No. 21-55454

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRISELDA NAVA, individually and
as successor and heir of Florentina Lopez, deceased,
Plaintiff-Appellee,

v.

RENEW HEALTH GROUP, LLC, a California Corporation; PARKWEST REHABILITATION CENTER LLC; CRYSTAL SOLORZANO,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:20-cv-07571-ODW-AFM
Hon. Otis D. Wright, III

APPELLEE'S MOTION FOR SUMMARY AFFIRMANCE

Pursuant to Circuit Rule 3-6(a)(1), Plaintiff-Appellee Griselda Nava, individually and as successor and heir of Florentina Lopez, hereby moves for summary affirmance of the district court's remand order.

Ms. Nava commenced this action against Parkwest Rehabilitation Center LLC, Renew Health Group LLC, and Crystal Solorzano (collectively, "Parkwest") in Los Angeles County Superior Court on June 1, 2020, alleging that Parkwest's failure to take appropriate measures to

stop the spread of COVID-19 led to the death of her mother, Florentina Lopez. Parkwest removed the action to federal court, invoking the federal-officer removal statute, complete preemption under the Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. §§ 247d-6d–6e, and the "embedded" or "substantial" federal question doctrine identified in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). As in more than fifty other cases in this Circuit, the district court rejected Parkwest's arguments and remanded the action to state court for a lack of subject-matter jurisdiction.

On February 22, 2022, this Court issued a published decision in *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679 (9th Cir. 2022), a case that arose in the same context and raised the same issues. *Saldana* holds that neither the federal-officer doctrine, complete preemption, nor the "embedded federal question" doctrine provide federal subject-matter jurisdiction over claims that are not materially distinguishable from those in this case. Those holdings are the law of the Circuit. *See In re Zermeno-Gomez*, 868 F.3d 1048, 1052–53 (9th Cir. 2017). The Court should therefore summarily affirm the district court's remand order and

allow this case to proceed in state court, where it was filed nearly two years ago.

BACKGROUND

I. Factual Background

Ms. Nava's mother, Florentina Lopez, was a resident at a nursing home operated by Parkwest in Reseda, California. Ms. Nava alleges that, despite extensive guidance issued by public health authorities in the first several months of the COVID-19 pandemic, Parkwest failed to take basic steps to minimize the risk of transmission of COVID-19 among its patients and staff. Specifically, she alleges that Parkwest did not implement screening or isolation policies for exposed and infected residents and staff. ER-114, 120, 121. The complaint alleges that Parkwest directed staff members that it knew had been exposed to the coronavirus to continue working and interacting with vulnerable patients, and did not provide any type of personal protective equipment to such staff members until at least May 2020. ER-114, 118, 121. Parkwest instructed staff it knew to be infected with the coronavirus to continue to directly provide patient care as usual, so long as they were asymptomatic. ER-114, 120. And despite its knowledge of the coronavirus

in its facility, Parkwest did not test any of its residents for COVID-19, even those exposed to the coronavirus or showing symptoms of COVID-19, until on or after May 22, 2020—months into the pandemic. ER-121. Parkwest also lied to residents' family members about the presence of coronavirus at the facility. ER-120.

By early May 2020, a nurse with responsibility for Florentina's care tested positive for COVID-19, as did other staff members. ER-119, 120. On May 10, 2020, Ms. Nava visited her mother for Mother's Day. ER-119. Although they only interacted through a window, Florentina appeared healthy. *Id.* Two days later, Parkwest told Ms. Nava that her mother was not feeling well but that it was nothing serious. *Id.* Parkwest did not tell Ms. Nava that Florentina was having trouble breathing, was refusing to eat, and had been placed on oxygen. ER-120. Although Parkwest failed to conduct a COVID-19 test on Florentina or any other resident, Ms. Nava believes that her mother had contracted the coronavirus at this time. *Id.* When Ms. Nava contacted Parkwest the next day, staff lied to her and told her there were no COVID-19 cases in the facility. *Id.*

On May 18, 2020, Ms. Nava learned from the family member of one of Florentina's roommates that both Florentina and her roommate had

been transferred to a hospital. ER-120. That day, an emergency room physician told Ms. Nava that Florentina had COVID-19. ER-121. After this call, a Parkwest staff member contacted Ms. Nava and told her that her mother had been transferred to a hospital for observation as a result of a slight fever and that her condition was not serious. *Id.* The next morning, Florentina died of COVID-19. *Id.*

II. Procedural History

Ms. Nava commenced this action against Parkwest in Los Angeles County Superior Court on June 1, 2020. ER-239. The operative complaint contains four state-law claims. First, Nava alleges that Parkwest's failure to protect Florentina from health and safety hazards, its intentional and/or reckless acts exposing her to the coronavirus, and its failure to provide basic necessary custodial care, constituted elder abuse under California law. ER-121–123. Second, Ms. Nava alleges that Parkwest committed willful misconduct, as that term is used in California law, by providing custodial care in which infected workers lacked appropriate safety equipment, and by not employing reasonable custodial policies for isolating COVID positive or suspected positive staff and residents. ER-123–26. Third, she alleges that Parkwest's failure to

implement policies, procedures, and safety measures necessary to prevent Florentina's exposure to the coronavirus constituted custodial negligence. ER-126. Finally, Ms. Nava alleges a claim for wrongful death. ER-126–27.

Parkwest removed the action to the U.S. District Court for the Central District of California on August 20, 2020, invoking jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and federal-question jurisdiction under 28 U.S.C. § 1331 based on both "complete preemption" and the *Grable* doctrine. ER-238.

Ms. Nava filed a motion to remand the action to state court for lack of subject-matter jurisdiction, which the district court granted on April 5, 2021. ER-3. The court held that it lacked jurisdiction under the federal officer jurisdiction statute because Parkwest "fail[ed] to establish that [its] alleged conduct was 'pursuant to a federal officer's directions,'" as is required. ER-5 (quoting *Stirling v. Minasian*, 955 F.3d 795, 800 (9th Cir. 2020)). In addition, the court rejected Parkwest's complete preemption argument, holding that Nava's claims based on Parkwest's "plain inaction or failure to protect" were not within the scope of the PREP Act's immunity provision, and thus, "even if the PREP Act could confer federal

jurisdiction via complete preemption, it would not do so here." ER-7–8. The court also found that no substantial question of federal law was necessarily raised by Nava's claims, as required for jurisdiction under *Grable*. ER-8–9.

On October 7, 2021, Parkwest filed its opening brief in this appeal. Dkt. 17. On October 21, 2021, *Saldana* and *Martin v. Filart*, No. 20-56067, were argued and submitted to a panel of this Court. In both cases, the nursing home appellants were represented by the same counsel as Parkwest here, and made the same arguments raised in Parkwest's opening brief. Ms. Nava thus moved for a stay of this action pending resolution of those appeals in light of the priority rule expressed in General Order 4.1(a). Dkt. 23 That stay was granted on November 4, 2021. Dkt. 26.

On February 23, 2022, this Court issued a published decision in *Saldana*, affirming the district court's remand order. Three days later, the Court issued a memorandum opinion in *Martin*, applying *Saldana* to affirm the remand order in that case as well. *Martin v. Filart*, 2022 WL 576012 (9th Cir. Feb. 25, 2022). On March 18, 2022, the Court lifted the stay of this appeal. Dkt. 31.

LEGAL STANDARD

"At any time prior to the completion of briefing in a civil appeal," the Court may summarily dispose of a civil appeal if it determines "that clear error or an intervening court decision or recent legislation requires affirmance, reversal or vacation of the judgment or order appealed from, the grant or denial of a petition for review, or a remand for additional proceedings." 9th Cir. R. 3-6(a)(1).

ARGUMENT

This Court's "published opinions on the law are authoritative once issued and remain binding on subsequent panels of this court." *Langere v. Verizon Wireless Servs., LLC*, 983 F.3d 1115, 1121 (9th Cir. 2020). In *Saldana*, this Court considered and rejected all arguments raised by Parkwest here, and there are no meaningful distinctions between this case and that one. Summary affirmance is therefore appropriate. *See also Martin*, 2022 WL 576012 (disposing of similar case in one-page memorandum opinion in light of *Saldana*); *Thomas v. Pomona Healthcare & Wellness Ctr.*, 2022 WL 845349 (C.D. Cal. Mar. 22, 2022) (remanding similar case under "explicit binding authority" of *Saldana*) *Herring v. Californian-Magnolia Convalescent Hosp., Inc.*, 2022 WL

743515 (C.D. Cal. Mar. 11, 2022) (similar); *Luna v. P & M Healthcare Holdings, Inc.*, 2022 WL 883475 (C.D. Cal. Mar. 1, 2022) (similar).

I. *Saldana* is binding precedent.

"[A] published decision constitutes binding authority and must be followed unless and until it is overruled by a body competent to do so." *In re Zermeno-Gomez*, 868 F.3d 1048, 1053 (9th Cir. 2017). Although the Appellant in *Saldana* has filed a petition for rehearing or rehearing en banc, neither the pendency of that petition nor the lack of a mandate deprives the published opinion of precedential value—as this Court has repeatedly explained. *See, e.g.*, *Zermeno-Gomez*, 868 F.3d at 1052–53 (holding that panel opinion was binding precedent even though mandate had been stayed pending petition for rehearing en banc or writ of certiorari); *United States v. Gomez-Lopez*, 62 F.3d 304, 306 (9th Cir. 1995) (similar); *Wedbush, Noble, Cooke, Inc. v. SEC*, 714 F.2d 923, 924 (9th Cir. 1983) (similar).

II. *Saldana* is dispositive.

In its opening brief, Parkwest argues that federal courts have subject-matter jurisdiction over Ms. Nava's claims under three theories: (1) the federal-officer removal statute, 28 U.S.C. § 1442(a)(1); (2)

complete preemption under the PREP Act; and (3) the *Grable* doctrine. Because this Court rejected all three arguments in *Saldana*, summary affirmance is proper.

A. This Court in *Saldana* rejected the same purported sources of federal direction cited by Parkwest here.

The federal officer removal statute allows removal to federal court of cases brought against "[t]he 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." 28 U.S.C. § 1442(a)(1). "To remove a state court action under the federal officer removal 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*, 955 F.3d at 800). "A private firm's compliance (or noncompliance) with federal laws, rules, and regulations does not by itself fall within the scope of the statutory phrase 'acting under' a federal 'official.' And that is so even if the regulation is highly detailed and even if the private firm's

activities are highly supervised and monitored." *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007).

Here, relying on district court cases that predate *Watson* by two decades, Parkwest argues that various guidance documents issued by the Centers for Disease Control and the Centers for Medicare and Medicaid Services constituted federal officer directions for purposes of the federal-officer removal statute. *See* Appellants' Br. 30–38. These guidance documents are the same ones relied upon by the nursing home in *Saldana*. *See* Appellants' Br. 29–30. As this Court has now explained, these documents "show 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 they are insufficient to meet a defendant's burden to establish it was acting under a federal officer for purposes of section 1442(a)(1). *Saldana*, 27 F.4th at 685.

Like the nursing home in *Saldana*, all that Parkwest "has demonstrated is that it operated as a private entity subject to government regulations, and that during the COVID-19 pandemic it

received additional regulations and recommendations from federal agencies." *Id.* at 686. Under *Saldana*, as well as *Watson* and Ninth Circuit precedent cited by the Court in *Saldana* and by the district court in its remand order, Parkwest was thus "not 'acting under' a federal officer or agency as contemplated by the federal officer removal statute." *Id.*; *see also* ER-5 (collecting cases).

B. This Court in *Saldana* rejected the complete preemption theory argued by Parkwest here.

This Court has articulated a two-part test to determine whether a federal statute completely preempts state-law claims, and thus converts state-law claims into federal ones: "(1) did Congress intend to displace a state-law cause of action and (2) did Congress provide a substitute cause of action?" *Saldana*, 27 F.4th at 687–88 (citing *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020)). Applying that test, this Court in *Saldana* held that "the PREP Act is not a complete preemption statute." *Id.* at 688. In light of this holding, this Court need go no further to reject Parkwest's complete preemption argument.

C. This Court in *Saldana* rejected the arguments underlying Parkwest's *Grable* theory.

Under the *Grable* doctrine, "federal jurisdiction over a state law claim will lie if 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." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Parkwest's *Grable* argument is based on its assertions that this case involves interpretation of the PREP Act and implicates important federal policy interests. Appellants' Br. 75–78. As in *Saldana*, however, "[t]he claims in the complaint are raised under California law and do not raise questions of federal law on the face of the complaint." 27 F.4th at 689. And while Parkwest "seeks to raise a federal defense under the PREP Act, … a federal defense is not a sufficient basis to find embedded federal question jurisdiction." *Id.* (citing *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1090 (9th Cir. 2009)). Additionally, that a case may raise "an important policy question" does not independently "raise a substantial question of federal law for the purpose of determining whether there is jurisdiction under [28 U.S.C.] § 1331." *Oakland*, 969

F.3d at 907. In light of *Saldana*, Parkwest's *Grable* argument must be rejected.

CONCLUSION

In light of *Saldana*, full briefing of this appeal would waste the parties' and the Court's time and resources. The Court should summarily affirm the district court's remand order.

April 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 27(a)(d)(2) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the Rules of this Court, it contains 2,442 words.

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 Times New Roman.

April 4, 2022

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