal jurisdiction. *See* Appellees' Br. 68–69.

[4] *Solomon* did not address the other requirements of "arising under" jurisdiction, which are not satisfied in this case for the reasons stated in Ms. Rivera-Zayas's principal brief. *See* Appellees' Br. 54–58.

jurisdiction is its purported PREP Act immunity. *Solomon* confirms that, like all other affirmative defenses, a potential PREP Act immunity defense does not satisfy the essential element requirement. 2023 WL 2376207, at *6. As in *Solomon*, Ms. Rivera-Zayas's "complaint raises claims under New York law and does not, on its face, raise questions of federal law." *Id.*

* * *

For these reasons and those stated in her principal brief and at oral argument, Ms. Rivera-Zayas respectfully requests that the Court remove this appeal from abeyance and affirm the district court's remand order.

Respectfully submitted,

/s/ Adam R. Pulver
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