No. 22-3703

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARGARET FRIEDMAN,
Executor of the Estate of Mary L. Friedman,
Plaintiff-Appellee,

v.

MONTEFIORE; MONTEFIORE FOUNDATION; MONTEFIORE HOME; MONTEFIORE HOUSING CORPORATION; MENORAH PARK FOUNDATION; and ARIEL HYMAN,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Ohio, Eastern Division
No. 1:21-cv-2083
Hon. Sara Lioi, District Judge

BRIEF OF PLAINTIFF-APPELLEE MARGARET FRIEDMAN

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March 15, 2023

STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that this appeal can be resolved by application of this Court's recent decision in *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845 (6th Cir. 2023). *Hudak* rejected an assisted living facility's assertions (i) that the Public Readiness and Emergency Preparedness (PREP) Act completely preempted state-law negligence claims relating to the failure to use certain COVID-19 "covered countermeasures," and (ii) that all recipients of federal guidance regarding COVID-19 infection control were "acting under" federal-officer direction for purposes of jurisdiction under 28 U.S.C. § 1442(a)(1). The negligence-based claims at issue here, relating to a nursing home's inadequate infection-control measures and care, including its failure to administer covered countermeasures, fall squarely within *Hudak*'s holdings. Accordingly, oral argument is not necessary.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 22-3703 Case Name: Friedman v. Montefiore

Name of counsel: Adam R. Pulver

Pursuant to 6th Cir. R. 26.1, Margaret Friedman
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on March 15, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Adam R. Pulver

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT OF JURISDICTION

As a motions panel of this Court concluded in its November 21, 2022 Order in this case and several others, the Court has appellate jurisdiction over the district court's remand order in this case "[b]ecause the case was removed in part under § 1442(a)(1)." Nov. 21, 2022 Order, at 7; *see* Amended Notice of Removal, RE 12, PageID #59.

The district court correctly concluded that it lacked subject-matter jurisdiction.

STATEMENT OF ISSUES

1. Whether, contrary to this Court's holding in *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845 (6th Cir. 2023), state-law claims based on allegations that a nursing home's inadequate COVID-19 infection control measures and treatment caused a resident's death are completely preempted by the PREP Act, 42 U.S.C. § 247d-6d(d)(1), where they include allegations that nursing home staff failed to administer COVID-19 tests to symptomatic residents, but lied and claimed they did.

2. Whether, contrary to *Hudak*,, regulatory guidance from the Department of Health and Human Services regarding COVID-19 infection control brought all of the nation's nursing homes under the

direction of federal officers, as required to invoke the federal-officer removal statute.

STATEMENT OF THE CASE

I. Montefiore's inadequate infection control and care and the resulting death of Mary Friedman

This case is one of at least twenty-one actions filed in Ohio state court, removed to the United States District Court for the Northern District of Ohio, and subsequently remanded to state court for lack of subject-matter jurisdiction, all arising out of deaths of residents of the Montefiore Home, a nursing home operated by Defendants-Appellants (collectively, "Montefiore") in Beechwood, Ohio. *See* Nov. 21, 2022 Order, at 4. In each case, the plaintiffs have alleged that their loved ones died as a result of Montefiore's failure to take appropriate measures to stop the spread of, and/or treat, COVID-19 at the facility.

Mary Friedman was transferred to the Montefiore facility for rehabilitation, care, and treatment on or about February 24, 2020. Compl., RE 12-1, PageID #68. While residing there, Mary contracted COVID-19 and later died from complications of COVID-19 in November 2020. *Id.* PageID #68, 69. In her complaint, Plaintiff Margaret Friedman, Mary's daughter and the executor of her estate, alleges that Montefiore's

deficient COVID-19 containment policies and treatment directly caused Mary's death. *Id.* PageID #67. These deficiencies fall into three categories.

First, Ms. Friedman alleges that Montefiore failed to adopt adequate infection control measures at the facility. She alleges, for example, that Montefiore did not properly screen new residents for COVID-19; did not ensure staff followed infection control procedures, including those related to handwashing and the use of face masks; did not test or screen employees who came into contact with residents, and, to the contrary, forced employees displaying symptoms of COVID-19 to work in direct proximity to vulnerable patients. *Id.* PageID #68.

Second, referencing "well published" reports, Ms. Friedman alleges that Montefiore "intentionally hid the fact that" Montefiore residents had contracted COVID-19, including by creating false negative COVID-19 test results. *Id.* This allegation refers to the highly publicized results of an Ohio Department of Health (ODH) investigation concerning an October 2020 COVID-19 outbreak at the facility. Statement of Deficiencies, The Montefiore Home, Master Complaint Number

OH00117160 (Nov. 24, 2020)[1]; *see also, e.g.*, Jane Kaufman, *State probe: Executive, nurses conspired to submit false tests*, Cleveland Jewish News, Dec. 10, 2020, *cited in* Montefiore Br. 31 n.2[2]; Mark Naymik, *Former employees at Menorah Park's Montefiore facility manipulated COVID-19 samples, state report says*, WKYC, Dec. 10, 2020[3]; Jessi Schultz, *State investigation reveals staff at Beachwood nursing home falsified negative COVID-19 lab samples*, News 5 Cleveland, Dec. 16, 2020.[4] ODH reported that Montefiore:

> failed to ensure resident specific accurate COVID 19 testing was done for 35 residents on the Mandel 3 Unit resulting in inaccurate results when Director of Nursing … #600 and Assistant Director of Nursing … #605 failed to collect samples from the affected residents and submitted false samples to the laboratory.

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[1] https://publicapps.odh.ohio.gov/EID/CLDOCUMENTS/assigned/OH00665/2567%20Federal%20Form%20-%20Finalized%20(FINAL)%2020201217-1405014035.pdf.

[2] https://www.clevelandjewishnews.com/news/local_news/state-probe-executive-nurses-conspired-to-submit-false-tests/article_2465cfdc-3a84-11eb-b821-fba4963350d4.html.

[3] https://www.wkyc.com/article/news/investigations/menorah-parks-montefiore-manipulated-covid-samples-report/95-0fea29ce-1d85-4b8a-96c6-41baf02c73a1.

[4] https://www.news5cleveland.com/news/continuing-coverage/coronavirus/local-coronavirus-news/state-investigation-reveals-staff-at-beachwood-nursing-home-falsified-negative-covid-19-lab-samples.

Statement of Deficiencies, *supra* n.1, at 64.[5]

According to the ODH report, on October 13, 2020, a number of residents of the facility were symptomatic for COVID-19. *Id.* at 74. Under normal protocol, nurse managers would have "swabbed" these residents to collect samples for COVID-19 testing. *Id.* at 73. But on that day, the Director of Nursing and the Assistant Director of Nursing asserted responsibility for this task, and later claimed to have swabbed thirty-five residents at approximately 4:30 a.m. *Id.* at 73–74, 80. A staff nurse found this suspicious and reported it to the Administrator (Defendant-Appellant Ariel Hyman) "because she had only briefly seen these staff on the unit and indicated it would have been difficult for them to perform testing on 35 residents and not been seen entering or exiting any of the resident rooms." *Id.* at 74; *see also id.* at 80. A review of video recordings

[5] Montefiore concedes that the complaint was referring to these "falsified test samples" and indeed quotes the Kaufman article discussing the ODH findings. *See* Montefiore Br. 30–31 (citations omitted). It is appropriate for the Court to take judicial notice of the existence and contents of the State's findings (not the correctness of those findings), as reflected in the Statement of Deficiencies—a matter as to which there is "no reasonable dispute." *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 579 (6th Cir. 2012); *see Platt v. Bd. of Comm'rs on Grievances & Discipline of Ohio Sup. Ct.*, 894 F.3d 235, 245 (6th Cir. 2018) (recognizing that the Court may take judicial notice of the existence and contents of public documents).

confirmed that neither the Director of Nursing nor the Assistant Director of Nursing had entered the rooms of any residents from whom they claimed to have taken samples. *Id.* at 75. Hyman later "admitted … that he directed the Director of Nursing and the Assistant Director of Nursing "to send [COVID-19 test swabs] to the lab, knowing the actual tests had not been performed on the Mandel 3 residents." *Id.* at 75–76. Hyman reported that they told him "not to worry" and that the test results "would all be negative ('and they winked indicating that the swabs were not obtained [from] the residents')." *Id.* at 75. Tests performed on whatever "samples" were sent to the lab were either negative for the coronavirus or inconclusive. *Id.* at 76. Four days later, follow-up testing that *was* administered to 22 of the residents whose samples had supposedly been taken earlier revealed positive results. *Id.* at 77.

Finally, Ms. Friedman alleges that after her mother contracted COVID-19, Montefiore was negligent in failing to provide her with oxygen, failing to ensure that she was seen by a physician, and failing to obtain emergency treatment for her. RE 12-1, PageID #67.

II. The PREP Act and the 2020 Declaration

A. 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 Apr. 13, 2022).[6] The statute's "evident purpose is to embolden caregivers, permitting them to administer certain encouraged forms of care … with the assurance that they will not face liability for having done so." *Maglioli v. Andover Subacute Rehab. Ctr. I*, 478 F. Supp. 3d 518, 529 (D.N.J. 2020), *aff'd on other grounds sub nom. Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393 (3d Cir. 2021); *see also* 151 Cong. Rec. H12244-03, H12264 (daily ed. Dec. 18, 2005) (statement of Rep. Deal) (noting statute was aimed to ensure that a pandemic flu "vaccine gets developed and to make sure doctors are willing to give it.").

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

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 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." *Id.* at § 247d-6d(i)(1)(A)–(D).

"The Act grants immunity from federal and state liability to 'covered person[s] … with respect to 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' if the HHS Secretary has issued a declaration under the Act 'with respect to such countermeasure.'" *Hudak*, 58 F.4th at 849 (quoting 42 U.S.C. § 247d-6d(a)(1)). The statute "limits both the reach and effect of its immunity provision," though, providing "immunity only from 'any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure.'" *Id.* (quoting 42 U.S.C.§ 247d-

6d(a)(2)(b)). Moreover, immunity is only available if "the countermeasure was administered or used" when a declaration was in effect, for the purpose specified in the declaration, and to or by an individual within the population and geographic area specified by the declaration. 42 U.S.C. § 247d-6d(a)(3).

Subsection (d) of the statute creates a carve-out from the subsection (a) immunity for suits brought against covered persons "for death or serious physical injury proximately caused by willful misconduct." *Id.* § 247d-6d(d)(1). For claims within the carve-out, the statute creates an "exclusive Federal cause of action," *id.*, and provides special adjudicatory procedures and exclusive jurisdiction in a three-judge court of the District Court for the District of Columbia, *id.* § 247d-6d(e). Such claims are governed by the substantive law "of the State in which the alleged willful misconduct occurred." *Id.* § 247d-6d(e)(2). The statute also creates an administrative compensation scheme, available only for injuries "directly caused by the administration or use of a covered countermeasure." 42 U.S.C. § 247d-6e(a).

On March 10, 2020, the HHS Secretary 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 "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 15,201–02.[7]

III. The Federal-State Pandemic Response

Since January 2020, federal agencies have issued guidance on best practices to reduce COVID-19's spread and on the applicability of existing regulations. Guidance by HHS's Centers for Disease Control and Prevention (CDC) and Centers for Medicare and Medicaid Services (CMS) about infection control in long-term care settings reflected the expectation that state and local governments would retain their roles as

[7] The Secretary has amended the Declaration several times. All of these amendments are available at https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx. Montefiore does not invoke any of these amendments in its principal brief.

primary protectors of public health. *See, e.g.*, CDC & CMS, COVID-19 Long-Term Care Facility Guidance (LTC Guidance) (Apr. 2, 2020)[8]; CDC, Coronavirus Disease 2019 (COVID-19) Preparedness Checklist for Nursing Homes and other Long-Term Care Settings (Preparedness Checklist) (Mar. 13, 2020).[9] The LTC Guidance provided "recommendations to State and local governments and long-term care facilities," and urged facilities and state and local governments to work together. LTC Guidance 1. The Preparedness Checklist recommended that "[i]nformation from state, local, tribal, and territorial health departments, emergency management agencies/authorities, and trade organizations should be incorporated into the facility's COVID-19 plan," and that facilities should "actively obtain information from state, local, tribal, and territorial resources to ensure that the facility's plan complements other community and regional planning efforts." Preparedness Checklist 1; *see also* CMS, Toolkit on State Actions to Mitigate COVID-19 Prevalence in Nursing Homes, Version 26 (Mar.

[8] https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf.

[9] https://www.cdc.gov/coronavirus/2019-ncov/downloads/novel-coronavirus-2019-Nursing-Homes-Preparedness-Checklist_3_13.pdf.

2022) at 3 (compiling "many creative plans that state governments and other entities have put into operation").[10]

Consistent with HHS's expectations, Ohio took several actions to address COVID-19 in care facilities. In March 2020, Governor DeWine declared a state of emergency. Ohio Exec. Order 2020-01D.[11] The Directors of ODH and the Ohio Department of Veterans Services then issued a joint order limiting access to care facilities and mandating screening and other infection control measures. In Re: Order to Limit Access to Ohio's Nursing Homes and Similar Facilities (Mar. 11, 2020).[12] Four state agencies jointly issued guidance for care facilities, addressing personal protective equipment and COVID-19 screening and treatment practices. *See* Ohio Dep't of Aging, et al., COVID-19 Pre-surge and Longer Term Planning Toolkit for Long Term Services and Community Supports

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[10] https://www.cms.gov/files/document/covid-toolkit-states-mitigate-covid-19-nursing-homes.pdf.

[11] https://governor.ohio.gov/media/executive-orders/executive-order-2020-01-d.

[12] https://coronavirus.ohio.gov/wps/wcm/connect/gov/4b9ce174-fe62-4bf1-989c-8dad91e0352e/ODH+Order+on+Nursing+Homes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-4b9ce174-fe62-4bf1-989c-8dad91e0352e-n6XCnuQ.

(June 19, 2020).[13] And ODH issued an order requiring facilities to notify interested persons of the existence of COVID-19 cases at residential care facilities. ODH, Director's Order to Facilities to Notify Residents, Guardians and Sponsor of Positive or Probable Cases of COVID-19 (Apr. 15, 2020).[14]

IV. Procedural History

A. The complaint

On October 27, 2021, in her capacity as executor of her mother's estate, Margaret Friedman commenced this action for medical malpractice and nursing home neglect, pursuant to Ohio's wrongful death and survival statutes, in the Cuyahoga County, Ohio Court of Common Pleas. *See* RE 12-1, PageID #64. Her complaint named various Montefiore-related corporate entities and Hyman as defendants. She alleged that all defendants were "negligent in their care and treatment of Decedent by, *inter alia*, negligently, recklessly, and maliciously

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[13] https://dodd.ohio.gov/wps/wcm/connect/gov/e17eaf5a-32a6-4ba0-8fb9-248378ae164b/LTSS_TOOLKIT_FINAL_6_19_20.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-e17eaf5a-32a6-4ba0-8fb9-248378ae164b-nc5P61q.

[14] https://coronavirus.ohio.gov/static/publicorders/SignedNursingHomeOrder-041520.pdf .

exposing [her] to [the coronavirus]"; that the corporate entities were negligent in their employment practices and in failing to adopt appropriate policies and standards; and that the corporate entities violated Mary Friedman's rights under the Ohio Nursing Home Patients' Bill of Rights, Ohio Revised Code 3721.13. *Id.* PageID #69–70. Mary's death, the complaint alleged, was the "direct and proximate result of the collective and/or individual negligence of all Defendants." *Id.* PageID #70.

B. District court proceedings

On November 3, 2021, Defendants Montefiore, the Montefiore Foundation, the Montefiore Home, the Montefiore Housing Corporation, and the Menorah Park Foundation ("Facility Defendants") removed the action to the United States District Court for the Northern District of Ohio, asserting that the case was removable pursuant to 28 U.S.C. §§ 1441(a) and 1331. Notice of Removal, RE 1, PageID #2. Specifically, the Facility Defendants asserted that Margaret's claims were completely preempted by the PREP Act, and thus arose under federal law. *Id.* PageID #2–3. The Facility Defendants indicated that the remaining defendant, Hyman, consented to removal. *Id.* PageID #3.

On December 2, 2021, Defendant Menorah Park Foundation filed an amended notice of removal, in which it invoked the federal-officer removal statute and noted the consent of all other defendants. RE 12, PageID #2, 3. The amended notice of removal stated that "[r]emoval is also proper under 28 U.S.C. § 1442(a)(1) because Defendants were acting under federal officers and/or agencies." *Id.* PageID #59. The notice did not provide any further details, not even to identify which federal officers or agencies the defendants were purportedly "acting under."

On December 14, 2021, Margaret moved to remand the action to state court. RE 14, PageID #88. She argued that federal-question jurisdiction did not exist because "the PREP Act does not apply to Plaintiff's claims," and because, even if it did, "at most, it would amount to a federal defense to be presented in state court." *Id.* PageID #89. She also argued that the court lacked federal-officer removal jurisdiction, given the absence of any allegations showing that Montefiore was "acting under [an] agency or officer of the United States." *Id.* PageID #106–07.

The Facility Defendants and Hyman filed separate, but substantively identical, oppositions to remand. *See* RE 17, PageID #185 (Facility Defendants); RE 18, PageID #213 (Hyman). They asserted that

Ms. Friedman's claims "expressly relate to the alleged improper administration and use of COVID-19 diagnostic tests to individuals at the Montefiore nursing home" and thus were within the scope of the PREP Act. RE 17, PageID #197; RE 18, PageID #226. Without addressing any of this Court's complete preemption case law, Montefiore argued that the PREP Act completely preempts all claims that could be brought pursuant to the statute's exclusive cause of action and that Ms. Friedman's allegations about Montefiore's false representations that it had tested residents brought her claims within the scope of the statute. RE 17, PageID #200–06; RE 18, PageID #229–35. As to federal-officer removal, Montefiore briefly argued that "[b]ecause Defendants were operating pursuant to Medicare provider contracts with the federal government and at CMS's direction in responding to COVID-19, they are entitled to invoke federal-officer removal." RE 17, PageID #209–10; RE 18, PageID #238–39. Montefiore did not offer any information about the contracts or the CMS direction that it referenced.

The district court granted the remand motion on July 11, 2022. RE 19, PageID #242. Summarizing its earlier decision in *Hudak*, the court noted that the "Defendants accept[ed] the conclusion reached" there and

in other decisions "that the PREP Act does not completely preempt state law negligence claims." *Id.* PageID #251–53 (citing, among others, *Hudak v. Elmcroft of Sagamore Hills*, 566 F. Supp. 3d 771 (N.D. Ohio 2021), *aff'd*, 58 F.4th 845). Turning to Montefiore's arguments that the allegations related to misrepresentations regarding its failure to test residents served as a basis for complete preemption, the court held that these allegations did not trigger complete preemption for a number of reasons.

First, the court explained that, because Ms. Friedman had not alleged the elements of "willful misconduct" as that term is defined by the PREP Act, the case did not come within the scope of the Act's federal cause of action. *Id.* PageID #256. Despite the complaint's reference to intentional acts, it concluded, the complaint's "serious allegations" "do not rise above the level of negligence or recklessness under state law." *Id.*

Second, and "[m]ore fundamentally," the district court held that "the allegations fail to demonstrate that the decedent's injuries were 'caused by, arose out of, related to, or resulted from' the 'administration' or 'use' of the identified 'covered countermeasures.'" *Id.* (quoting 42 U.S.C. §§ 247d-6d(a), (d)). The allegations regarding Montefiore's

misrepresentations that it had tested residents for COVID, the court concluded, were not allegations "that the administration of the COVID-19 test, itself, resulted in the decedent's injuries or death," as would be required to fall within the scope of the PREP Act. *Id.* PageID #257–58.

Third, the court held that the PREP Act did not provide a basis for federal jurisdiction because the Act does not meet the standards set out by this Court and the Supreme Court for complete preemption. *Id.* PageID #258–59 (citing, among others, *Miller v. Bruenger*, 949 F.3d 986, 994 (6th Cir. 2020); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 688 (9th Cir. 2022); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987); and *Hudak*, 566 F. Supp. 3d at 784–85).

As to federal-officer removal, the district court noted the lack of any support for Montefiore's generic assertions that all of the nation's nursing homes were acting as "extensions" of the Centers for Medicare and Medicaid Services, and held that mere compliance with regulations and guidelines was insufficient to meet the "acting under" requirement of 28 U.S.C. § 1442(a), as interpreted by the Supreme Court in *Watson v. Philip Morris Cos.*, 551 U.S. 142 (2007). RE 19, PageID # 19–21.

Each of the five other district judges to consider Montefiore's arguments in favor of federal jurisdiction for claims arising out of its inadequate infection-control measures and false representations that it administered tests to residents reached the same conclusion and remanded the actions before them to state court. *See, e.g.*, *Nemeth v. Montefiore*, 2022 WL 4779035 (N.D. Ohio Oct. 3, 2022) (Fleming, J.); *Levert v. Montefiore Home*, 2022 WL 4591253 (N.D. Ohio Sept. 30, 2022) (Ruiz, J.); *Spring v. Montefiore Home*, 2022 WL 1120381 (N.D. Ohio Apr. 14, 2022) (Barker, J.); *Rosen v. Montefiore*, 582 F. Supp. 3d 553 (N.D. Ohio 2022) (Gwin, J.); *Singer v. Montefiore*, 577 F. Supp. 3d 633 (N.D. Ohio 2021) (Calabrese, J.).

C. Proceedings in this Court

Montefiore appealed to this Court. On November 21, 2022, the Court issued an omnibus order addressing the application of 28 U.S.C. § 1447(d) to Montefiore's appeals from the various district court remand orders. As to this appeal, the Court held that Menorah Park's amended notice of removal meant that "the case was removed in part under § 1442(a)(1)" and thus that the exception to the bar on review of remand orders applied. Nov. 21, 2022 Order, at 7. The court dismissed all the

other appeals except *Levert v. Montefiore Home*, No. 22-3876, which is pending.

SUMMARY OF ARGUMENT

Two months ago, in *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845 (6th Cir. 2023), *reh'g denied*, 2023 WL 2238008 (6th Cir. Feb. 22, 2023), this Court unanimously held that neither complete preemption nor the federal-officer removal statute allowed a care facility to remove a plaintiff's state-law claims that her father died as a result of the facility's failure to undertake appropriate COVID-19 infection control measures or failure to provide adequate medical care after he contracted COVID-19. Despite this binding precedent, Montefiore makes the same argument rejected in *Hudak* here: that complete preemption and the federal-officer removal statute allow it to remove Ms. Friedman's state-law claims that her mother died due to Montefiore's failure to undertake appropriate COVID-19 infection control measures or provide adequate medical care after she contracted COVID-19. For purposes of the issues on appeal, the only difference between this case and *Hudak* is that Ms. Friedman alleges that Montefiore *lied* about its failures and falsely represented that it did administer certain countermeasures to residents. This

distinction is immaterial to removal. As in *Hudak*, the Court should affirm the district court's remand order.

As to complete preemption, the district court correctly held that, like the claims in *Hudak*, the claims here lie outside the scope of the PREP Act's federal cause of action and, therefore, are not completely preempted by that provision. Montefiore's attempts to cram the facts of this case into the immunity provision of the PREP Act require it to ignore what is actually alleged to have occurred. This case is not one, as Montefiore suggests, where a plaintiff alleges that a health care provider's improper administration of a COVID-19 test to an individual caused the plaintiff injury. Rather, Ms. Friedman alleges that Montefiore failed to administer tests *at all* to residents who were symptomatic for COVID-19 and that, as the Ohio Department of Health concluded, the failure to test delayed identification of and response to the outbreak within the facility. That Montefiore *pretended* it administered tests to these residents does not convert the allegations of a failure to use countermeasures into claims that Mary Friedman's death had 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 only causal

relationship alleged is with the *failure* to administer covered countermeasures to individuals—just as in *Hudak*.

Ms. Friedman's claims are also similar to those in *Hudak* because, as is alleged throughout the complaint, they are grounded in negligence. That Ms. Friedman alleges that Montefiore staff members acted intentionally is not enough to convert her claims into ones for "willful misconduct" as that term is defined under the statute—the only claims that this Court held in *Hudak* might be completely preempted.

In addition to being outside the scope of PREP Act subsection (d), Ms.Friedman's claims are not subject to complete preemption for another reason as well: As the district court correctly recognized, the PREP Act is not one of the rare statutes where Congress has demonstrated clear intent to transfer jurisdiction to adjudicate a federal defense from state to federal court, and thus does not create complete preemption. Under this Court's precedent, a statute that incorporates state substantive law into a federal cause of action does not create complete preemption. The PREP Act is just such a statute. It creates no federal rights or duties. Unlike the statutes that this Court and the Supreme Court have found to meet the high bar of complete preemption, the PREP Act does not

provide exclusively federal substantive law to govern the federal cause of action. In enacting the PREP Act, Congress has not dislodged the presumption that state courts are competent to adjudicate federal defenses to claims grounded in state substantive law.

As to federal-officer removal jurisdiction, Montefiore's argument is the same one rejected by this Court in *Hudak* and by five other courts of appeals: that COVID-19 related guidance from federal agencies transformed all the nation's nursing homes into subordinates of the federal government for purposes of 28 U.S.C. § 1442(a)(1). There is no basis for this Court to revisit that argument. Montefiore briefly argues that it acted under federal-officer direction merely by engaging in the "recommended activity" of conducting COVID-19 tests. That argument is both forfeited by Montefiore's failure to raise it in either the amended notice of removal or its brief below, and is incompatible with the reasoning of *Hudak* and other precedents of this Court and the Supreme Court. If compliance with binding regulations and directives is not sufficient to trigger the federal-officer removal statute, compliance (much less non-compliance, as is alleged here) with mere recommendations obviously is not either.

STANDARD OF REVIEW

"[T]he party requesting a federal forum … bears the burden of establishing federal jurisdiction." *Siding & Insulation Co. v. Acuity Mut. Ins. Co.*, 754 F.3d 367, 368 (6th Cir. 2014). This Court reviews *de novo* a district court's ruling that the burden has not been met. *See Mays v. City of Flint*, 871 F.3d 437, 442 (6th Cir. 2017).

ARGUMENT

I. Ms. Friedman's claims are not completely preempted.

In *Hudak*, this Court held that the only provision of the PREP Act that could *potentially* create complete preemption, and thus convert state-law claims into federal ones for purposes of the well-pleaded complaint rule and federal-question jurisdiction under 28 U.S.C. § 1331, is the exclusive cause of action for "willful misconduct" created by § 247d-6d(d)(1). *Hudak*, 58 F.4th at 853–54. Nonetheless, the Court "decline[d] to decide whether [that provision] is completely preemptive," because the *Hudak* plaintiff's claims "d[id] not fall within the scope of the federal cause of action." *Id.* at 854. Agreeing with four other courts of appeals that "the Act does not completely preempt claims … that do not allege willful misconduct related to the administration or use of covered

COVID-19 countermeasures," *id.* at 853 (citing *Maglioli*, 16 F.4th at 406–13; *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 584–88 (5th Cir. 2022); *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 242–46 (5th Cir. 2022); *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210, 1213–14 (7th Cir. 2022); and *Saldana*, 27 F.4th at 687–88), the Court therefore affirmed the district court's order remanding the case to state court. Since *Hudak* was decided, a sixth court of appeals has reached the same conclusion. *See Solomon v. St. Joseph Hospital*, __ F.4th __, 2023 WL 2376207, at *4–5 (2d Cir. Mar. 7, 2023).

The Court may resolve this appeal on the same grounds, because Ms. Friedman's claim that her mother's death was caused by Montefiore's inadequate infection control measures—including its failure to test symptomatic residents—lies outside the narrow scope of the subsection (d)(1) cause of action. Alternatively, the Court may affirm the district court on the ground not reached in *Hudak*: that the PREP Act's cause of action, which incorporates state substantive law, does not completely preempt any state-law claims.

A. The claims are not within the ambit of subsection (d) of the PREP Act.

A federal preemption defense does not generally provide a basis for removal. *See Hudak*, 58 F.4th at 852 (citing *Caterpillar*, 482 U.S. at 392–93). "The misleadingly named doctrine of complete preemption … refers to a jurisdictional doctrine that is distinct from ordinary preemption." *Id.* (cleaned up). "Complete preemption occurs where 'the pre-emptive force of a federal 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.'" *Id.* (quoting *Caterpillar*, 482 U.S. at 393). Even where such extraordinary "pre-emptive force" exists, "[a] federal statute will completely preempt only those state-law claims that fall within the scope of the federal cause of action." *Id.* at 853 (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004), and *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003)).

In *Hudak*, the Court recognized that, for a claim to fall within the scope of the PREP Act's subsection (d) cause of action, it both "must be for a loss that has a 'causal relationship with the administration to or use by an individual of a covered countermeasure'" and must allege "willful misconduct within the meaning of the PREP Act." *Id.* at 854, 855

(quoting 42 U.S.C. § 247d-6d(a)(2)(B)). As the district court correctly concluded, Ms. Friedman's claims, like those in *Hudak*, do not meet either requirement.

1. Ms. Friedman does not allege that the administration of a covered countermeasure to an individual caused her mother's death.

As noted above, Ms. Friedman's allegations as to Montefiore's role in causing her mother's death fall into three categories: (1) allegations that Montefiore failed to adopt infection-control measures like isolation and screening policies to stop the spread of COVID-19; (2) allegations that Montefiore failed to test symptomatic residents and misrepresented that it had; and (3) allegations that Montefiore provided inadequate care to Mary Friedman after she contracted COVID-19.

Montefiore does not argue that the claims in the first and third categories—that is, those relating to Montefiore's failures to conduct screening and quarantine measures, to require face masks and hand-washing, to ensure symptomatic staff members did not work with vulnerable residents, or to obtain adequate medical care for Mary Friedman—are within the scope of the PREP Act. Any such argument would be precluded by the Court's decision in *Hudak*, which held that

similar allegations that a resident's death was caused by a facility's "failure to use countermeasures or to take appropriate care of him" was outside the statute's scope.[15] 58 F.4th at 857; *see also id.* at 850 (summarizing allegations of inadequate infection control and COVID care). The Court explained that allegations that a facility "*failed* to use a COVID-19 countermeasure (facemasks) or to administer another (an infection protocol) differ[] in kind from an allegation that [the facility]'s *administration* or [the decedent]'s *use* of those countermeasures caused [the decedent]'s death." *Id.* at 856 (citing *Manyweather*, 40 F.4th at 245–46; *Martin*, 37 F.4th at 1213–14).

Montefiore bases its complete preemption argument solely on Ms. Friedman's allegations regarding COVID-19 testing—specifically,

[15] Because the PREP Act has no application to Ms. Friedman's claims to the extent they are based on inadequate infection-control measures and negligent treatment, Montefiore is wrong that a finding that the PREP Act completely preempts *other* aspects of her claims would mean that "the proper and mandatory course of action" is "to transfer this case" in its entirety to the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. § 1631. Montefiore Br. 37. The district court would have "considerable discretion" to decide whether to dismiss that part without prejudice (and then remand the remainder) in lieu of transfer. *See United States v. Botefuhr*, 309 F.3d 1263, 1274 n.8 (10th Cir. 2002) (collecting cases and rejecting argument that transfer pursuant to § 1631 is mandatory). How to proceed in this case would be best addressed by the district court in the first instance.

allegations that Montefiore lied in claiming to have administered COVID-19 tests to residents when it had not done so. Montefiore Br. 26–31. Montefiore's argument, however, is contradicted by *Hudak*'s holding that a claim that a failure to administer a covered countermeasure to an individual caused an injury is outside of the scope of the statute. The complaint does not allege that Mary Friedman died because of "the administration to or use by an individual" of COVID-19 tests. She alleges that her mother died, in part, because Montefiore *did not* administer COVID-19 tests to symptomatic facility residents. That Montefiore falsely represented that it did administer tests does not convert a claim based on non-administration into one about affirmative use.

Montefiore's discussion on this point ignores the specifics of the "well published and admitted false testing" referenced in the complaint, RE 12-1, PageID #68, and attempts to recharacterize the allegations about Montefiore's lies about testing as averments that "test samples that Defendants submitted to the lab … were allegedly collected improperly." Montefiore Br. 45. But the allegations here are not about "improper" collection. The problem is not, for example, that a Montefiore nurse did not rotate a swab in a resident's nostril enough times, or that

a nurse contaminated a swab by touching it with her hands. Rather, as ODH found, Montefiore did not administer the test to the symptomatic residents *at all*—despite stating that it did. As the ODH report explains, Montefiore's wrongdoing was its "failure to ensure COVID-19 testing was completed as required." Statement of Deficiencies, *supra* n.1, at 64. This failure "had the potential to delay proper infection control measures to prevent the spread of COVID 19" and "placed all 183 residents at risk for the likelihood of harm, complications and/or death." *Id.* at 64–65; s*ee also id.* at 75 (noting Appellant Hyman's admission "that he was aware the testing was not performed").[16]

Contrary to Montefiore's suggestion, Br. at 44–45, the possibility that Montefiore may have administered COVID-19 tests to people *other* than symptomatic residents is irrelevant, given the plain text of the statute. As *Hudak* recognizes, a facility is not entitled to PREP Act immunity "solely because it provides countermeasures." 58 F.4th at 857;

[16] Accordingly, the declaration of former Montefiore Chief Operating Officer Richard Schwalberg, cited by Montefiore (at 25), is irrelevant. That declaration discusses "every COVID-19 diagnostic test used or administered to residents by The Montefiore Home." RE 17-1, PageID #212. But the only testing relevant to this case is that which was *not* administered to residents whom Montefiore staff knew were exhibiting symptoms of COVID-19.

see also Jackson v. Big Blue Healthcare, Inc., 2020 WL 4815099, at *7 (D. Kan. Aug. 19, 2020) ("[T]hat a facility us[es] covered countermeasures *somewhere* in the facility is [not] sufficient to invoke the PREP Act as to all claims that arise in that facility."). Rather, the statute applies only to claims that an injury had 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). Even if, hypothetically, Montefiore staff "administered" COVID-19 tests to some unknown *other* individuals, it is not that administration that Ms. Friedman alleges caused her mother's death. *Cf.* Kaufman, *State probe: Executive, nurses conspired to submit false tests*, *supra* n.2 (noting that the Statement of Deficiencies "does not indicate where the samples [that Montefiore pretended were from residents] were collected"). What she alleges caused the spread of COVID throughout the facility, and ultimately her mother's death, were Montefiore's failure to test symptomatic residents and its lies about that failure.

Asserting that "the whole point of the PREP Act is to encourage providers to freely use and administer covered countermeasures," Montefiore Br. 28, Montefiore suggests that this statutory purpose supports its argument that the PREP Act incorporates claims arising out

of false representations that countermeasures were administered to individuals. Montefiore fails to explain, however, how immunizing providers who falsely represent that they have administered covered countermeasures serves that goal. Rather, immunizing non-use and lies about such non-use "would defeat the basic purpose of the statute." *Martin v. Petersen Health Ops., LLC*, 2021 WL 4313604, at *10 (C.D. Ill. Sept. 22, 2021), *aff'd*, 37 F.4th 1210.

2. Ms. Friedman does not allege PREP Act willful misconduct.

Although the PREP Act's inapplicability to claims of failure to administer a covered countermeasure is sufficient to dispose of Montefiore's complete preemption argument, Ms. Friedman's claims also lie outside the scope of subsection (d)(1) of the PREP Act because they are claims for malpractice and negligence.

In *Hudak*, rejecting the argument that the PREP Act's civil cause of action could "completely preempt[] *all* claims that relate to covered countermeasures irrespective of whether the claims allege negligence or willful misconduct," 58 F.4th at 854, this Court recognized that if the Act completely preempts any countermeasure-related claims at all, it could do so only if the claims were for "willful misconduct" as defined by the

statute—that is, actions 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). To conclude otherwise, the Court held, would "override Congress's choice" that only claims for injuries "proximately caused by willful misconduct," as opposed to "any claim implicating the PREP Act," were to be adjudicated in federal court. 58 F.4th at 855. Claims of negligence, *Hudak* recognized, do not fall within the narrow bounds of the PREP Act's definition of "willful misconduct," even where a complaint uses labels such as "reckless, intentional, willful and wanton misconduct" in asserting its negligence claims. *Id.* at 854; *accord*, *e.g.*, *Maglioli*, 16 F.4th at 393, 411; *Manyweather*, 40 F.4th at 245; *Solomon*, 2023 WL 2376207, at *4; *see* 42 U.S.C. § 247d-6d(c)(1)(B) (stating that the elements of a subsection (d) claim "establish[] a standard for liability that is more stringent than a standard of negligence in any form or recklessness").

Here, Montefiore does not even try to rebut the district court's conclusion that the complaint does not include allegations as to each of

the elements of willful misconduct. RE 19, PageID #256. And Montefiore does not dispute that the standard of liability that Ms. Friedman seeks to impose is a negligence standard. Instead, Montefiore asserts that Ms. Friedman *could* have pleaded willful misconduct because the complaint has "enough detail to put [it] on notice that [she] is claiming 'willful misconduct' as defined under the PREP Act." Montefiore Br. 34. But a defendant cannot invoke complete preemption by ignoring the facts, and legal characterizations of facts, presented by the plaintiff and instead "arguing that there are different facts [the plaintiff] might have alleged that would have constituted a federal claim." *Caterpillar*, 482 U.S. at 397. Ms. Friedman's complaint alleges that her mother died as a "result of the collective and/or individual negligence of all Defendants." RE 12-1, PageID #70 (¶ 30). Regardless of what she could have pleaded, she pleaded negligence, not willful misconduct. Because the complaint does not allege a subsection (d) claim, the claim that it does assert, like the claims in *Hudak*, *Solomon*, *Manyweather*, and *Maglioli*, does not "fall within [the] narrow scope" "of the PREP Act's one federal cause of action

(for willful misconduct)," and thus cannot be completely preempted. *Solomon*, 2023 WL 2376207, at *3.[17]

B. The PREP Act does not completely preempt any claims.

As the district court held, Montefiore's claim of complete preemption fails for another reason: the PREP Act does not completely preempt even state-law claims that could have been brought pursuant to its federal cause of action. Complete preemption only exists "where 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.'" *Matthews v. Centrus Energy Corp.*, 15 F.4th 714, 720 (6th Cir. 2021) (quoting *Caterpillar*, 482 U.S. at 393). Establishing complete preemption is "exceedingly difficult,"

[17] As the Second Circuit recently explained, limiting federal jurisdiction to cases where a plaintiff actually brings a non-immunized subsection (d) claim is consistent with the statute's purpose. *Solomon*, 2023 WL 2376207, at *5. If what could be brought as a subsection (d) claim is framed as a negligence claim in an "artfully pled complaint," "the immunity provision of the PREP Act would still apply," even in state court. *Id.* And where a state court finds the immunity provision does apply, "the immunity ends the case, and litigants may either file a claim for willful misconduct in the United States District Court for the District of Columbia, or seek relief from the compensation fund." *Id.* at *4 n.4 (citations omitted).

requiring "clear congressional intent," *Miller*, 949 F.3d at 995, "not merely to preempt a certain amount of state law, but also to transfer jurisdiction to decide the preemption question from state to federal courts," *Musson Theatrical, Inc. v. Fed. Exp. Corp.*, 89 F.3d 1244, 1253 (6th Cir. 1996), *amended by* 1998 WL 117980 (6th Cir. Jan. 15, 1998). "Without evidence of Congress's intent to transfer jurisdiction to federal courts, there is no basis for invoking federal judicial power." *Id.*

Complete preemption is rare. The Supreme 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, 11; *see Matthews*, 15 F.4th at 721. What all of these statutes have in common is both a federal cause of action and federal rights and duties that govern adjudication of that cause of action. Where these statutes apply, state law disappears, and the claims are transformed into ones for a violation of these federal duties. *See Matthews*, 15 F.4th at 721 (noting that in the instances of complete preemption recognized by the Supreme Court, federal law "entirely displace[s] state law").

For example, the LMRA preempts only state-law claims that are "controlled by [the] federal substantive law" of contract interpretation 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). "If the claim 'does not invoke contract interpretation' and 'is borne of state law,' then it is not preempted." *Adamo Demolition Co. v. Int'l Union of Operating Engineers Loc. 150, AFL-CIO*, 3 F.4th 866, 873 (6th Cir. 2021). Similarly, ERISA section 502(a) completely preempts state-law claims that are governed by federal substantive duties—specifically, those imposed by ERISA or an ERISA plan. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004); *K.B. ex rel. Qassis v. Methodist Healthcare-Memphis Hosps.*, 929 F.3d 795, 800–01 (6th Cir. 2019). And sections 85 and 86 of the National Bank Act completely preempt claims that are governed by the federal "substantive limits on the rates of interest that national banks may charge." *Beneficial*, 539 U.S. at 9.

Unlike these statutes, the PREP Act creates no federal substantive duties that can be adjudicated independent of state law. *Hudak*, 58 F.4th at 854. The PREP Act is, "at its core, an immunity statute; it does not

create rights, duties, or obligations." *Dorsett v. Highlands Lake Ctr., LLC*, 557 F. Supp. 3d 1218, 1230 (M.D. Fla. 2021) (citation omitted); *cf. Solomon*, 2023 WL 2376207, at *4 ("[T]he PREP Act principally creates an immunity scheme. And immunity has no bearing on complete preemption, which is a jurisdictional doctrine, not a preemption-defense doctrine."). When a state-law claim meets the requirements of subsection (a) of the PREP Act, one of two things happens. *First*, if the three criteria for willful misconduct are alleged, the statute expressly preserves, not displaces, state law and provides a federal venue for adjudicating state-law claims. *See* 42 U.S.C. § 247d-6d(e)(2) (providing that *state* law is the source of "[t]he substantive law for decision" in a subsection (d) action). *Second*, if the three criteria for willful misconduct are not alleged, 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). In neither set of circumstances does the PREP Act transform state-law claims into purely federal ones.

Such a transformation, however, is necessary for complete preemption, which posits that state law has been wholly displaced in favor of uniform, federal substantive and procedural law. *See Beneficial*,

539 U.S. at 10; *see also Roddy v. Grand Trunk W. R.R. Inc.*, 395 F.3d 318, 323 (6th Cir. 2005) ("Complete preemption that permits removal is reserved for statutes 'designed to occupy the regulatory field with respect to a particular subject.'" (quoting *Warner v. Ford Motor Co.*, 46 F.3d 531, 535 (6th Cir. 1995) (*en banc*))). As this Court has explained, if a statute merely "incorporat[es] state law into the federal action, [it] does not entirely displace state law" and fails to meet the complete preemption standard. *Matthews*, 15 F.4th at 720 (discussing similar feature of the Price-Anderson Act). The express congressional direction that state law continue to apply, even if limited by a federal defense, evidences the opposite of the required complete displacement. In this regard, the subsection (d) cause of action is indistinguishable from the cause of action created by the Price-Anderson Act, 42 U.S.C. § 2014(hh), which this Court in *Matthews* held does not create complete preemption. *Compare* 42 U.S.C. § 247d-6d(e)(2) (providing that, for subsection (d) claims, state law provides "the substantive law for decision," "unless such law is inconsistent with" federal law, including the liability protections of the PREP Act), *with* 42 U.S.C. § 2014(hh) (providing that the "substantive rules for decision in [a public liability] action shall be derived from the

law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of [42 U.S.C. § 2210]").

Montefiore ignores this holding of *Matthews* and relies solely on the Third Circuit's statement in *Maglioli* that "[t]he PREP Act's language easily satisfies the standard for complete preemption of particular causes of action." 16 F.4th at 409. Of course, to the extent that *Matthews* and *Maglioli* are in tension, the Court is bound to follow its own decision in *Matthews*, not that of a sister circuit. In any event, as the Third Circuit recognized in "a note on the limits of [its] holding," its musing that "[c]onceivably" some state-law claims could be completely preempted by the PREP Act was not actually a holding of the case. *Id.* at 413. Moreover, the court did not state, as Montefiore suggests, that the plaintiffs' claims *would* have been completely preempted if all of the elements of PREP Act willful misconduct had been pleaded. Rather, it recognized that claims that could be brought under the PREP Act might not be completely preempted if they were supported by "an independent legal duty," an analysis the court found it unnecessary to undertake. *Id.* at 410 n.11 (citations omitted). As explained above, though, because the PREP Act does not create any federal legal duty *at all*, claims brought under the

subsection (d) cause of action will *always* be based on an independent legal duty—typically a state-law duty that has not been displaced.

To the extent that Montefiore, or the dicta in *Maglioli*, suggests that any time Congress uses the term "exclusive federal cause of action" it is invoking the complete preemption doctrine, that suggestion is incorrect. Congress's intention to allow state-law rights to be vindicated only by federal causes of action in narrow circumstances is not alone sufficient evidence that Congress intended "to transfer jurisdiction to decide the preemption question from state to federal courts." *Musson Theatrical*, 89 F.3d at 1253; *see also Saldana*, 27 F.4th at 688 ("The provision of one specifically defined, exclusive federal cause of action" is insufficient to show "that Congress intended the Act to completely preempt all state-law claims related to the pandemic."). Here, by preserving a prominent role for state law, "Congress has not manifested a clear intent for the PREP Act to occupy the field so completely" as to trigger complete preemption. *Bolton v. Gallatin Ctr. for Rehab. & Healing, LLC*, 535 F. Supp. 3d 709, 729 (M.D. Tenn. 2021); *see also Martin*, 37 F.4th at 1213 (rejecting complete preemption argument because subsection (d) does not "occupy the field of health safety").

II. Federal-officer removal jurisdiction is lacking.

"Persons like [Montefiore], who are not federal officers, must satisfy three requirements in order to invoke the federal-officer removal statute: (1) the defendants must establish that they acted under a federal officer, (2) those actions must have been performed under color of federal office, and (3) the defendants must raise a colorable federal defense." *Mays*, 871 F.3d at 442–43. Montefiore's brief addresses only the first of these elements—the "acting under" requirement—and thus does not attempt to carry its burden. And even as to that element, its argument is barred by *Hudak*.

"To demonstrate that it was acting under a federal officer, the removing party must show that it was 'in a relationship with the federal government where the government was functioning as the defendant's superior.'" *Hudak*, 58 F.4th at 858 (quoting *Mays*, 871 F.3d at 444). In its opening brief, Montefiore asserts without citation that, with the onset of the pandemic, all of the nation's "[n]ursing homes essentially became extensions of HHS and relied upon constantly changing directives from CMS to prevent the spread of COVID-19." Montefiore Br. 52–53. But that is exactly the argument this Court rejected in *Hudak*. *See* 58 F.4th at

859. "[A] highly regulated firm," like a nursing home, "cannot find a statutory basis for removal in the fact of federal regulation alone." *Watson*, 551 U.S. at 153. Accordingly, as this Court held in *Hudak*, applying *Watson* and consistent with holdings of the Third, Fifth, Seventh, and Ninth Circuits, neither regulatory directives and guidance related to COVID-19 infection control at congregate facilities, nor those facilities' claims that they were performing the "governmental task" of "helping to contain the spread of the COVID-19 virus" bring the facilities within the scope of the federal-officer removal statute. 58 F.4th at 859; *see also Martin*, 37 F.4th at 1212–13; *Mitchell*, 28 F.4th at 589–91; *Saldana*, 27 F.4th at 684–86; *Maglioli*, 16 F.4th at 404–06; *Solomon*, 2023 WL 2376207, at *6.

On appeal, Montefiore for the first time argues that this case involves its "affirmative engagement in a 'recommended activity' recognized under the PREP Act and the Declaration as serving a public health function"—suggesting that *any* entity "engaged in a 'recommended activity'" was "'acting under' federal officers for purposes of the federal-officer removal statute." Montefiore Br. 39. That argument is not properly before the Court, and is wrong.

First, the amended notice of removal nowhere suggests that the facility's engagement in "recommended activities" is what constituted action under federal-officer direction. And this Court will not consider purported federal directions as the source of removal jurisdiction if they were not identified as such in the removal notice. *Mays*, 871 F.3d at 446; *accord Lopez-Munoz v. Triple-S Salud, Inc.*, 754 F.3d 1, 4 (1st Cir. 2014) (holding that a court's inquiry into whether federal-officer jurisdiction exists is "cabined by the notice of removal"). Additionally, in briefing in the district court, no defendant argued that its engagement in "recommended activities" sufficed to satisfy the "acting under" prong. *See* RE 17, PageID #23–24; RE18, PageID #26–27. Accordingly, the argument has been forfeited. *See Armstrong v. City of Melvindale*, 432 F.3d 695, 699–700 (6th Cir. 2006).

Further, Montefiore's argument rests on a fundamental misunderstanding of the PREP Act—a statute that does not require anyone to do anything at all but, to encourage voluntary action by non-federal actors, limits liability for such action. Specifically, the statute provides a limited immunity for those who voluntarily choose to administer or use covered countermeasures in a manner consistent with

the HHS Secretary's recommendation.[18] Nothing in the statute, or in any implementing declaration, places these actors under federal control. Given that, as *Hudak* made clear, "compliance with [HHS] mandates … does not demonstrate that [a regulated entity] was 'acting under' a federal officer," 58 F.4th at 859, compliance (or here, non-compliance) with a *recommendation* does not do so.

The absurd consequences of Montefiore's argument that anyone engaged in a "recommended activity" was acting under a federal officer also highlight the error. Accepting Montefiore's view would necessitate a finding "that the federal government exercised control over" every single health care provider in America who donned a mask or administered a COVID-19 test "to such a degree that the government acted as [their] superior." *Id.* at 845. Not only would such a finding defy logic, but it "would expand the scope of the [federal-officer removal] statute

[18] As used in the PREP Act Declaration, "recommended activities" refers to "the manufacture, testing, development, distribution, administration, and use of the Covered Countermeasure," "under the conditions stated" in that declaration, *See, e.g.*, Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 79,190, 79,195 (Dec. 9, 2020).

considerably," and nothing in that statute, the PREP Act, or any secretarial action compels such a result. *Watson*, 551 U.S. at 153.

To the contrary, throughout the early days of the pandemic, HHS repeatedly stated that it expected entities like Montefiore to take their primary direction from state and local governments. *See supra*, at 10–11. But the federal-officer removal statute's "basic purpose is to protect the Federal Government from … interference with its operations" by states. *Watson*, 551 U.S. at 150. Where the federal government has itself expressly recognized state authority as primary, that purpose is not implicated. *See Mays*, 871 F.3d at 448 (declining to find statute satisfied where federal jurisdiction would not serve statute's purpose of "protect[ing] federal officers from state court hostility to the federal government"); *cf. Maglioli*, 16 F.4th at 400 ("There is no COVID-19 exception to federalism.").

Not only is a recommendation not a federal officer "direction," but Montefiore's failures to protect and care for Mary Friedman, including its failure to test symptomatic residents and its false representations that it had tested them, do not relate to any such recommendation. *See Ohio State Chiropractic Ass'n v. Humana Health Plan Inc.*, 647 F. App'x 619,

624–25 (6th Cir. 2016) (discussing "relating to" requirement). Montefiore has not met its burden to show that this suit relates to actions taken under federal government control. *See Hudak*, 58 F.4th at 859–60.

CONCLUSION

The Court should affirm the district court's remand order.

Respectfully submitted,

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March 15, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing brief complies with the typeface and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(5), (a)(6), and (a)(7)(B) as follows: The proportionally spaced typeface is 14-point Century Schoolbook and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 9,114 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam R. Pulver
Adam R. Pulver

ADDENDUM

(Pursuant to 6 Cir. R. 28(b)(1)(A)(i) and R. 30(g)(1))

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 28(b)(1)(A)(i) and 30(g)(1), Plaintiff-Appellee designates as relevant the following docket entries from the U.S. District Court for the Northern District of Ohio, Case No. 1:21-cv-02083:

RE#	Description	PageID # Range
1	Notice of Removal (Nov. 3, 2021)	1–4
12	Amended Notice of Removal (Dec. 2, 2021)	57–61
12-1	Exhibit A to Notice of Removal – State Court Complaint	62–81
14	Plaintiff-Appellee's Motion to Remand (Feb. 3, 2021)	88–109
17	Memorandum in Opposition to Motion to Remand filed by Defendants-Appellants Menorah Park Foundation, Montefiore, Montefiore Foundation, Montefiore Home, Montefiore Housing Corporation (Jan. 13, 2022)	185–211
18	Memorandum in Opposition to Motion to Remand filed by Defendant-Appellant Ariel Hyman (Jan. 13, 2022)	213–241
19	Order of Remand (July 11, 2022)	242–262
24	Notice of Appeal (Aug. 8, 2022)	296–297