No. 23-15195
c/w 23-15452

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NANCY HEARDEN, et al.,
Plaintiffs-Appellees,

v.

SHLOMO RECHNITZ, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of California
Case No. 2:22-cv-00944-MCE-DMC
Hon. Morrison C. England, Jr., United States District Judge

APPELLEES' ANSWERING BRIEF

Russell Reiner
Richard Frankel
Reiner Slaughter & Frankel
2851 Park Marina Drive
Suite 200
Redding, CA 96001

Adam R. Pulver
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

William Kershaw
Stuart C. Talley
Kershaw, Talley & Barlow PC
401 Watt Avenue
Sacramento, CA 95864

Wendy C. York
Daniel Jay
York Law Corporation
1111 Exposition Boulevard
Building 500
Sacramento, CA 95815

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTRODUCTION 1

STATEMENT OF JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

ISSUES PRESENTED 3

STATEMENT OF THE CASE 5

I. The PREP Act and the 2020 Declaration 5

II. The Federal-State Pandemic Response 10

III. Conditions at Windsor Redding Care Center and the Resulting Deaths 13

IV. Procedural History 15

A. The Families' State Court Complaint 15

B. District Court Proceedings 17

SUMMARY OF ARGUMENT 20

STANDARD OF REVIEW 23

ARGUMENT 23

I. Windsor failed to preserve its complete preemption and federal-officer removal arguments. 23

II. The PREP Act does not completely preempt the families' claims. 27

A. *Saldana* disposes of Windsor's complete preemption argument. 28

B. Windsor's complete preemption argument fails for additional reasons. 28

III. Windsor does not satisfy the requirements of the federal-officer removal statute. 33

IV. The families' state-law claims do not raise a substantial federal question. 37

V. The district court did not abuse its discretion in awarding attorneys' fees. 44

CONCLUSION 53

STATEMENT OF RELATED CASES 55

CERTIFICATE OF COMPLIANCE 56

ADDENDUM OF PROVISIONS INVOLVED ....

TABLE OF AUTHORITIES

Cases **Page(s)**

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 33

Agarwal v. Arthur G. McKee & Co.,
644 F.2d 803 (9th Cir. 1981) 46

Alyeska Pipeline Service Co. v. Wilderness Society,
421 U.S. 240 (1975) 51

Arbor Management Services, LLC v. Hendrix,
875 S.E.2d 392 (Ga. Ct. App. 2022) 31

ARCO Environmental Remediation, L.L.C. v. Department of Health & Environmental Quality of Montana,
213 F.3d 1108 (9th Cir. 2000) 39

Avilez v. Garland,
--- F.4th ---, 2023 WL 3832024 (9th Cir. June 6, 2023) 28

Balcorta v. Twentieth Century Fox Film Corp.,
208 F.3d 1102 (9th Cir. 2000) 45

Beeman v. Anthem Prescription Management, Inc.,
780 F. App'x 486 (9th Cir. 2019) 26

Beneficial National Bank v. Anderson,
539 U.S. 1 (2003) 29

Bennett v. Southwest Airlines Co.,
484 F.3d 907 (7th Cir. 2007) 44

Bolton v. Gallatin Center for Rehabilitation & Healing, LLC,
535 F. Supp. 3d 709 (M.D. Tenn. 2021) 49

BP P.L.C. v. Mayor & City Council of Baltimore,
141 S. Ct. 1532 (2021) 52

Burrell v. Bayer Corp.,
918 F.3d 372 (4th Cir. 2019) 41

Cagle v. NHC Healthcare-Maryland Heights, LLC,
2022 WL 2833986 (E.D. Mo. July 20, 2022) 50

California Shock Trauma Air Rescue v. State Compensation Insurance Fund,
636 F.3d 538 (9th Cir. 2011) 38

Estate of Champion v. Billings Skilled Nursing Facility, LLC,
591 F. Supp. 3d 892 (D. Mont. 2022) 31

City & County of Honolulu v. Sunoco LP,
39 F.4th 1101 (9th Cir. 2022) 36

City of Oakland v. BP PLC,
969 F.3d 895 (9th Cir. 2020) 28, 39, 43

County of San Mateo v. Chevron Corp.,
32 F.4th 733 (9th Cir. 2022) 36, 40

Cowen v. Walgreen Co.,
2022 WL 17640208 (N.D. Okla. Dec. 13, 2022) 50

Dennis v. Hart,
724 F.3d 1249 (9th Cir. 2013) 29

Dietrich v. Boeing Co.,
14 F.4th 1089 (9th Cir. 2021) 23

Dorsett v. Highlands Lake Center, LLC,
557 F. Supp. 3d 1218 (M.D. Fla. 2021) 49

Eaton v. Big Blue Healthcare, Inc.,
480 F. Supp. 3d 1184 (D. Kan. 2020)..50

Empire Healthchoice Assurance, Inc. v. McVeigh,
547 U.S. 677 (2006)..41, 43

Garcia v. Amfels, Inc.,
254 F.3d 585 (5th Cir. 2001)..48

Gardner v. UICI,
508 F.3d 559 (9th Cir. 2007)..44

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,
545 U.S. 308 (2005)..9, 38, 41, 42, 43

Grancare, LLC v. Thrower by and through Mills,
889 F.3d 543 (9th Cir. 2018)...3, 44, 45

Gunn v. Minton,
568 U.S. 251 (2013)..37, 43

Gwilt v. Harvard Square Retirement & Assisted Living,
537 F. Supp. 3d 1231 (D. Colo. 2021) 49

Hagoubyan v. KF Rinaldi, LLC,
No. 21-56171, 2023 WL 4103939 (9th Cir. June 21, 2023) 1

Houden v. Todd,
348 F. App'x 221 (9th Cir. 2009)...48

Hudak v. Elmcroft of Sagamore Hills,
58 F.4th 845 (6th Cir. 2023) 1, 30, 31, 32, 35, 38

Hudak v. Elmcroft of Sagamore Hills,
566 F. Supp. 3d 771 (N.D. Ohio 2021)..49

Hunter v. Earthgrains Co. Bakery,
281 F.3d 144 (4th Cir. 2002) 52

Leroy v. Hume,
554 F. Supp. 3d 470 (E.D.N.Y. 2021) 49

Leroy v. Hume,
No. 21-2158-cv, 2023 WL 2928353 (2d Cir. Apr. 13, 2023) 32

Lopez v. Life Care Centers of America, Inc.,
2021 WL 1121034 (D.N.M. Mar. 24, 2021) 50

Louque v. Allstate Insurance Co.,
314 F.3d 776 (5th Cir. 2002) 27

Lussier v. Dollar Tree Stores, Inc.,
518 F.3d 1062 (9th Cir. 2008) 45

Lyons v. Cucumber Holdings, LLC,
520 F. Supp. 3d 1277 (C.D. Cal. 2021) 31

Maglioli v. Alliance HC Holdings LLC,
16 F.4th 393 (3d Cir. 2021) 1, 30, 32, 33, 35, 37, 38, 49

Malgesini v. Malley,
No. 22-15625, 2023 WL 1281664 (9th Cir. Jan. 31, 2023) 47

Manyweather v. Woodlawn Manor, Inc.,
40 F.4th 237 (5th Cir. 2022) 30, 31

Martin v. Filart,
No. 20-56067, 2022 WL 576012 (9th Cir. Feb. 25, 2022) 2

Martin v. Franklin Capital Corp.,
546 U.S. 132 (2005) 44, 45, 52

Martin v. Petersen Health Operations, LLC,
37 F.4th 1210 (7th Cir. 2022) 1, 31, 35, 38

Martin v. Petersen Health Operations, LLC,
2021 WL 4313604 (C.D. Ill. Sept. 22, 2021) 49, 54

Massamore v. RBRC, Inc.,
595 F. Supp. 3d 594 (W.D. Ky. 2022) 49

In re Mercury Interactive Corp. Securities Litigation,
618 F.3d 988 (9th Cir. 2010) 26, 40

Merrell Dow Pharmaceuticals Inc. v. Thompson,
478 U.S. 804 (1986) 41, 42

Miller v. Gammie,
335 F.3d 889 (9th Cir. 2003) 28

Mitchell v. Advanced HCS, LLC,
28 F.4th 580 (5th Cir. 2022) 1, 30, 33, 35, 38, 49

Moore v. Chesapeake & Ohio Ry. Co.,
291 U.S. 205 (1934) 41

NASDAQ OMX Group v. UBS Securities, LLC,
770 F.3d 1010 (2d Cir. 2014) 43

Nisenbaum v. Milwaukee County,
333 F.3d 804 (7th Cir. 2003) 52

O'Halloran v. University of Washington,
856 F.2d 1375 (9th Cir. 1988) 39

Perez v. Southeast SNF, LLC,
No. 21-50399, 2022 WL 987187 (5th Cir. Mar. 31, 2022) 49

Powell v. Healy,
No. 21-55477, 2022 WL 4181717 (9th Cir. Sept. 13, 2022) 47

Powers v. Cottrell, Inc.,
728 F.3d 509 (6th Cir. 2013) 48

Premier Electric Construction Co. v. National Electrical Contractors Ass'n, Inc.,
814 F.2d 358 (7th Cir. 1987) 51, 52

Renegade Swish, L.L.C. v. Wright,
857 F.3d 692 (5th Cir. 2017) 48, 50

Robinson v. Pfizer, Inc.,
855 F.3d 893 (8th Cir. 2017) 52

Sabra v. Maricopa County Community College District,
44 F.4th 867 (9th Cir. 2022) 25

Saldana v. Glenhaven Healthcare,
27 F.4th 679 (9th Cir. 2022), reh'g en banc denied, (9th Cir. Apr. 18, 2022), cert. denied, 143 S. Ct. 444 (2022) ....
1, 2, 3, 4, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 34, 35, 36, 37, 38, 45, 47, 50, 52

Sauk-Suiattle Indian Tribe v. City of Seattle,
56 F.4th 1179 (9th Cir. 2022) 43

Schleider v. GVDB Operations, LLC,
2021 WL 2143910 (S.D. Fla. May 24, 2021) 50

Shankle v. Heights of Summerlin, LLC,
574 F. Supp. 3d 820 (D. Nev. 2021) 31

Shapnik v. Hebrew Home for the Aged at Riverdale,
535 F. Supp. 3d 301 (S.D.N.Y. 2021) 49

Solomon v. St. Joseph Hospital,
62 F.4th 54 (2d Cir. 2023) 1, 30, 35, 38

Stirling v. Minasian,
955 F.3d 795 (9th Cir. 2020) 34

United States v. Bonds,
608 F.3d 495 (9th Cir. 2010) 46

United States v. Trudeau,
812 F.3d 578 (7th Cir. 2016) 26

USA Petroleum Co. v. Atlantic Richfield Co.,
13 F.3d 1276 (9th Cir. 1994) 25

Van Buskirk v. Baldwin,
265 F.3d 1080 (9th Cir. 2001) 46

Van Gerwen v. Guarantee Mutual Life Co.,
214 F.3d 1041 (9th Cir. 2000) 51

Walker v. Beard,
789 F.3d 1125 (9th Cir. 2015) 25

Washington State Department of Transportation v. Washington Natural Gas Co., Pacificorp,
59 F.3d 793 (9th Cir. 1995) 46

Watson v. Philip Morris Cos.,
551 U.S. 142 (2007) 34, 35, 36, 37

Weisler v. Jefferson Parish Sheriff's Office,
736 F. App'x 468 (5th Cir. 2018) 27

Wright v. Encompass Health Rehabilitation Hospital of Columbia, Inc.,
2021 WL 1177440 (D.S.C. Mar. 29, 2021) 50

Yarnell v. Clinton No. 1, Inc.,
591 F. Supp. 3d 432 (W.D. Mo. 2022) 49

Federal Statutes

28 U.S.C. § 1291 3

28 U.S.C. § 1331 3

28 U.S.C. § 1442 .... 3, 21, 52

28 U.S.C. § 1442(a)(1) 17, 34

28 U.S.C. § 1443 52

28 U.S.C. § 1446(a) 39

28 U.S.C. § 1447(c) 3, 5, 18, 22, 23, 44, 48, 51, 52, 53

28 U.S.C. § 1447(d) 3

42 U.S.C. § 247d-6d 8

42 U.S.C. § 247d-6d(a)(1) 6

42 U.S.C. § 247d-6d(a)(2)(B) 6, 30

42 U.S.C. § 247d-6d(a)(3) 6

42 U.S.C. § 247d-6d(a)(5) 6

42 U.S.C. § 247d-6d(b)(1) 6

42 U.S.C. § 247d-6d(b)(2) 6

42 U.S.C. § 247d-6d(c)(1)(A) 7, 32, 33

42 U.S.C. § 247d-6d(d)(1) 7, 29, 33

42 U.S.C. § 247d-6d(i)(1) 6

42 U.S.C. § 247d-6d(e) 7

42 U.S.C. § 247d-6e(a) 7

State Statutes

California Business and Professions Code § 17200 17

California Health and Safety Code § 1430 17

California Welfare and Institutions Code § 15657 16

Federal Administrative Materials

Department of Health & Human Services (HHS), Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198 (Mar. 17, 2020), https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx 7

HHS, Amendment to Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID–19, 85 Fed. Reg. 21,012 (Apr. 15, 2020), https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx 8

HHS, Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration, 85 Fed. Reg. 79,190 (Dec. 9, 2020), https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx 8

HHS, Office of General Counsel, Advisory Opinion 21-01 (Jan. 8, 2021) 9

HHS, Centers for Disease Control and Prevention (CDC) Coronavirus Disease 2019 (COVID-19) Preparedness Checklist for Nursing Homes and other Long-Term Care Settings (Preparedness

Checklist) (Mar. 13, 2020), https://www.cdc.gov/coronavirus/2019-ncov/downloads/novel-coronavirus-2019-Nursing-Homes-Preparedness-Checklist_3_13.pdf 10

HHS, Centers for Medicare and Medicaid Services (CMS), Interim Final Rule, Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, 85 Fed. Reg. 54,820 (Sept. 2, 2020) 10

HHS, CMS, Toolkit on State Actions to Mitigate COVID-19 Prevalence in Nursing Homes (Version 26 Mar. 2022), https://www.cms.gov/files/document/covid-toolkit-states-mitigate-covid-19-nursing-homes.pdf.. 11

HHS, CDC and CMS, COVID-19 Long-Term Care Facility Guidance (Apr. 2, 2020), https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf 10, 11

State Materials

California Division of Occupational Safety and Health (Cal/OSHA), Release No. 2020-08, Cal/OSHA Issues Guidance on Requirements to Protect Health Care Workers from 2019 Novel Coronavirus (Feb. 3, 2020), https://www.dir.ca.gov/DIRNews/2020/2020-08.html 13

Cal/OSHA, Release No. 2021-13, Cal/OSHA Issues Citations to Multiple Employers for COVID-19 Violations (Feb. 4, 2021), https://www.dir.ca.gov/DIRNews/2021/2021-13.html 13

Cal/OSHA, Release No. 2020-80, Cal/OSHA Issues Citations to Health Care Facilities and Public Safety Employers for COVID-19 Violations (Sept. 22, 2020), https://www.dir.ca.gov/DIRNews/2020/2020-80.html 13

California Executive Order N-27-20 (Mar. 15, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.15.2020-COVID-19-Facilities.pdf 12

California Department of Public Health, All Facilities Letters – 2020, https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/LNCAFL20.aspx 12

California Department of Public Health, AFL 20-52, Coronavirus Disease 2019 (COVID-19) Mitigation Plan Implementation and Submission Requirements for Skilled Nursing Facilities (SNF) and Infection Control Guidance for Health Care Personnel (HCP), https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-20-52.aspx 12

Other Authorities

Congressional Research Service, The PREP Act and COVID-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures 1 (2022), https://crsreports.congress.gov/product/pdf/LSB/LSB10443 5

Wright & Miller, 14C Federal Practice & Procedure, Jurisdiction § 3733 (Rev. 4th ed.) 39

INTRODUCTION

In *Saldana v. Glenhaven Healthcare*, 27 F.4th 679 (9th Cir. 2022), this Court held that neither complete preemption by the Public Readiness and Emergency Preparedness (PREP) Act, the embedded federal question doctrine, nor the federal-officer removal statute provides a basis for federal jurisdiction over state-law claims brought against health care facilities and alleging negligent COVID-19 infection control. Five other courts of appeals have reached the same conclusion in similar cases; none disagree. *See Solomon v. St. Joseph Hospital*, 62 F.4th 54 (2d Cir. 2023); *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845 (6th Cir. 2023); *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210 (7th Cir. 2022); *Mitchell v. Advanced HCS, LLC*, 28 F.4th 580 (5th Cir. 2022); *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393 (3d Cir. 2021). The *Saldana* defendants' petition for en banc rehearing in this Court was denied without a call for response. *See* Order, No. 20-56194 (9th Cir. Apr. 18, 2022). And their petition for certiorari review was denied by the Supreme Court. *See* 143 S. Ct. 444 (2022). Since *Saldana* was decided, this Court has applied *Saldana* to require remand in dozens of similar cases. *See*, *e.g.*, *Hagoubyan v. KF Rinaldi, LLC*, No. 21-56171, 2023 WL

4103939 (9th Cir. June 21, 2023); *Martin v. Filart*, No. 20-56067, 2022 WL 576012 (9th Cir. Feb. 25, 2022).

Defendant-Appellants here (collectively, "Windsor") are entities related to the Windsor Redding Care Center, a California nursing home facing state-law claims based on allegations that negligent COVID-19 infection control and persistent understaffing caused the deaths of 24 of its 83 residents. Notwithstanding *Saldana* and unanimous appellate authority, Windsor removed this case, invoking the same theories that this Court had already rejected in *Saldana*. As to all three of the jurisdictional bases asserted by Windsor, *Saldana* governs and requires that the case be returned to state court. Indeed, in its opposition to the motion to remand in the district court, Windsor abandoned any assertion that federal-officer removal or complete preemption provided jurisdiction, simply noting in its introduction that *Saldana* "resolve[d]" any such arguments. To the extent that Windsor attempts to distinguish this case from *Saldana* as to "embedded federal question" or *Grable* jurisdiction, those attempts fail both because they were not properly presented to the district court, and because they run counter to both *Saldana* and binding precedent predating that decision.

The district court's order remanding this case and awarding fees under the fee-shifting provision of 28 U.S.C. § 1447(c) should be affirmed.

STATEMENT OF JURISDICTION

The district court lacked subject-matter jurisdiction over this action under either 28 U.S.C. § 1331 or § 1442.

Under 28 U.S.C. § 1447(d), this Court has appellate jurisdiction to review the district court's remand order. *Saldana*, 27 F.4th at 683. The Court has jurisdiction to review the district court's order awarding attorney's fees pursuant to 28 U.S.C. § 1447(c) under 28 U.S.C. § 1291. *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 546 (9th Cir. 2018).

STATUTORY PROVISIONS INVOLVED

Relevant statutory authorities appear in the Addendum to this brief.

ISSUES PRESENTED

1. Whether removing defendants may raise on appeal a jurisdictional argument that they did not make in opposing remand in the district court.

2. Whether, contrary to this Court's decision in *Saldana* and the decisions of five other courts of appeals, the PREP Act completely preempts state-law claims arising out of deaths caused by a nursing home's negligent failure to deploy adequate COVID-19 infection control measures and to provide adequate medical care and monitoring.

3. Whether, contrary to this Court's decision in *Saldana* and the decisions of five other courts of appeals, federal regulations and guidance relating to COVID-19 brought private health care facilities under the control of the federal government so as to trigger the federal-officer removal statute.

4. Whether a defendant may argue that an "embedded federal question" different from the federal question identified in its notice of removal creates federal jurisdiction, without a timely amendment to the notice.

5. Whether, contrary to Supreme Court precedent, in garden-variety state-law tort cases, reliance on violations of federal regulations for their negligence per se effect creates federal question jurisdiction.

6. Whether a district court abuses its discretion in awarding attorney's fees pursuant to 28 U.S.C. § 1447(c) where a defendant

removed a case to federal court based on theories rejected by binding Circuit precedent and the unanimous precedent of other courts of appeals.

STATEMENT OF THE CASE

I. The PREP Act and the 2020 Declaration

A. Enacted in 2005 "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency, the Public Readiness and Emergency Preparedness Act (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 (2022).[1]

The Secretary can trigger 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

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

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.* §§ 247d-6d(i)(1)(A)–(D).

Subsection (a) of the PREP Act provides "covered person[s]" with immunity from liability under state or federal law for "any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure." *Id.* §§ 247d-6d(a)(1), (a)(2)(B). The statute imposes conditions that limit this immunity, *id.* § 247d-6d(a)(3), and authorizes the Secretary to impose further limitations, *id.* §§ 247d-6d(a)(5), (b)(2).

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). The term "willful misconduct" is defined only to include acts or omissions taken "intentionally to achieve a wrongful purpose," "knowingly without legal or factual justification," and "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." *Id.* § 247d-6(c)(1)(A). For claims

within the carve-out, the statute creates an "exclusive Federal cause of action," *id.* § 247d-6d(d)(1), 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 fund, available to those who suffered injuries "directly caused by the administration or use of a covered countermeasure." 42 U.S.C. § 247d-6e(a).

B. 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.

The Secretary has subsequently amended the Declaration ten times.[2] The First Amendment expanded covered countermeasures to include certain respiratory protective equipment. *See* 85 Fed. Reg. 21,012, 21,014 (Apr. 15, 2020). Later, in the Fourth Amendment's preamble, the Secretary opined that "[w]here there are limited Covered Countermeasures, *not* administering a Covered Countermeasure to one individual in order to administer it to another individual can constitute 'relating to … the administration to … an individual' under 42 U.S.C. 247d-6d," where it reflects "[p]rioritization or purposeful allocation … particularly if done in accordance with a public health authority's directive." 85 Fed. Reg. 79,190, 79,197 (Dec. 9, 2020). He gave as an example the decision to vaccinate a more-vulnerable individual instead of a less-vulnerable individual. *Id.*

The Fourth Amendment also incorporated by reference four advisory opinions previously issued by HHS's Office of General Counsel

---

[2] All of the Amendments are available at https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx.

(OGC). *Id.* at 79,191 & n.5. On January 8, 2021, OGC issued another advisory opinion, in which it opined that "the PREP Act is a '[c]omplete [p]reemption' [s]tatute" and that it applies to situations where a covered person makes a decision regarding allocation of covered countermeasures that "results in non-use by some individuals," but *not* where non-use is the result of "nonfeasance." OGC, HHS, Advisory Opinion 21-01 on the Public Readiness and Emergency Preparedness Act; Scope of Preemption Provision (Jan. 8, 2021), ER122, 123–125.[3] The Advisory Opinion also asserted that "substantial federal question" jurisdiction exists in any case where a defendant invokes the PREP Act. *Id.* at ER125–26 (citing *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005)). Like the previous advisory opinions, it stated that it "set[] forth the [then-]current views" of OGC, was "not a final agency action or a final order," and did "not have the force or effect of law." *Id.* at ER126.

---

[3] All "ER" references refer to the Excerpts of Record filed in Appeal No. 23-15452 on May 26, 2023.

II. The Federal-State Pandemic Response

Since January 2020, federal agencies, including HHS's Centers for Disease Control and Prevention (CDC) and Centers for Medicare and Medicaid Services (CMS), have issued guidance to long-term care facilities regarding COVID-19 infection control and the applicability of existing regulations, while also revising certain regulations. *See*, *e.g.*, CMS, Interim Final Rule, Medicare and Medicaid Programs, Clinical Laboratory Improvement Amendments (CLIA), and Patient Protection and Affordable Care Act; Additional Policy and Regulatory Revisions in Response to the COVID-19 Public Health Emergency, 85 Fed. Reg. 54,820 (Sept. 2, 2020); CDC & CMS, COVID-19 Long-Term Care Facility Guidance (LTC Guidance) (Apr. 2, 2020);[4] CDC, Coronavirus Disease 2019 (COVID-19) Preparedness Checklist for Nursing Homes and other Long-Term Care Settings (Preparedness Checklist) (Mar. 13, 2020).[5] Throughout, the agencies explicitly indicated that state and local governments would retain their roles as primary protectors of public

---

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

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

health. 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 3 (Version 26 Mar. 2022) (compiling "many creative plans that state governments and other entities have put into operation").[6]

Consistent with this expectation, the State of California took a variety of actions to address the spread of COVID-19 in nursing homes. On March 15, 2020, for instance, Governor Newsom issued an executive order directing the Department of Social Services, the Division of

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

Occupational Safety and Health (Cal/OSHA), and the Department of Public Health (CDPH) to take a variety of actions to address the risk of COVID-19 in facilities like Windsor "to protect the health and safety of Californians receiving care in these critical facilities." Cal. Exec. Order N-27-20 (Mar. 15, 2020).[7] CDPH issued detailed guidance to skilled nursing facilities, including Windsor, regarding the transmission of the coronavirus. *See*, *e.g.*, CDPH, All Facilities Letters – 2020.[8] For example, on May 11, 2020, CDPH required all such facilities "to expand their existing infection control policies to include the development and implementation of a CDPH approved COVID-19 mitigation plan," addressing infection prevention and control, staffing issues, and isolation plans. CDPH, AFL 20-52, Coronavirus Disease 2019 (COVID-19) Mitigation Plan Implementation and Submission Requirements for Skilled Nursing Facilities (SNF) and Infection Control Guidance for Health Care Personnel (HCP).[9]

---

[7] https://www.gov.ca.gov/wp-content/uploads/2020/03/3.15.2020-COVID-19-Facilities.pdf.

[8] https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/LNCAFL20.aspx.

[9] https://www.cdph.ca.gov/Programs/CHCQ/LCP/Pages/AFL-20-52.aspx.

In addition, Cal/OSHA informed all health care workplaces that the State's Aerosol Transmissible Disease standard required them to take certain steps to reduce transmission of the coronavirus. *See* Cal/OSHA, Release No. 2020-08, Cal/OSHA Issues Guidance on Requirements to Protect Health Care Workers from 2019 Novel Coronavirus (Feb. 3, 2020).[10] Cal/OSHA subsequently cited a number of skilled nursing facilities for violating this and other state workplace health and safety standards. *See*, *e.g.*, Cal/OSHA, Release No. 2021-13, Cal/OSHA Issues Citations to Multiple Employers for COVID-19 Violations (Feb. 4, 2021)[11]; Cal/OSHA, Release No. 2020-80, Cal/OSHA Issues Citations to Health Care Facilities and Public Safety Employers for COVID-19 Violations (Sept. 22, 2020).[12]

III. Conditions at Windsor Redding Care Center and the Resulting Deaths

In summer 2020, despite the wealth of federal and state guidance, and the then-well-known hazards that COVID-19 posed for long-term care facilities and their vulnerable residents, Windsor had not adopted

[10] https://www.dir.ca.gov/DIRNews/2020/2020-08.html.

[11] https://www.dir.ca.gov/DIRNews/2021/2021-13.html.

[12] https://www.dir.ca.gov/DIRNews/2020/2020-80.html.

adequate infection control policies—as documented by CDPH inspections in July and August 2020. ER 360–61 (First Am. Compl. (FAC) ¶¶ 70–72). As a result of those inspections, CDPH cited Windsor for, among other things, its failure to segregate residents with COVID-19 exposures and diagnoses. *Id.*

In September, despite CDPH's warnings, things got worse: 60 of the facility's 83 residents contracted COVID-19 that month, and 24—nearly a third of the entire facility—died. ER 361 (FAC ¶ 72). A subsequent CDPH investigation revealed three factors that contributed to the September 2020 outbreak: (1) Windsor management had told employees who self-reported as symptomatic for COVID-19 that they were required to work; (2) Windsor's chronic understaffing meant it was unable to adequately train its employees as to infection control procedures; and (3) Windsor failed to test its staff for COVID-19 and allowed untested staff to work with vulnerable patients. *Id.* (FAC ¶ 73). Subsequent investigations revealed that Windsor staff failed to comply with the facility's procedures requiring monitoring residents for COVID-19 symptoms. ER 362 (FAC ¶¶ 75–77).

Once residents contracted COVID-19, Windsor's neglect continued as a result of "extreme understaffing." ER 363 (FAC ¶ 77). One nurse reported she alone was responsible for 27 COVID-19 patients. *Id.* Some sick patients were not monitored at all. ER 362–63 (FAC ¶¶ 77–78). As to others, their deteriorating conditions were noted but doctors were not contacted. ER 362 (FAC ¶ 77). The operative complaint also alleges that Windsor's persistent understaffing led to abuse and neglect "in many other ways unrelated to COVID-19," leading to injury-producing falls, pressure ulcers, and other infections. ER 363–65 (FAC ¶¶ 80–89).

IV. Procedural History

A. The Families' State Court Complaint

Plaintiffs-Appellees are the surviving family members of 15 of the 24 Windsor residents who contracted, and died from, COVID-19 during the September 2020 outbreak. They commenced this action in Shasta County Superior Court on August 26, 2021, and filed the operative amended complaint on April 27, 2022, alleging that the decedents died "[a]s a direct result of Windsor's neglect." ER 339 (FAC ¶ 6).

The complaint includes six state-law claims. First, the families allege that, acting "negligently and recklessly and with conscious disregard," the defendants violated their state-law duties to ensure the

decedents received necessary care and supervision in an environment free from abuse and neglect, thus committing elder abuse under California Welfare and Institutions Code § 15657. ER 365–69 (FAC ¶¶ 91–103). Second, they allege that the defendants' failures to adequately staff the facility, provide adequate care, adequately train staff, and establish and implement an adequate infection control program constituted negligence, as evidenced by Windsor's violations of various state and federal regulations (thus constituting negligence *per se*). ER 369–71 (FAC ¶¶ 104–112). Third, they allege that the defendants violated the decedents' rights as patients under California Health and Safety Code § 1430. ER 372–73 (FAC ¶¶ 113–21). Fourth, they allege that a variety of Windsor's business practices, including intentional understaffing, concealment of prior regulatory violations and complaints, and misrepresentations as to the level of care they will provide residents, violated California Business and Professions Code § 17200. ER 374–75 (FAC ¶¶ 122–28). Fifth, they bring a wrongful death claim based on Windsor's neglect of the decedents. ER 375–76 (FAC ¶¶ 129–32). Finally, they allege a claim for fraud, based on the defendants' misrepresentations to CDPH in response to previous citations, and a

breach of fiduciary duty to the decedents by failing to disclose material facts as to the facility's complaint and deficiency history and by understaffing the facility to maximize profits. ER 376–79 (FAC ¶¶ 133–48).

B. District Court Proceedings

Defendants Brius Management Co. and Brius, LLC removed the action to the U.S. District Court for the Eastern District of California on June 6, 2022—nearly two months after the Court denied the petition for rehearing en banc in *Saldana*. ER 275. In their notice of removal, they raised the same three theories of jurisdiction that had been considered and rejected by this Court in *Saldana*: (1) "complete preemption under the Public Readiness and Emergency Preparedness Act (PREP Act)," (2) "the embedded federal question doctrine," and (3) "the federal officer removal statute, 28 U.S.C. § 1442(a)(1)." ER 277. They "acknowledge[d] that the Ninth Circuit ha[d] rejected similar jurisdictional arguments" in *Saldana*, but stated that they were filing their "Notice of Removal in order to preserve their arguments for review, including by the Ninth Circuit sitting *en banc* and by the United States Supreme Court." ER 278. The notice of removal "acknowledge[d] that [the district court] [wa]s

bound by the Ninth Circuit's decision in *Saldana*." ER 283, 284, 287. As to complete preemption and federal officer removal, the notice did not suggest that the case was distinguishable from *Saldana*. As to the embedded federal question doctrine, the notice (incorrectly) suggested that this case was distinguishable from *Saldana* because the defendants in that case were not "covered persons" under the PREP Act. ER 284.

The families timely moved to remand the action to state court, arguing that each of the three jurisdictional theories asserted in the removal notice was barred by *Saldana*. ER 247, 263–65. They also moved for an award of attorneys' fees under 28 U.S.C. § 1447(c), on the basis that the defendants lacked an objectively reasonable basis for removing the action given the clarity of circuit law at the time of removal. ER 268–71.

In opposing remand, Windsor invoked only one ground for jurisdiction, the embedded federal question doctrine. As to that doctrine, it suggested that *Saldana*'s precedential value was limited to the specific facts of the case. ER 232–41. As to the request for fees, Windsor argued that the embedded federal question argument and a desire "to seek en banc or Supreme Court review" of the circuit precedent created by

Saldana constituted objectively reasonable bases for removal. ER 241–44.

On January 31, 2023, the district court granted the motion to remand, rejecting Windsor's argument that the court had "jurisdiction under the embedded federal question doctrine, specifically on the basis that Plaintiffs' causes of action implicate the PREP Act." ER 5. The court explained that any factual distinction between this case and *Saldana* "was not central to the Ninth Circuit's overall conclusion that a PREP Act federal defense was not a sufficient basis to find embedded federal question jurisdiction." ER 6. As to fees, the court noted that Windsor "removed this case despite binding and on-point Ninth Circuit authority disposing of the same asserted bases for jurisdiction in comparable cases," and concluded that any distinction between *Saldana* and this case "was too insignificant to support the conclusion that 'Defendants had an objectively reasonable basis to contend that *Saldana* does not control the embedded federal question here[.]'" ER 7 (quoting ER 241).

After supplemental briefing as to the appropriate amount of fees, the district court issued an order awarding plaintiffs' counsel "$10,500 in

attorneys' fees associated with removal" and directing the Clerk of Court "to remand this case back to Shasta County Superior Court." ER11.

SUMMARY OF ARGUMENT

In addressing the remand to state court, Windsor argues that federal subject-matter jurisdiction exists on three bases: (1) complete preemption by the PREP Act, (2) the federal-officer removal statute, and (3) the "embedded federal question" doctrine. In its district court opposition to the motion to remand, however, it abandoned its complete preemption and federal-officer removal arguments; it argued only that the embedded federal question doctrine provided jurisdiction. Accordingly, it has waived for this appeal any arguments based on complete preemption and federal-officer removal.

In any event, each of Windsor's jurisdictional arguments fails on the merits. First, Windsor's complete preemption argument is barred by *Saldana*'s holding that the PREP Act is not a complete preemption statute. The argument also fails on an alternative ground identified by several other courts of appeals. As those courts (like this Court and the Supreme Court) have recognized, a claim cannot be completely preempted by a federal statute unless it lies within the scope of a federal

cause of action created by that statute. Here, the families' state-law claims do not lie within the scope of the PREP Act's willful-misconduct cause of action, both because they do not allege that the deaths of their loved ones were caused by the administration to or use of a covered countermeasure, and because they do not allege that Windsor engaged in "willful misconduct," as the PREP Act defines that term.

Windsor's federal-officer removal argument fares no better. As Windsor conceded in its notice of removal, that argument is precluded by *Saldana*. Although it did not make the argument below, Windsor argues in its appellate brief that the facts in these cases are distinguishable from *Saldana*. That new-found argument is wrong: Under *Saldana* and Supreme Court precedent predating it, Medicare and Medicaid regulations did not convert all of the nation's skilled nursing facilities into agents of federal officers entitled to invoke 28 U.S.C. § 1442.

As to the sole jurisdictional ground on which Windsor relied in opposing remand below, "embedded federal question" jurisdiction, Windsor has not shown that this case fits into the slim category of cases where that doctrine is properly applied. Notably, Windsor has abandoned the theory of embedded federal question jurisdiction that it identified in

its removal notice and that the district court correctly held was barred by *Saldana*: that the applicability of the PREP Act is an embedded federal question. Instead, Windsor advances a new theory: that the families' reliance on violations of federal infection control regulations as establishing negligence per se creates federal jurisdiction. Windsor's failure to include this theory of jurisdiction in its removal notice or in its briefing below precludes Windsor from raising it here. Moreover, as the Supreme Court has recognized, a plaintiff's reliance on the violation of a federal standard as evidence of negligence per se does not create federal-question jurisdiction in garden-variety tort cases. The fact-intensive question of whether Windsor's chronic understaffing and inadequate infection control measures violated federal regulations is not an issue important to the federal system as a whole, as is required for embedded federal question jurisdiction to exist.

Finally, the district court did not abuse its discretion in finding Windsor's removal objectively unreasonable and awarding attorney's fees pursuant to 28 U.S.C. § 1447(c). Each of the theories raised in Windsor's notice of removal was precluded by published circuit precedent that pre-dated the notice. Windsor's suggestion that the subjective belief that

Circuit precedent is wrong and should be overruled makes removal objectively reasonable would make section 1447(c) a nullity, substituting it with a bad-faith standard. But as the Supreme Court has recognized, Congress has decided that fee-shifting is appropriate in certain cases where a defendant's meritless theory of removal jurisdiction falls short of frivolous. The district court's decision that the standard was met here was within its discretion.

STANDARD OF REVIEW

This Court "review[s] remand orders de novo, and their accompanying awards of attorneys' fees for an abuse of discretion." *Dietrich v. Boeing Co.*, 14 F.4th 1089, 1093 (9th Cir. 2021) (citation omitted).

ARGUMENT

I. Windsor failed to preserve its complete preemption and federal-officer removal arguments.

In their motion to remand in the district court, the families addressed each of the three bases of federal jurisdiction asserted in Windsor's removal notice. ER 264–68. In opposition, Windsor argued only that *one* of those bases of federal jurisdiction, the embedded federal question doctrine, provided the district court with jurisdiction. ER 232–

41. As to the other two grounds invoked in the removal notice, Windsor conceded that this Court's decision in *Saldana* "resolves two of Defendants' three arguments for federal jurisdiction as a matter of law (namely, complete preemption and federal officer removal)." ER 225. It made no argument to distinguish *Saldana*'s complete preemption and federal-officer holdings, and no argument that those cases were wrongly decided. Accordingly, in resolving the motion to remand, the district court only addressed (and rejected) Windsor's argument that embedded federal question jurisdiction existed. ER 4–5.

Despite not asking the district court to deny the remand motion on the grounds that complete preemption or the federal-officer removal statute provided jurisdiction over this case, Windsor asserts that the district court "erred" by not doing so. *See*, *e.g.*, Windsor Br. 3, 38, 52.[13] It devotes eighteen pages of its brief to arguments never presented to the district court that the PREP Act completely preempts the families' claims—arguments both about the complete preemption doctrine and about the specific claims in these cases. *See* Windsor Br. 20–38. As to

[13] Unless otherwise noted, all references to Windsor's Brief are to the opening brief filed in Appeal No. 23-15452 on May 26, 2023.

federal-officer removal, Windsor appears to argue both that *Saldana* is distinguishable from this case and that *Saldana* was wrongly decided. *Compare* Windsor Br. 52 ("*Saldana* and the District Court erred in concluding that skilled nursing facilities such as Windsor are not acting under federal officers for purposes of the federal removal statute."), *with id.* at 53 ("But *Saldana* involved a claim arising at the early stages of the pandemic. This case involves different facts.").

The district court did not "err" by not addressing these arguments, because Windsor did not make the arguments at all and, thus, abandoned them. *See Sabra v. Maricopa Cnty. Cmty. Coll. Dist.*, 44 F.4th 867, 883 (9th Cir. 2022) (collecting cases finding a waiver where a "party abandoned a claim in the proceedings below and then sought to revive it on appeal"); *Walker v. Beard*, 789 F.3d 1125, 1133 (9th Cir. 2015) ("A party abandons an issue when it has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case." (citation omitted)); *USA Petroleum Co. v. Atl. Richfield Co.*, 13 F.3d 1276, 1283–84 (9th Cir. 1994) (arguments not raised in the opposition to a dispositive motion are abandoned). Because Windsor's complete preemption and federal-officer

removal arguments were "not raised sufficiently for the trial court to rule on" them, Windsor cannot resuscitate them in this appeal. *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) ("[A]n issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." (cleaned up)).

Windsor has no basis for seeking an exception to the requirement that arguments on appeal be first presented to the district court. Windsor's argument that *Saldana*'s holdings do not apply to this case due to factual distinctions is the kind of argument district courts regularly entertain and resolve. Nor is the fact that the district court was, like this Court is, bound by *Saldana* relevant. "The requirement to present issues first to the district court does not turn on whether it would have been futile to raise it." *Beeman v. Anthem Prescription Mgmt., Inc.*, 780 F. App'x 486, 490 (9th Cir. 2019); *United States v. Trudeau*, 812 F.3d 578, 589 (7th Cir. 2016) (holding party waived argument that circuit precedent should be overruled by failing to raise it in district court, "even though district court would have been bound by that decision"). And the fact that Windsor invoked federal-officer removal and complete preemption in its notice of removal is irrelevant given its abandonment

of those bases for jurisdiction as "resolve[d]. ER 225; *see Louque v. Allstate Ins. Co.*, 314 F.3d 776, 779 n.1 (5th Cir. 2002) (holding that a basis for jurisdiction raised in notice of removal but not asserted in the opposition to a remand motion was forfeited).

If Windsor wanted to preserve its arguments that *Saldana*'s holdings as to complete preemption or federal-officer removal were wrong, or that they did not apply here, it was required to "press the argument" by presenting it to the district court "as a proposed basis for deciding the case. Merely intimating an argument is not enough." *Weisler v. Jefferson Parish Sheriff's Office*, 736 F. App'x 468 (5th Cir. 2018) (cleaned up) (holding that party had not preserved argument that the Supreme Court should overrule precedent). Since, in opposing remand, Windsor did not press its arguments that *Saldana* was wrongly decided or did not apply as to complete preemption or federal-officer removal, it cannot do so on appeal.

II. The PREP Act does not completely preempt the families' claims.

Because Windsor did not preserve its argument that the PREP Act completely preempts the families' state-law claims, the Court need go no further to reject Windsor's complete preemption argument. If the Court

addresses the merits, Windsor's argument fails under *Saldana* and for additional reasons identified by other courts of appeals.

A. *Saldana* disposes of Windsor's complete preemption argument.

In *Saldana*, the Court held that, "under this court's two-part test [for complete preemption], the PREP Act is not a complete preemption statute." 27 F.4th at 688 (referring to *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020)). "A three-judge panel may depart from circuit precedent only if '[ ] prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority.'" *Avilez v. Garland*, --- F.4th ---, 2023 WL 3832024 (9th Cir. June 6, 2023) (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc)). Windsor identifies no such intervening higher authority. Thus, as Windsor conceded below, *Saldana* "resolves" any argument that the PREP Act completely preempts the families' claims. ER 225.

B. Windsor's complete preemption argument fails for additional reasons.

Windsor argues here—though it did not in opposing remand below—that "*Saldana*'s [c]onclusion [r]egarding [c]omplete [p]reemption [s]hould [b]e [o]verruled." Windsor Br. 35. Not only does a panel of this Court lack the authority to do so, but *Saldana* is not the only barrier to

Windsor's complete preemption argument. As other courts of appeals have held, even if the PREP Act completely preempted *some* state-law claims, it would only preempt those claims within the scope of the statute's cause of action. The families' claims are not such claims.

"The complete preemption doctrine applies only to 'claims which come within the scope of a federal cause of action.'" *Dennis v. Hart*, 724 F.3d 1249, 1254 (9th Cir. 2013) (quoting *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003) (alterations omitted)). Thus, even if, contrary to the holding in *Saldana*, the PREP Act completely preempted *some* claims, it would completely preempt only claims within the scope of the sole cause of action it contains: the cause of action for willful misconduct created by 42 U.S.C. § 247d-6d(d)(1). As four courts of appeals have explained, claims like the families' are not within the scope of that cause of action because they "do not allege willful misconduct related to the administration or use of covered COVID-19 countermeasures." *Hudak*, 58 F.4th at 853 (collecting cases); *see Solomon*, 62 F.4th at 60; *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 244–46 (5th Cir. 2022); *Mitchell*, 28 F.4th at 586–87; *Maglioli*, 16 F.4th at 410–11.

First, "a willful misconduct claim brought under the PREP Act must be for a loss that has a 'causal relationship with the administration to or use by an individual of a covered countermeasure.'" *Hudak*, 58 F.4th at 855 (quoting 42 U.S.C. § 247d-6d(a)(2)(B)) (alteration omitted). Here, as discussed above, the families allege that their loved ones died because of Windsor's (1) chronic understaffing; (2) failure to adopt and follow infection control procedures; (3) assignment of sick and symptomatic staff to provide care; and (4) failure to provide adequate care and monitoring after their loved ones tested positive. The only connection that these allegations have to covered countermeasures is Windsor's failure to use them. But as three courts of appeals have held, "an allegation that [a nursing home] *failed* to use a COVID-19 countermeasure (facemasks) or to administer another (an infection protocol) differs in kind from an allegation that [the nursing home]'s *administration* or [a decedent]'s *use* of those countermeasures caused [the decedent]'s death." *Hudak*, 58 F.4th at 856 (citing *Manyweather*, 40 F.4th at 245–46, and *Martin*, 37 F.4th at 1213–14); *see also*, *e.g.*, *Arbor Mgmt. Servs., LLC v. Hendrix*, 875 S.E.2d 392, 396–98 (Ga. Ct. App. 2022) (holding similar claims were outside the scope of PREP Act); *Estate of Champion v. Billings Skilled*

Nursing Facility, LLC, 591 F. Supp. 3d 892, 901–02 (D. Mont. 2022) (same); *Shankle v. Heights of Summerlin, LLC*, 574 F. Supp. 3d 820, 825–26 (D. Nev. 2021) (same); *Lyons v. Cucumber Holdings, LLC*, 520 F. Supp. 3d 1277, 1286 (C.D. Cal. 2021) (same). The Families allege that Windsor "was wrong not to use medical countermeasures, not that it engaged in wrongful actions that had a causal relationship with the administration to or use by [an individual] of a countermeasure." *Hudak*, 58 F.4th at 856. The PREP Act thus is irrelevant to their claims.

Second, even if the families' state-law claims implicated the use or administration of covered countermeasures, they still would fall outside the PREP Act's cause of action. "Congress could have created an exclusive federal cause of action for any claim implicating the PREP Act, or it could have provided for the removal of any claim arising under the Act, but it chose not to do so." *Hudak*, 58 F.4th at 855. Rather, Congress created federal jurisdiction only for claims based on "willful misconduct"—defined as acts or omissions 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). Nowhere in the complaint do the families allege or imply that their claims are based on such acts or omissions, and thus their claims are not within the scope of the PREP Act willful misconduct cause of action. *See Hudak*, 58 F.4th at 854–55; *Maglioli*, 16 F.4th at 411.

Suggesting otherwise, Windsor points to language in the complaint that refers to various actions and omissions that Windsor undertook "willfully and with conscious disregard of [the decedents'] rights" as bases for the families' state-law elder abuse, neglect, and negligence claims. Windsor Br. 37 (citing ER 367–71 (FAC ¶¶ 96, 103, 106, 109, 112)). But as the Second Circuit recently held in addressing a complaint with similar language, "[t]hese allegations do not a willful misconduct claim make." *Leroy v. Hume*, No. 21-2158-cv, 2023 WL 2928353, at *3 (2d Cir. Apr. 13, 2023). They are substantively different from claims that Windsor acted "intentionally to achieve a wrongful purpose," "knowingly without legal or factual justification," and "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"—the elements of PREP Act willful misconduct. 42 U.S.C. § 247d-6d(c)(1)(A). As the Third Circuit explained in *Maglioli*, although "[t]he elements of the state cause of action need not 'precisely duplicate'

the elements of the federal cause of action for complete preemption to apply[,] … complete preemption does not apply when federal law creates an entirely different cause of action from the state claims in the complaint." 16 F.4th at 411 (quoting *Aetna Health Inc. v. Davila*, 542 U.S. 200, 216 (2004)). Because the families "could not have brought their claims under § 247d-6d(d)(1) of the PREP Act," they cannot be completely preempted by that cause of action. *Id.*; *see also Mitchell*, 28 F.4th at 586–87.

III. Windsor does not satisfy the requirements of the federal-officer removal statute.

As with its complete preemption argument, Windsor failed to preserve its federal-officer removal argument by failing to make any argument that federal-officer removal jurisdiction existed in opposing remand. In any event, the federal-officer removal theory that Windsor advances on appeal lacks merit.

The federal-officer removal statute allows private actors "acting under" federal officers to remove actions to state court under specified circumstances. 28 U.S.C. § 1442(a)(1). To take advantage of this statute, "a defendant must establish that '(a) it is a person within the meaning of the statute; (b) there is a causal nexus between its actions, taken

pursuant to a federal officer's directions, and plaintiff's claims; and (c) it can assert a colorable federal defense.'" *Saldana*, 27 F.4th at 684 (quoting *Stirling v. Minasian*, 955 F.3d 795, 800 (9th Cir. 2020)). In *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007), the Supreme Court held that "the fact of federal regulation alone" is insufficient for a defendant to satisfy the second element, "even if the regulation is highly detailed and even if the private firm's activities are highly supervised and monitored."

In *Saldana*, the defendants argued that the "acting under" requirement was met because "the 'unprecedented circumstances' of COVID-19 resulted in federal directives and operational control amounting to more than compliance with government regulations," and that the "federal government and its agencies ... became hyper-involved in the operational activities of nursing facilities in response to the pandemic." 27 F.4th at 684–85 (quoting brief of the defendants-appellants). The Court rejected that argument, finding that the cited materials showed "nothing more than regulations and recommendations for nursing homes, covering topics such as COVID-19 testing, use and distribution of personal protective equipment, and best practices to

reduce transmission within congregate living environments," and that such "government regulations and recommendations" did not establish that the nursing home was "acting under" a federal official under *Watson*. *Id.* at 685; *see also Hudak*, 58 F.4th at 859–60 (reaching same conclusion); *Martin*, 37 F.4th at 1212–13 (same); *Mitchell*, 28 F.4th at 589–91 (same); *Maglioli*, 16 F.4th at 404–06 (same); *cf. Solomon*, 62 F.4th at 63 (rejecting a similar argument by a hospital defendant).

As Windsor conceded below, *Saldana* "resolves" any argument that "the extensive regulations imposed on" nursing homes by CMS creates an "acting under" relationship. ER 225; Windsor Br. 50. To the extent that the Court is inclined to consider Windsor's argument, made for the first time in this Court, that *Saldana* is distinguishable, *see* Windsor Br. 52–53, Windsor is wrong: Any distinctions between the regulations and guidance at issue in *Saldana* and the ones at issue here do not reflect a difference in the nature of the relationship between the federal government and the nursing homes at issue; at most, any "difference is one of degree, not kind." *Watson*, 551 U.S. at 157.

Windsor suggests here that *all* participants in the Medicare and Medicaid program are "acting under" federal officers because they are

"government contractors." Windsor Br. 48. This Court, however, has rejected the notion that *all* contracts with the federal government create an acting under relationship. *See City & County of Honolulu v. Sunoco LP*, 39 F.4th 1101, 1108 (9th Cir. 2022) (holding that payment under a federal contract "does not involve close supervision or control and does not equal 'acting under' a federal officer); *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 757–78 (9th Cir. 2022) (holding contracts to provide goods and services to the federal government do not evidence "acting under" relationship). Rather, a federal contract is sufficient to support federal-officer removal only where it results in unusually close supervision or control by a federal officer, or evidences a delegation of a federal governmental task to a private party. *Sunoco*, 39 F.4th at 1109–10. As to the former, the only "control" Windsor became subject to by its participation in Medicare and Medicaid is the regulatory regime *Saldana* deemed insufficient to meet the standard set out in *Watson*. Under Windsor's logic, any entity that agrees to conditions in order to receive federal funds is "acting under" a federal officer. But adopting that view would be inconsistent with *Watson,* as it "would expand the scope of the statute considerably, potentially bringing within its scope state-court

actions filed against private firms in many highly regulated industries," 551 U.S. at 153. As to the suggestion that the pandemic converted the operation of skilled nursing facilities into a delegated federal governmental task, *Saldana* rightly rejected that argument, 27 F.4th at 685, as has every other court to consider it, *see*, *e.g.*, *Maglioli*, 16 F.4th at 405.

IV. The families' state-law claims do not raise a substantial federal question.

The "embedded federal question" doctrine recognizes a "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). Under this doctrine, sometimes referred to as *Grable* jurisdiction, federal courts may exercise jurisdiction over state-law actions where a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* (citing *Grable*, 568 U.S. at 313–14). The well-pleaded-complaint rule applies in determining whether a state-law claim meets this standard. *Cal. Shock Trauma Air Rescue v. State Comp. Ins. Fund*, 636 F.3d 538, 542 (9th Cir. 2011) (citing *Grable*, 545 U.S. at 314).

In *Saldana*, this Court rejected the argument that a defendant's desire to raise a PREP Act defense satisfies the *Grable* standard. *See* 27 F.4th at 689. Yet, in its notice of removal, the only theory of embedded federal question jurisdiction Windsor identified was tied to its potential PREP Act defenses. *See* ER 283–85. There, Windsor asserted that:

> This case turns on a substantial, necessary, and disputed question of federal law: what is the scope of Plaintiffs' cause of action in light of the PREP Act's civil cause of action, immunities, and preemptions.

ER 284. This argument remained Windsor's sole embedded federal question theory in opposing remand below. *See* ER 236–40. And this argument is the one that the district court addressed and correctly rejected as barred by *Saldana*. ER 5–6; *see Saldana*, 27 F.4th at 689; *see also Solomon*, 62 F.4th at 64 (rejecting same argument); *Hudak*, 58 F.4th at 858 (same); *Martin*, 37 F.4th at 1214–15 (same); *Mitchell*, 28 F.4th at 588–89 (same); *Maglioli*, 16 F.4th at 413 (same).

On appeal, Windsor appears to have abandoned a PREP Act-based theory of embedded federal question jurisdiction. Instead, it now suggests a different embedded federal question gives rise to federal jurisdiction: whether Windsor violated federal infection-control regulations,

regulations that the families invoke to establish negligence per se under state law. This new argument is both forfeited and wrong.

Under 28 U.S.C. § 1446(a), a removing defendant must include in its notice of removal a "short and plain statement of the grounds for removal." "[T]he removal notice must make the basis for federal jurisdiction clear, and contain enough information so that the district judge can determine whether jurisdiction exists." Wright & Miller, 14C Fed. Prac. & Proc. Juris. § 3733 (Rev. 4th ed.). Although defendants may "set out more specifically the grounds for removal that already have been stated in the original notice," "defendants may not add completely new grounds for removal." *Id.* Doing so constitutes a substantive amendment of the notice of removal, which is barred outside the thirty-day removal period. *See*, *e.g.*, *City of Oakland*, 969 F.3d at 911 n.12; *ARCO Enviro. Remediation, L.L.C. v. Dep't of Health & Enviro. Quality of Mont.*, 213 F.3d 1108, 1117 (9th Cir. 2000); *O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1381 (9th Cir. 1988).

Here, the removal notice explicitly identified one, and only one, "substantial, necessary, and disputed question of federal law": the impact of the PREP Act on the families' claims. ER 284. Windsor's argument that

whether it complied with federal infection-control regulations is such a question was not fairly contained within the scope of the removal notice, and thus cannot be considered. *See*, *e.g.*, *Cnty. of San Mateo v. Chevron Corp.*, 32 F.4th 733, 763 n.33 (9th Cir. 2022) (finding jurisdictional argument not contained in notice of removal forfeited).

Similarly, the argument was not presented to the district court in Windsor's opposition to remand. Windsor referenced "Plaintiffs' express invocation of federal regulations" in its memorandum, ER 237–38, but it made no argument that the alleged violations of those regulations created a substantial federal question. To the contrary, it doubled down on its assertion that "[t]he core federal issues here involve generally-applicable interpretations and applications of the PREP Act." ER 240. Windsor cannot now on appeal take a different tack and argue that the "core federal issue" is the question of whether it complied with CMS regulations. *See In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d at 992 (stating that issues not raised sufficiently for the trial court to rule on them are waived).

Furthermore, this new argument is barred by Supreme Court precedent. In the context of embedded federal question jurisdiction, "it

takes more than a federal element 'to open the arising under door." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 701 (2006) (quoting *Grable*, 545 U.S. at 313). In *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 817 (1986), the Court held that a plaintiff's reliance on violations of a federal statute to establish negligence per se does not create federal question jurisdiction—a holding reaffirmed in *Grable*, 545 U.S. at 318–19. *See also Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 217 (1934) (reliance on federal statutory violation as evidence of negligence per se did not convert state-law claim into "one arising under the laws of the United States"); *Burrell v. Bayer Corp.*, 918 F.3d 372, 387 (4th Cir. 2019) (citing *Merrell Dow* and rejecting argument that negligence per se effect of federal law created embedded federal question jurisdiction).

While arguing that *Merrell-Dow* did not create a "hard-and-fast rule that applies in all cases," Windsor Br. 51, Windsor fails to identify any relevant distinction between that case and this one. As the Court explained in *Grable*, *Merrell-Dow* rested on the principle that finding federal jurisdiction over a state-law negligence claim based on a "federal standard without a federal cause of action" would "have heralded a

potentially enormous shift of traditionally state cases into federal courts," 545 U.S. at 318–19, contrary to what is now considered the fourth *Grable* requirement. A finding of federal jurisdiction over state-law negligence claims that are based, in part, on violations of federal health care regulations would yield the same result. The only way that federal legal issues are raised by the families' complaint is "the treatment of federal violations generally in garden variety state tort law"; *Grable* makes plain that those issues do not open the door of federal jurisdiction. 545 U.S. at 318.

Windsor's jurisdictional theory on appeal is not only inconsistent with the fourth *Grable* requirement for the reasons identified in *Grable* and *Merrell-Dow*, but also with the third requirement: that any federal element of the claim be "substantial." As this Court has recognized, "the question whether a case 'turns on substantial questions of federal law' … focuses on the importance of a federal issue 'to the federal system as a whole.'" *City of Oakland*, 969 F.3d at 905 (quoting *Grable*, 545 U.S. at 312 and *Gunn*, 568 U.S. at 260). Whether an individual skilled nursing facility complied with federal infection-control regulations and thus whether Windsor was negligent does not meet that standard. *Cf. Sauk-*

Suiattle Indian Tribe v. City of Seattle, 56 F.4th 1179, 1185 (9th Cir. 2022), *cited in* Windsor Br. 40 (holding that whether "the Gorge Dam's presence and operation violate the Congressional Acts and Supremacy Clause" constitutes a substantial federal question); *NASDAQ OMX Grp. v. UBS Sec., LLC*, 770 F.3d 1010 (2d Cir. 2014), *cited in* Windsor Br. 40 (holding that "whether NASDAQ violated its Exchange Act obligation to provide a fair and orderly market in conducting an IPO [] is sufficiently significant to the development of a uniform body of federal securities regulation to satisfy the requirement of importance to the federal system as a whole").

Here, whether Windsor complied with infection-control regulations is an archetypal "fact-bound and situation-specific," and thus insubstantial, question. *City of Oakland*, 969 F.3d at 905 (quoting *Empire Healthchoice*, 547 U.S. at 701). The families' claims involve "a fact-specific application of rules that come from both federal and state law rather than a context-free inquiry into the meaning of a federal law." *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 910 (7th Cir. 2007). They do not trigger jurisdiction under *Grable*.

V. The district court did not abuse its discretion in awarding attorneys' fees.

Windsor argues that, even if federal jurisdiction is lacking, the Court should vacate the district court's award of attorneys' fees to plaintiffs. However, each of the theories of jurisdiction raised in Windsor's notice of removal were squarely precluded by binding circuit precedent. Accordingly, the district court's award of fees pursuant to 28 U.S.C. § 1447(c) was well within its discretion.

A court award of fees under 28 U.S.C. § 1447(c) is appropriate "where the removing party lacked an objectively reasonable basis for seeking removal." *Grancare*, 889 F.3d at 552 (citing *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005)). This standard recognizes Congress's "desire to deter removals sought for the purpose of prolonging litigation and imposing costs on the opposing party, while not undermining Congress' basic decision to afford defendants a right to remove as a general matter, when the statutory criteria are satisfied." *Gardner v. UICI*, 508 F.3d 559, 561 (9th Cir. 2007) (quoting *Martin*, 546 U.S. at 140). Although removal is not objectively unreasonable "solely because the removing party's arguments lack merit," "the degree of clarity in the relevant law at the time of removal" may convert an

argument for removal from a mere losing one to an objectively unreasonable one. *Grancare*, 889 F.3d at 552; *see Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1066 (9th Cir. 2008) (considering "whether the relevant case law clearly foreclosed the defendant's basis of removal").

Here, the district court did not abuse its discretion in concluding that this standard was met, given its findings that "Defendants removed this case despite binding and on-point Ninth Circuit authority disposing of the same asserted bases for jurisdiction in comparable cases" and that any factual distinctions between this case and *Saldana* were "too insignificant" to provide "an objectively reasonable basis to contend that *Saldana* does not control the embedded federal question" analysis in this case. ER 30. Because Windsor's arguments were "clearly foreclosed" by *Saldana*, fees were appropriately awarded. *Lussier*, 518 F.3d at 1067.

Windsor complains that the district court cited to the pre-*Martin* decision *Balcorta v. Twentieth Century Fox Film Corp.*, 208 F.3d 1102, 1106 n.6 (9th Cir. 2000), in the standard of review section of its opinion. Windsor Br. 55–56 (citing ER 3). The court, however, applied the correct "objectively reasonable basis" standard in its analysis. ER 30. A district

court's citation to an incorrect standard is not a basis for reversal where the court applies the correct standard. *See*, *e.g.*, *United States v. Bonds*, 608 F.3d 495, 504 (9th Cir. 2010) (finding no abuse of discretion where district court misstated legal standard but its ruling was based on the correct standard); *Van Buskirk v. Baldwin*, 265 F.3d 1080, 1085 (9th Cir. 2001) (affirming the district court's ruling where its analysis made "clear that the court was aware of and applied the correct … standard …, even though it misstated the standard a few lines before").[14]

In determining whether the conclusion that Windsor's arguments were objectively unreasonable was an abuse of discretion, only the theories for removal jurisdiction raised in the district court are relevant—not theories advanced for the first time on appeal. And in arguing that the district court erred in awarding fees, Windsor does not question "the clarity of the relevant law" in this Circuit at the time of

---

[14] Moreover, given the lack of any disputed facts, this Court could affirm under a de novo review and "need not remand for application of the correct legal standard." *Washington State Dep't of Transp. v. Washington Nat. Gas Co., Pacificorp*, 59 F.3d 793, 802 n.8 (9th Cir. 1995); *see also Agarwal v. Arthur G. McKee & Co.*, 644 F.2d 803, 807 (9th Cir. 1981) (affirming district court's decision on attorney's fees "[a]lthough the district court may have applied the wrong standard, [since] application of the correct standard would surely have led to the same result").

removal. Nor could it. As the district court correctly noted, Windsor "removed this action in June 2022, over three months after the *Saldana* decision in February 2022 and over a month after the Ninth Circuit unanimously denied rehearing and *en banc* review of *Saldana* in April 2022." ER 7.

Nonetheless, Windsor suggests that the necessary "clarity in the relevant law" does not exist because its theories "remain untested and unresolved at the Supreme Court level." Windsor Br. 56. But it cites no case that suggests that a jurisdictional argument is only objectively unreasonable if there is adverse Supreme Court authority. To the contrary, this and other courts of appeals have frequently held that adverse circuit precedent is itself enough to make removal unreasonable. *See*, *e.g.*, *Malgesini v. Malley*, No. 22-15625, 2023 WL 1281664, at *1 (9th Cir. Jan. 31, 2023) (holding that "removal was objectively unreasonable because our precedent 'clearly forecloses' the argument that supplemental jurisdiction can be a basis for removal"); *Powell v. Healy*, 2022 WL 4181717, at *1 (9th Cir. Sept. 13, 2022) (holding that the district court did not abuse its discretion where the law was "well settled in this circuit"); *Houden v. Todd*, 348 F. App'x 221, 223 (9th Cir. 2009) (finding

the denial of a fee award was an abuse of discretion where the defendant's jurisdictional theory was "clearly foreclosed" by circuit precedent); *Powers v. Cottrell, Inc.*, 728 F.3d 509, 517 (6th Cir. 2013) ("[W]e hold that the Sixth Circuit precedent available to [the removing party] at the time of removal made it clear that [it] had no reason to believe that removal would be proper."); *Garcia v. Amfels, Inc.*, 254 F.3d 585, 587–88 (5th Cir. 2001) (upholding an award of fees where "Fifth Circuit law explicitly prevented removal based on [the proffered] defense"). Indeed, a theory of removal can be objectively unreasonable even in the *absence* of directly on-point circuit precedent. *See*, *e.g.*, *Renegade Swish, L.L.C. v. Wright*, 857 F.3d 692, 700 (5th Cir. 2017).

The possibility that circuit precedent, or even Supreme Court precedent, will be overruled someday always exists. Were that possibility alone a basis to make removal objectively reasonable, no case law could *ever* be sufficiently clear to support a fee award under section 1447(c). Notably, this case is not one where Windsor can point to decisions from other courts of appeals that would have provided it an objectively reasonable basis to believe the law was likely to change so as to make the case properly removed under the federal-officer removal statute, the

embedded federal question doctrine, or a complete preemption theory. By the time of removal, the Third and Fifth Circuits had rejected arguments that each of these theories provided a basis for removal jurisdiction—along with *dozens* of district courts in other circuits. *See*, *e.g.*, *Perez v. Se. SNF, LLC*, 2022 WL 987187 (5th Cir. Mar. 31, 2022); *Mitchell*, 28 F.4th 580; *Maglioli*, 16 F.4th 393; *Massamore v. RBRC, Inc.*, 595 F. Supp. 3d 594 (W.D. Ky. 2022); *Yarnell v. Clinton No. 1, Inc.*, 591 F. Supp. 3d 432 (W.D. Mo. 2022); *Hudak v. Elmcroft of Sagamore Hills*, 566 F. Supp. 3d 771 (N.D. Ohio 2021), *aff'd by* 58 F.4th 845 (6th Cir. 2023); *Martin v. Petersen Health Operations, LLC*, 2021 WL 4313604 (C.D. Ill. Sept. 22, 2021) , *aff'd by* 37 F.4th 1210 (7th Cir. 2022); *Dorsett v. Highlands Lake Ctr., LLC*, 557 F. Supp. 3d 1218 (M.D. Fla. 2021); *Gwilt v. Harvard Sq. Ret. & Assisted Living*, 537 F. Supp. 3d 1231 (D. Colo. 2021); *Leroy v. Hume*, 554 F. Supp. 3d 470 (E.D.N.Y. 2021), *aff'd by* 2023 WL 2928353 (2d Cir. Apr. 13, 2023); *Shapnik v. Hebrew Home for the Aged at Riverdale*, 535 F. Supp. 3d 301 (S.D.N.Y. 2021); *Bolton v. Gallatin Ctr. for Rehab. & Healing, LLC*, 535 F. Supp. 3d 709 (M.D. Tenn. 2021); *Wright v. Encompass Health Rehab. Hosp. of Columbia, Inc.*, 2021 WL 1177440 (D.S.C. Mar. 29, 2021); *Lopez v. Life Care Ctrs. of Am., Inc.*, 2021

WL 1121034 (D.N.M. Mar. 24, 2021); *Eaton v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1184 (D. Kan. 2020). That some of the reasoning of those courts differed from the reasoning in *Saldana* as to *one* of the three bases for jurisdiction invoked by Windsor is irrelevant, because, as discussed above, the result in *this* case would be the same under any of the circuits' approaches: no removal jurisdiction.[15] *Cf. Renegade Swish*, 857 F.3d at 700–01 (finding a fee award appropriate where any disagreement among the courts of appeals was "tepid and lopsided").

Contrary to Windsor's suggestion, a fee award against it is not a "penal[ty] for exercising its legal rights." Windsor Br. 56. Fee-shifting statutes are not penalties for exercising the right to make arguments in

[15] Windsor suggests that it is relevant that other circuit courts are currently considering cases involving these questions." Windsor Br. 56 (referencing *Cagle v. NHC HealthCare*, No. 22-2757 (8th Cir.); *Cowen v. Walgreen Co.*, No. 23-5003 (10th Cir.); *Schleider v. GVDB Operations LLC*, No. 21-11765 (11th Cir.)). *Cagle* and *Schleider* arise from district court orders that, like dozens of others across the country, rejected the theories supporting federal jurisdiction. *See Cagle v. NHC Healthcare-Md. Heights, LLC*, 2022 WL 2833986 (E.D. Mo. July 20, 2022); *Schleider v. GVDB Operations, LLC*, 2021 WL 2143910 (S.D. Fla. May 24, 2021). The existence of appeals from such orders says nothing about the reasonableness of Windsor's theories of removal jurisdiction. *Cowen* is an appeal from the dismissal of vaccination-related claims in a case pending in federal court based on diversity jurisdiction. *See Cowen v. Walgreen Co.*, 2022 WL 17640208 (N.D. Okla. Dec. 13, 2022). That appeal has no relevance to Windsor's jurisdictional theories at all.

court, but rather reflect the Congress's judgment that, in certain circumstances, it is appropriate to "require[ ] the party that creates the costs to bear them." *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 373 (7th Cir. 1987). *Cf. Van Gerwen v. Guarantee Mut. Life Co.*, 214 F.3d 1041, 1047 (9th Cir. 2000) (stating that "the main purpose of fee-shifting statutes is not to punish or reward attorneys" (internal quotation marks omitted)). And here, Congress has determined that, where a litigant exercises its "right" to remove a case to federal court despite contrary binding authority, it is appropriate for that litigant to bear the costs it has created. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (noting that Congress "has the power and judgment to pick and choose among its statutes and to allow attorneys' fees under some, but not others"). A fee award under section 1447(c) here no more "penalize[s] [Windsor] for exercising its legal rights," Windsor Br. 56, than "a requirement that a person who wants to publish a newspaper pay for the ink, the paper, and the press" penalizes the exercise of First Amendment rights. *Premier Electric*, 814 F.2d at 373.

The cases that Windsor cites involve Rule 11 sanctions and are inapposite. Windsor Br. 56 (citing *Nisenbaum v. Milwaukee Cnty.*, 333

F.3d 804, 809 (7th Cir. 2003); *Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 156 (4th Cir. 2002)). Section "1447(c) is not a sanctions rule but merely a fee-shifting statute," and the statute "does not remotely suggest that every attorney's fee award under § 1447(c) can be described as a sanction or that the party removing the case has acted in a reprehensible way." *Robinson v. Pfizer, Inc.*, 855 F.3d 893, 898–99 (8th Cir. 2017).[16] As the Supreme Court held in *Martin*, section 1447(c) does more than simply allow courts to apply Rule 11 to removals. 546 U.S. at 138. It authorizes fees in situations *beyond* those in which removal is "frivolous, unreasonable, or without foundation," a standard the Supreme Court found would create a "strong bias *against* fee awards" inconsistent with Congressional intent. *Id.* Through section 1447(c), Congress "sought to reduce the attractiveness of removal as a method for delaying litigation

[16] That said, Windsor's invocation of the federal-officer removal statute—an argument it conceded was barred by *Saldana* and has been rejected by five other courts of appeals on indistinguishable grounds—was frivolous. This Court only has jurisdiction over this appeal because of that frivolous argument. As the Supreme Court noted in *BP P.L.C. v. Mayor & City Council of Baltimore*, courts may issue Rule 11 sanctions where a defendant "frivolously add[s] § 1442 or § 1443 to their other grounds for removal, all with an eye to ensuring appellate review down the line if the case is remanded." 141 S. Ct. 1532, 1542 (2021).

and imposing costs on the plaintiff." *Id*. at 140. Awarding fees where a defendant removes a case on theories contrary to both indistinguishable binding Circuit authority and the unanimous views of other courts of appeals is consistent with that view.[17] Although Windsor has the "right" to proceed despite binding circuit authority, Congress has decided it does not have the right to inflict the resulting costs on the families.

CONCLUSION

For the foregoing reasons, the district court's remand and award of attorney's fees should be affirmed.

---

[17] Consistent with congressional intent, Appellees believe that a section 1447(c) award for attorneys' fees and costs incurred in connection with this appeal is also appropriate. They intend to file a Circuit Rule 39-1.6 motion seeking such relief at the appropriate time.

Respectfully submitted,

/s/ Adam R. Pulver

Adam R. Pulver
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
Apulver@citizen.org

Russell Reiner
Richard Frankel
Reiner Slaughter & Frankel
2851 Park Marina Drive
Suite 200
Redding, CA 96001

Wendy C. York
Daniel Jay
York Law Corporation
1111 Exposition Boulevard
Building 500
Sacramento, CA 95815

William Kershaw
Stuart C. Talley
Kershaw, Talley & Barlow PC
401 Watt Avenue
Sacramento, CA 95864

Attorneys for Appellees

June 26, 2023

STATEMENT OF RELATED CASES

Appellees are aware of the following related cases within the meaning of Ninth Circuit Rule 28-2.6 currently pending in this Court, each of which raises similar arguments as to federal-officer removal, the PREP Act, and the *Grable* doctrine:

- 21-17068 – *Ostrander v. Heights of Summerlin, LLC*
- 21-55302 – *McCalebb v. AG Lynwood, LLC*
- 21-55454 – *Nava v. ReNew Health Group, LLC*
- 21-55893 – *Acosta v. WDW Joint Venture*
- 21-55921 – *Serrano v. San Antonio Post Acute LLC*
- 21-56011 – *Holloway v. Centinela Skilled Nursing West*
- 21-56065 – *Cortez v. Parkwest Rehabilitation Center LLC*
- 21-56082 – *Carrillo v. Sela Healthcare, Inc.*
- 21-56091 – *Apothaker v. Silverado Senior Living, Inc.*
- 21-56105 – *Hedde v. Spring Senior Assisted Living*
- 21-56113 – *Ringo v. Silverado Senior Living, Inc.*
- 21-56115 – *Jones v. Beverly West Healthcare, LLC*
- 21-56242 – *Risner v. Silverscreen Healthcare Inc.*
- 21-56269 – *Hie v. La Mirada Healthcare, LLC*
- 21-56301 – *Burton v. Silverado Escondido, LLC*
- 21-56366 – *Landrum v. WDW Joint Venture*
- 22-15003 – *Smith v. Heights of Summerlin*
- 22-15131 – *Jalili-Farshchi v. Aldersly*
- 22-55132 – *Stanley v FH & HF-Torrance I, LLC*
- 22-55234 – *Aguirre v. Norwalk Skilled Nursing*
- 22-55710 – *Sigala v. Oxnard Manor*
- 23-15084 – *Shumlai v. Eretz Chico*

June 26, 2023 /s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 10,488 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 MSO in 14-point Century Schoolbook.

June 26, 2023

/s/ Adam R. Pulver
Adam R. Pulver

ADDENDUM

ADDENDUM OF PROVISIONS INVOLVED

28 U.S.C. § 1442 Federal officers or agencies sued or prosecuted

(a) A civil action or criminal prosecution that is commenced in a State court and that is against or directed to any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

> (1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, in an official or individual capacity, for or relating to any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.
>
> …

42 U.S.C. § 247d-6d Targeted liability protections for pandemic and epidemic products and security countermeasures

(a) Liability protections

> **(1) In general**
>
> Subject to the other provisions of this section, a covered person shall be immune from suit and liability under Federal and State law 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 a declaration under subsection (b) has been issued with respect to such countermeasure.

(2) Scope of claims for loss

…

(B) Scope

The immunity under paragraph (1) applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.

…

(c) Definition of willful misconduct

(1) Definition

(A) In general

Except as the meaning of such term is further restricted pursuant to paragraph (2), the term "willful misconduct" shall, for purposes of subsection (d), denote an act or omission that is taken--

(i) intentionally to achieve a wrongful purpose;

(ii) knowingly without legal or factual justification; and

(iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit.

(B) Rule of construction

The criterion stated in subparagraph (A) shall be construed as establishing a standard for liability that is more stringent than a standard of negligence in any form or recklessness.

…

(d) Exception to immunity of covered persons

(1) In general

Subject to subsection (f), the sole exception to the immunity from suit and liability of covered persons set forth in subsection (a) shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct, as defined pursuant to subsection (c), by such covered person. For purposes of section 2679(b)(2)(B) of Title 28, such a cause of action is not an action brought for violation of a statute of the United States under which an action against an individual is otherwise authorized.

…

(i) Definitions

In this section:

(1) Covered countermeasure

The term "covered countermeasure" means--

(A) a qualified pandemic or epidemic product (as defined in paragraph (7));

(B) a security countermeasure (as defined in section 247d-6b(c)(1)(B) of this title);

(C) a drug (as such term is defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.

321(g)(1)),2 biological product (as such term is defined by section 262(i) of this title), or device (as such term is defined by section 201(h) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 321(h)) that is authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act; or

(D) a respiratory protective device that is approved by the National Institute for Occupational Safety and Health under part 84 of title 42, Code of Federal Regulations (or any successor regulations), and that the Secretary determines to be a priority for use during a public health emergency declared under section 247d of this title.

…

(7) Qualified pandemic or epidemic product

The term "qualified pandemic or epidemic product" means a drug (as such term is defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)),2 biological product (as such term is defined by section 262(i) of this title), or device (as such term is defined by section 201(h) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 321(h))2 that is--

(A)(i) a product manufactured, used, designed, developed, modified, licensed, or procured--

(I) to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic; or

(II) to limit the harm such pandemic or epidemic might otherwise cause;

(ii) a product manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life-threatening disease or condition caused by a product described in clause (i); or

(iii) a product or technology intended to enhance the use or effect of a drug, biological product, or device described in clause (i) or (ii); and

(B)(i) approved or cleared under chapter V of the Federal Food, Drug, and Cosmetic Act or licensed under section 262 of this title;

(ii) the object of research for possible use as described by subparagraph (A) and is the subject of an exemption under section 505(i) or 520(g) of the Federal Food, Drug, and Cosmetic Act; or

(iii) authorized for emergency use in accordance with section 564, 564A, or 564B of the Federal Food, Drug, and Cosmetic Act.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing 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
Attorney for Appellees