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 REPLY IN SUPPORT OF MOTION FOR SUMMARY AFFIRMANCE

Plaintiff-Appellee Griselda Nava, individually and as successor and heir of Florentina Lopez, submits this reply in support of her motion for summary affirmance.

Parkwest's opposition to summary affirmance is based on (1) its belief that this Court's decision in *Saldana v. Glenhaven Healthcare*, 27 F. 4th 679 (9th Cir. 2022), *pet. for rehearing en banc denied* (Apr. 18, 2022), was wrongly decided; (2) inaccurate characterizations of the

holdings of *Saldana*; and (3) arguments about specific aspects of the complaint in this case that were *also* present in the complaint in *Saldana*. None of Parkwest's arguments provides a reason to prolong resolution of this appeal, filed more than a year ago. As this Court recognized in affirming the district court's remand in *Martin v. Filart*, No. 20-56067, 2022 WL 576012 (9th Cir. Feb. 25, 2022), and as district courts in this Circuit have recognized in similar cases, the Court's published opinion in *Saldana* disposes of all arguments Parkwest has raised on appeal. *See*, *e.g.*, *Kovacs v. MEK Norwood Pines, LLC*, 2022 WL 1129269, at *4 (E.D. Cal. Apr. 15, 2022) (finding arguments raised by defendants "in support of removal are foreclosed by *Saldana*" and awarding attorneys' fees to plaintiff because defendants' opposition to plaintiff's motion [to remand] in the face of binding and on-point authority was" unreasonable); *Thomas v. Pomona Healthcare & Wellness Ctr.*, 2022 WL 845342 (C.D. Cal. Mar. 22, 2022) (remanding similar case based on *Saldana*); *Herring v. Californian-Magnolia Convalescent Hosp., Inc.*, 2022 WL 743515 (C.D. Cal. Mar. 11, 2022) (same); *Luna v. P & M Healthcare Holdings, Inc.*, 2022 WL 946993 (C.D. Cal. Feb. 25, 2022) (same).

ARGUMENT

I. *Saldana* is binding.

Parkwest suggests that this Court is not bound to follow *Saldana* because, in Parkwest's view, *Saldana* was incorrectly decided. Opp'n 7. The sole case Parkwest cites for the erroneous proposition that a panel of this Court can disregard earlier published decisions if the panel thinks they were wrongly decided is the two-paragraph memorandum opinion in *United States v. Brown*, No. 19-16274, 2022 WL 229139 (9th Cir. Jan. 25, 2022). Not surprisingly, that case holds the exact opposite of what Parkwest argues. There, the appellant asked this Court to disregard its precedent established in *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2018). The Court refused to do so, stating, "Notwithstanding Brown's assertion that *Watson* was wrongly decided, *Watson* controls the outcome of this appeal." 2022 WL 229139, at *1.

Citing *Brown* for the proposition that this Court may ignore a published decision whenever "the reasoning or theory of that decision is clearly irreconcilable with the reasoning or theory of the higher authority of the United States Supreme Court," Opp'n 7, Parkwest misleadingly paraphrases a parenthetical in *Brown*. There, the Court quoted the

unobjectionable statement in *United States v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015), that, "As a three-judge panel we are bound by prior panel opinions and can only reexamine them when the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of *intervening* higher authority." 2022 WL 229139, at *1 (emphasis added). The key word, which Parkwest omits, is "intervening." And the only "higher authority" that Parkwest asserts is "clearly irreconcilable" with *Saldana* is *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215–16 (2004) – a case decided eighteen years *before Saldana* (and addressed in the parties' briefs in *Saldana*). *Davila* is not "intervening higher authority."

Moreover, Parkwest's counsel unsuccessfully made exactly the same argument that *Saldana* is incorrect in its petitions for en banc review in both *Saldana* and *Martin*. This Court denied both petitions without a request for a response or an en banc poll. That *Saldana* is not "clearly irreconcilable" with *Davila* is also demonstrated by the Third and Fifth Circuits' rejection of the argument Parkwest makes based on *Davila*. *See Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580 (5th Cir. 2022); *Perez v. Southeast SNF, L.L.C.*, 2022 WL 987187 (5th Cir. Mar.

31, 2022); *Maglioli v. Alliance HC Holdings, LLC*, 16 F.4th 393 (3d Cir. 2021). In *Mitchell*, the Fifth Circuit endorsed *Saldana*'s reasoning as "both sound and persuasive." 28 F.4th at 584 n.1.

In short, *Saldana* is the law of the Circuit and controls the outcome of this case.

II. *Saldana* bars a finding of complete preemption.

Parkwest's resistance to the application of *Saldana* to its complete preemption theory rests on misstatements of *Saldana*'s holdings and an erroneous conflation of "complete" preemption" and "ordinary" preemption.

Parkwest suggests that this case differs from *Saldana* because Ms. Nava's claims are for "willful misconduct" and, therefore, completely preempted by the PREP Act's exclusive cause of action for willful misconduct. Opp'n 8–10. This argument is inconsistent with *Saldana*, which explicitly held that "the PREP Act is not a complete preemption statute." 27 F.4th at 688. In stating that *Saldana* "left the question of preemption of a willful misconduct claim to be decided on a case-by-case basis depending on the complaint's allegations," Opp'n 8–9, Parkwest confuses complete preemption and ordinary preemption. *Cf. Balcorta v.*

Twentieth Century-Fox Film Corp., 208 F.3d 1102, 1107 n.7 (9th Cir. 2000) ("In spite of its title, the 'complete preemption' doctrine is actually a doctrine of jurisdiction and is not to be confused with ordinary preemption doctrine (although it is related to preemption law)."). As *Saldana* explains, whether a claim is "preempted is different than finding that the 'federal statutory scheme is so comprehensive that it entirely supplants state causes of action," which is necessary for complete preemption. 21 F.4th at 688. Ms. Nava agrees that *Saldana* left open the question whether claims like those she brought are *ordinarily* preempted by the PREP Act. But, in holding that the PREP Act is "not a complete preemption statute," it firmly resolved the question whether state-law claims can be completely preempted by the PREP Act, and it did so in the negative.

In addition, there is no meaningful distinction between the claims brought in *Saldana* and those brought by Ms. Nava. As noted in the *Saldana* opinion, the plaintiff there, like Ms. Nava, explicitly brought a claim labeled "willful misconduct" under California law. 27 F.4th at 688. And the cases involve similar facts: In *Saldana*, the plaintiff alleged that the nursing home "not only failed to implement appropriate safety

measures, but stopped its staff from protecting themselves and the residents from the coronavirus," and deliberately withheld information about COVID-19 exposures. *Saldana v. Glenhaven Healthcare LLC*, 2020 WL 6713994, at *1 (C.D. Cal. Oct. 14, 2020). Ms. Nava alleges similar facts. *See* ER-114, 118, 121. As in *Saldana*, these allegations do *not* fall within the exclusive cause of action provided by the PREP Act, because they do not seek to recover for an injury caused by the administration to or use by an individual of a covered countermeasure, and they do not meet the other requirements of a PREP Act willful misconduct claim.

Parkwest devotes three pages of its opposition to the issue of supplemental jurisdiction, Opp'n 10–12, but it is unclear why. For the federal district court to have supplemental jurisdiction, the court must have original jurisdiction over at least one claim. Parkwest appears to rely on the fact that the *Third* Circuit stated that claims that fall under the PREP Act's willful misconduct cause of action would be completely preempted. Opp'n 12; *see Maglioli*, 16 F.4th at 409. But that is not what *this* Court held in *Saldana*. Moreover, Parkwest's opening brief does not even argue that Ms. Nava's claims fall within the scope of the willful

misconduct cause of action, and thus it has waived any argument based on that theory.

The claims and arguments in this case are on all fours with *Saldana*. *Saldana*'s holding as to complete preemption is thus controlling in this case.

III. Parkwest's federal officer argument is barred by *Saldana*.

In *Saldana*, the Court rejected the argument that the federal government "conscript[ed] ... private entities like [the nursing home defendant] to join in the fight against COVID-19 through detailed and specific mandatory directives to nursing homes on the use and allocation of PPE, the administration of COVID-19 testing, intervention protocols, and virtually every other aspect of the operations of nursing homes during the pandemic." 27 F.4th at 684. It acknowledged that nursing homes were part of the nation's critical infrastructure but found that did not equate to "acting under" a federal officer for purposes of 28 U.S.C. § 1442.

Parkwest argues that because *Saldana* did not explicitly address each and every HHS document cited in Parkwest's opening brief when it rejected the suggestion that the onset of the COVID-19 pandemic meant

every nursing home in America was acting under a federal officer, summary affirmance is inappropriate. But nothing that Parkwest points to is even *relevant* to the "acting under" inquiry, much less casts doubt on the applicability of *Saldana*'s holding. First, Parkwest points to documents—some of which were cited in the *Saldana* opinion—indicating that nursing homes and other medical providers may invoke the PREP Act as "program planners," "covered persons," or "qualified persons," as they were authorized to administer covered countermeasures like COVID-19 tests. Opp'n 13–15. But the fact that nursing homes are among the entities entitled to invoke the liability provisions of the PREP Act or to give COVID-19 tests says nothing about whether those nursing homes were "authorized to act with or for federal officers or agents in affirmatively executing duties under ... federal law," *Saldana*, 27 F.4th at 684 (citation omitted), as is required to be "acting under" a federal officer. *See also County of San Mateo v. Chevron Corp.*, __ F.4th __, No. 18-15499, 2022 WL 1151275, at *12 (9th Cir. Apr. 19, 2022) (identifying factors to "consider in determining whether a private person is 'acting under' a federal officer for purposes of § 1442(a)(1)"). A contrary view would entitle every doctor, pharmacist, and drug store in

America to federal-officer removal. *Saldana*'s rejection of the proposition that the COVID-19 pandemic made all of America's nursing homes agents of the federal government requires summary rejection of Parkwest's attempt to restate that proposition.

Second, Parkwest points out that, when *Saldana* rejected the assertion of federal-officer removal by nursing homes, it did not explicitly address one quotation in which the federal government referred to nursing homes as "critical partners" in fighting COVID-19. Opp'n 15. But the Court did state:

> It cannot be that the federal government's mere designation of an industry as important—or even critical—is sufficient to federalize an entity's operations and confer federal jurisdiction.

27 F.4th at 685 (quoting *Buljic v. Tyson Foods, Inc.*, 22 F.4th 730, 740 (8th Cir. 2021)). That the Court did not separately address the term "critical partners" does not make Parkwest's argument viable.

IV. Parkwest's *Grable* argument is barred by *Saldana*.

Parkwest asserts that *Saldana*'s *Grable* holding does not apply here because Ms. "Nava's claims directly assert a 'willful misconduct' claim of the type which the PREP Act completely preempts." Opp'n 16. Parkwest's conflation of the *Grable* and complete preemption doctrines adds nothing

to its attempt to avoid *Saldana*'s holding that *Grable* provides no support for federal jurisdiction over claims such as the ones in this case. Moreover, as explained above, *Saldana* rejected the argument that "the PREP Act completely preempts" anything, and the claim labeled "willful misconduct" in Ms. Nava's complaint is indistinguishable from the claim in the complaint in *Saldana*. As in *Saldana*, Parkwest "does not identify how a right or immunity created by the PREP Act must be an essential element of the willful misconduct claim as stated in the complaint." 27 F.4th at 689. None of the elements of the California state-law willful misconduct claim depend on a question of federal law; that Parkwest "seeks to raise a federal defense under the PREP Act" does not create an embedded federal question. 27 F.4th at 679. *See also San Mateo*, 2022 WL 1151275, at *5 (finding *Grable* jurisdiction lacking "even if the complaints raise federal policy issues that are national and international in scope" where tort claims did not "require any interpretation of a federal statutory or constitutional issue" and "require[d] a fact-intensive and situation-specific analysis").

CONCLUSION

For the reasons stated above and in Ms. Nava's motion, the Court should summarily affirm the district court's remand order.

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Respectfully submitted,

s/ Adam R. Pulver
Adam R. Pulver
Allison M. Zieve
Scott L. Nelson
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-7790
apulver@citizen.org

Scott C. Glovsky
Law Offices of Scott C. Glovsky
343 Harvard Avenue
Claremont, CA 91711
(626) 243-5598

Counsel for Appellee

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 2,050 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 Century Schoolbook.

April 20, 2022

/s/ Adam R. Pulver
Adam R. Pulver