No. 21-50399

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CRYSTAL PEREZ, on behalf of the Estate of Ricardo Lozano, Deceased,
Plaintiff-Appellee,

v.

SOUTHEAST SNF, L.L.C., doing business as Southeast Nursing & Rehabilitation Center; TEXAS OPERATIONS MANAGEMENT, L.L.C., doing business as Southeast Nursing & Rehabilitation Center; ADVANCED HCS, L.L.C., doing business as Advanced Healthcare Solutions, doing business as Southeast Nursing & Rehabilitation Center,
Defendants-Appellants.

(caption continued on inside cover)

On Appeal from the United States District Court for the Western District of Texas, Nos. 5:21-CV-88, 5:21-CV-90, and 5:21-CV-89
Hon. Jason Pulliam

BRIEF FOR PLAINTIFFS-APPELLEES

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August 13, 2021

consolidated with

No. 21-50412

ROBERT T. STRAIT, Individually and
on Behalf of the Estate of Robert M. Strait, Deceased,
Plaintiff-Appellee,

v.

SOUTHEAST SNF, L.L.C., doing business as Southeast Nursing & Rehabilitation Center; TEXAS OPERATIONS MANAGEMENT, L.L.C., doing business as Southeast Nursing & Rehabilitation Center; ADVANCED HCS, L.L.C., doing business as Advanced Healthcare Solutions, doing business as Southeast Nursing & Rehabilitation Center,
Defendants-Appellants.

consolidated with

No. 21-50413

JOE SALINAS, Individually and
on Behalf of the Estate of Elodia Salinas, Deceased,
Plaintiff-Appellee,

v.

SOUTHEAST SNF, L.L.C., doing business as Southeast Nursing & Rehabilitation Center; ADVANCED HCS, L.L.C., doing business as Advanced Healthcare Solutions, doing business as Southeast Nursing & Rehabilitation Center; TEXAS OPERATIONS MANAGEMENT, L.L.C., doing business as Southeast Nursing & Rehabilitation Center,
Defendants-Appellants.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellees	**Current and Former Counsel for Plaintiffs-Appellees**
Crystal Perez, on Behalf of the Estate of Ricardo Lozano, Deceased Robert T. Strait, Individually and on Behalf of the Estate of Robert M. Strait, Deceased Joe Salinas, Individually and on Behalf of the Estate of Elodia Salinas, Deceased	Adam R. Pulver Allison M. Zieve Scott L. Nelson Public Citizen Litigation Group 1600 20th Street NW Washington, DC 20009 Andrew Skemp Beth Janicek Jessica Rodriguez Janicek Law Firm, PC 1100 N.E. Loop 410, Suite 600 San Antonio, TX 78209
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/s/ Adam R. Pulver
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REQUEST FOR ORAL ARGUMENT

Plaintiffs-Appellees agree that oral argument is appropriate in this case, which presents a question of statutory interpretation of first impression for this Court—specifically, whether the Public Readiness and Emergency Preparedness Act, enacted in 2005 to encourage the manufacture and distribution of certain drugs and devices, completely preempts negligence claims based on injuries not caused by the use or administration of such drugs and devices.

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JURISDICTIONAL STATEMENT

This consolidated appeal arises from three state-law actions, each initially filed in Texas state court and subsequently removed by Defendants-Appellees to the United States District Court for the Western District of Texas. *See* ROA.21-50399.2; ROA.21-50412.2; ROA.21-50413.2. The district court correctly determined that neither 28 U.S.C. § 1331 nor 28 U.S.C. § 1442(a)(1) confers subject-matter jurisdiction over these actions, and thus properly remanded them.

The district court issued an order remanding all three cases to state court on April 12, 2021. *See* ROA.21-50399.382; ROA.21-50412.461; ROA.21-50413.382. Defendants-Appellees filed timely notices of appeal in each case. *See* ROA.21-50399.393; ROA.21-50412.473; ROA.21-50413.394. This Court has jurisdiction to review the district court's remand order pursuant to 28 U.S.C. § 1447(d).

STATEMENT OF THE ISSUES

1. Whether, in creating an express preemption defense for claims based on injuries causally related to "the administration of or use by an individual of a covered countermeasure," 42 U.S.C. § 247d-6d(a)(1), Congress completely preempted all state-law claims based on negligent

infection control policies, irrespective of whether those claims were based on the administration or use of a covered countermeasure.

2. Whether an anticipated federal defense brings garden-variety tort actions into the special and small category of cases where *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), recognizes federal-question jurisdiction despite the absence of a federal-law claim.

3. Whether federal agencies' issuance of guidance related to COVID-19 converted the nation's nursing homes into instrumentalities of the federal government for purposes of the federal officer removal statute.

STATEMENT OF THE CASE AND OF FACTS

This consolidated appeal arises from Texas-law negligence actions filed by the survivors of three residents who died of COVID-19 at Southeast Nursing and Rehabilitation Center, a San Antonio skilled nursing facility and nursing home, in April 2020. *See* ROA.21-50399.29, 31; ROA.21-50413.29, 31; ROA.21-50412.30, 32. That facility is owned, operated, and managed by Defendants-Appellants Southeast SNF, L.L.C., Texas Operations Management, L.L.C., and Advanced HCS, L.L.C. (collectively, "Southeast"). The plaintiffs allege that, despite a citation and guidance from the Texas

Health and Human Service Commission, Southeast failed to adopt adequate infection control policies and procedures, and the plaintiffs' loved ones contracted the coronavirus as a result. They also alleged that Southeast was negligent in providing care to their loved ones after they were diagnosed with COVID-19, leading to their deaths.

I. The Federal-State Response to the Pandemic

Since the first reported COVID-19 cases in January 2020, federal agencies have issued guidance documents setting forth best practices and interpretations of how existing regulatory requirements apply to measures to reduce the spread of the disease. For instance, the Centers for Disease Control and Prevention (CDC), a division of the U.S. Department of Health and Human Services (HHS), issued guidance that applies to all "workplaces and businesses," and guidance for specific industries ranging from higher education institutions to amusement parks, and from homeless shelters to community gardens. *See* CDC, COVID-19, Community, Work, and School.[1] And both CDC and HHS's Centers for Medicare & Medicaid Services (CMS) issued guidance about infection control in nursing homes and other health

[1] https://www.cdc.gov/coronavirus/2019-ncov/community/index.html.

care facilities. *See*, *e.g.*, Appellants' Motion to Take Judicial Notice (MJN), Exs. 9, 11–15.

These HHS guidance documents explicitly contemplated that state and local governments would retain their role as primary protectors of public health. CMS directed nursing homes to "follow the local health department recommendations" if any facility staff developed signs or symptoms of a respiratory infection and to "contact their local or state health department" if they noticed "an increased number of respiratory illnesses." MJN Ex. 12 at 2. CMS characterized its own guidance as "recommendations to State and local governments and long-term care facilities." MJN Ex. 15 at 1. *See also* CMS, "Toolkit on State Actions to Mitigate COVID-19 Prevalence in Nursing Homes," June 2021 (Version 23) (compiling "the many creative plans that state governments and other entities have put into operation" to combat COVID-19 since early 2020).[2]

Consistent with CMS's expectation, the State of Texas has taken a variety of actions to address the spread of COVID-19 in nursing homes. The Texas Health and Human Services Commission (THHS) first provided

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

COVID-19-specific guidance on March 2, 2020. *See* THHS, News Release, HHS Monitors Coronavirus, Provides Guidance to Long-Term Care Facilities.[3] On March 15, THHS issued expanded guidance requiring nursing homes to restrict access to essential personnel. THHS, News Release, HHS Provides Expanded Guidance to Nursing Facilities to Prevent Spread of COVID-19 in Texas.[4] THHS has continued to expand, review, and revise this guidance over the course of the pandemic. *See* THHS, COVID-19 Response for Nursing Facilities, Version 4.0 (July 20, 2021);[5] THHS, Nursing Facilities (NF) (collecting rules, FAQs, and guidance related to COVID-19 for nursing facilities).[6] In addition, in April 2020, THHS promulgated an emergency rule mandating that nursing facilities take certain screening and other infection

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[3] https://www.hhs.texas.gov/about-hhs/communications-events/news/2020/03/hhs-monitors-coronavirus-provides-guidance-long-term-care-facilities.

[4] https://www.hhs.texas.gov/about-hhs/communications-events/news/2020/03/hhs-provides-expanded-guidance-nursing-facilities-prevent-spread-covid-19-texas.

[5] https://www.hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/long-term-care/nf/covid-response-nursing-facilities.pdf.

[6] https://www.hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/nursing-facilities-nf.

control measures. THHS, Emergency Rule for Nursing Facility Response to COVID-19, 45 TexReg. 2479 (Aug. 7, 2020) (adopting 40 Tex. Admin. Code 19.2801 (2020)). THHS later promulgated additional rules. *See* 40 Tex. Admin. Code §§ 19.2802–2804 (2020).

II. The PREP Act and Its Implementation

A. The PREP Act

Initially enacted in 2005 "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency, the [PREP Act] authorizes the Secretary of [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: Limiting Liability for Medical Countermeasures* 1 (updated Mar. 19, 2021).[7] The Secretary triggers the Act's provisions by declaring a public-health emergency and "recommending" the "manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures." 42 U.S.C. § 247d-6d(b)(1).

"Covered countermeasures" include certain drugs, biological products, and devices authorized for emergency use, 42 U.S.C. §§ 247d-

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

6d(i)(1)(A)–(C). In 2020, Congress amended the statute, via the Families First Coronavirus Response Act and the Coronavirus Aid, Relief, and Economic Security (CARES) Act, to make respiratory protective devices approved by the National Institute of Occupational Safety and Health covered countermeasures in limited circumstances. Pub. L. No. 116-127, § 6005, 134 Stat. 178, 207 (2020); Pub. L. No. 116-136, § 3103, 134 Stat. 281, 361 (2020), *codified at* 42 U.S.C. § 247d–6d(i)(1)(D).

The PREP Act limits liability with respect to "claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(1). Subsection (a) makes "a covered person" "immune from suit and liability under Federal and State law" for claims with 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," subject to certain conditions. *Id.* §§ 247d-6d(a)(1), (a)(2)(B), (a)(3). Subsection (d) creates a carveout from subsection (a) immunity for suits "for death or serious physical injury proximately caused by willful misconduct." *Id.* § 247d-6d(d)(1). For these claims, the statute creates an

"exclusive Federal cause of action," *id.*, and provides special procedures for their adjudication, with exclusive jurisdiction in the District Court for the District of Columbia, *id.* § 247d-6d(e).

The PREP Act also creates an HHS-administered fund to provide "compensation to eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure" subject to a PREP Act declaration. 42 U.S.C. § 247d-6e(a). HHS regulations specify that eligibility for compensation is limited to "injured countermeasure recipients" and their survivors, 42 C.F.R. § 110.10(a), and specify that "covered injuries" excludes "injur[ies] sustained as the direct result of the covered condition or disease for which the countermeasure was administered or used … (e.g., if the covered countermeasure is ineffective in treating or preventing the underlying condition or disease)," *id*. § 110.20(d).

B. The COVID-19 PREP Act Declaration and Amendments

On March 17, 2020, the HHS Secretary invoked the PREP Act by issuing a Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID–19. 85 Fed. Reg. 15,198, 15,198 (Mar. 17, 2020). The Secretary has amended the initial Declaration several times. The First Amendment, issued April 15, 2020,

expanded covered countermeasures to include certain respiratory protective equipment, based on the CARES Act. *See* 85 Fed. Reg. 21,012, 21,013–14.

Months after the events of this case, the Fourth Amendment expressed the view 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 nonadministration is the result of "prioritization or purposeful allocation … particularly if done in accordance with a public health authority's directive." 85 Fed. Reg. 79,190, 79,194 (Dec. 9, 2020). As an example, the Secretary referenced the decision to vaccinate a more-vulnerable individual instead of a less-vulnerable individual given limited doses. *Id.* The Fourth Amendment also incorporated by reference four advisory opinions previously issued by the HHS Office of General Counsel (OGC). *Id.* at 79,191 & n.5.

OGC later issued a fifth advisory opinion, stating its view that "the PREP Act is a [c]omplete [p]reemption statute," which 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 was the result of "nonfeasance." OGC, Advisory Opinion 21-

01 (Jan. 8, 2021), MJN Ex. 8 at 2. OGC also opined that the *Grable* doctrine of federal-court jurisdiction applies to any case where there is a question about whether the PREP Act applies. *Id.* at 4–5. Like the previous advisory opinions, Opinion 21-01 says that it "sets forth the current views" of OGC, is "not a final agency action or a final order," and "does not have the force or effect of law." *Id.* at 5.

III. Southeast's Inaction and the Resulting 18 Resident Deaths

In October 2019, Southeast was cited by THHS for failing to "provide and implement an infection prevention and control program," including its failure to ensure staff "perform proper hand hygiene procedures." ROA.21-50399.32; ROA.21-50412.32; ROA.21-50413.29. Despite this citation, Southeast "did not maintain an infection prevention and control program to prevent the spread of COVID-19" or "put into place proper policies to ensure that [Southeast] residents were provided standard infection prevention care." ROA.21-50399.30; ROA.21-50412.31; ROA.21-50413.30. Even after the March 2020 THHS guidance, Southeast did not screen staff for symptoms of or exposure to COVID-19, or ensure employees washed their hands. ROA.21-50399.30; ROA.21-50412.31; ROA.21-50413.30. Southeast was also "systematically understaffed," with staff levels approximately 20 percent

lower than expected by CMS. ROA.21-50399.31–32; ROA.21-50412.32–33; ROA.21-50413.31–32.

The plaintiffs in each action allege that Southeast's failures to establish and implement adequate infection policies and procedures both before and in response to the COVID-19 pandemic, as well as its persistent understaffing, led to at least 74 Southeast residents and 28 Southeast staff members contracting the coronavirus, and to the deaths of 18 residents, including the plaintiffs' loved ones. ROA.21-50399.31; ROA.21-50412.32; ROA.21-50413.31. The plaintiffs also allege that Southeast's negligent care *after* each of their loved ones' diagnoses led to their deaths. *See, e.g.*, ROA.21-50399.32–36; ROA.21-50412.33–37; ROA.21-50413.32–36.

Ricardo Lozano was admitted as a resident to Southeast in 2012 because he needed nursing care. ROA.21-50399.30. On or about April 1, 2020, Mr. Lozano tested positive for COVID-19. ROA.21-50399.30. Although his condition quickly deteriorated, Southeast did not send him to a hospital for treatment, or otherwise adequately monitor and treat his health, and he died on April 6, 2020. ROA.21-50399.31, 33.

Robert M. Strait was admitted as a resident to Southeast to receive nursing care. ROA.21-50412.31. In March 2020, there was an outbreak of

COVID-19 among residents of Mr. Strait's hallway, and he contracted the virus. ROA.21-50412.32. Southeast failed to properly monitor and treat him or timely transfer him to a higher level of care. ROA.21-50412.35. Mr. Strait died of COVID-19 on April 4, 2020. ROA.21-50412.35.

Elodia Salinas was admitted as a resident to Southeast on or around March 25, 2020, for rehabilitation following a hospitalization. ROA.21-50413.30. Upon her admission, she was not isolated from residents who had been diagnosed with COVID-19. ROA.21-50413.31. Approximately one week later, she tested positive for COVID-19. ROA.21-50413.30–31. Southeast failed to properly monitor and treat her or timely transfer her to a higher level of care. ROA.21-50413.33. She died from COVID-19 on April 10, 2020. ROA.21-50413.31.

IV. Procedural History

Crystal Perez, Mr. Lozano's niece and heir; Robert T. Strait, Mr. Strait's son and heir; and Joe Salinas, Mrs. Salinas's son and heir (collectively, the Families) each sued Southeast in Texas state court on December 30, 2020. ROA.21-50399.26; ROA.21-50412.27; ROA.21-50413.26. All three lawsuits included claims for negligence based on Southeast's failures to prevent infection and to provide appropriate care and treatment after the decedents

contracted COVID-19; and for gross negligence based on Southeast's failure to adopt rules regarding COVID-19 minimization, to provide a reasonably safe nursing home, and to hire competent employees. ROA.21-50399.32–37; ROA.21-50412.33–38; ROA.21-50413.32–37.

Southeast removed the actions to the U.S. District Court for the Western District of Texas on February 2, 2021, invoking federal-question jurisdiction under 28 U.S.C. § 1331 on the basis of both "complete preemption" and the "embedded federal question" or *Grable* doctrine, and jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1). ROA.21-50399.4, 5–6; ROA.21-50412.5, 6–7; ROA.21-50413.4, 5–6. Southeast also moved to dismiss each action. ROA.21-50399.113; ROA.21-50412.148; ROA.21-50413.112. The Families moved to remand each action. *See* ROA.21-50399. 190; ROA.21-50412.225; ROA.21-50413.189.

On April 12, 2021, in a joint order for all three cases, Judge Pulliam granted the Families' motions to remand and denied as moot Southeast's motions to dismiss. ROA.21-50399.382. First, citing his earlier decision in *Gibbs v. Southeast SNF*, 2021 WL 1186626 (W.D. Tex. Mar. 30, 2021), and "the weight of authority," Judge Pulliam concluded that "the PREP Act does not completely preempt state law negligence claims for COVID-19-related

injuries." ROA.21-50399.384–85. Second, he found that Southeast failed to demonstrate that federal-question jurisdiction over the Families' Texas-law claims existed under the *Grable* doctrine. ROA.21-50399.385–89. Finally, he concluded that federal-officer jurisdiction was lacking because Southeast failed to "demonstrate a 'special relationship' with the federal government or show that [Southeast] w[as] something more than a 'highly regulated entity.'" ROA.21-50399.390 (quoting *Watson v. Philip Morris Cos.*, 551 U.S. 142, 153 (2007), and *St. Charles Surgical Hosp., LLC v. La. Health Serv. & Indem. Co.*, 990 F.3d 447, 452 (5th Cir. 2021)).

SUMMARY OF ARGUMENT

Federal courts lack jurisdiction over the Families' garden-variety Texas tort claims, which are based on Southeast's breaches of state-law duties of care by failing to adopt infection-control measures like screening and providing inadequate medical care to residents who were suffering from COVID-19. As the district court, like dozens of district courts addressing similar arguments, held, none of the exceptions to the general rule that federal courts lack jurisdiction over state-law claims between non-diverse parties applies.

First, subsection (a)(1) of the PREP Act does not completely preempt the Families' claims. To start, that provision is irrelevant to the claims at issue. Its immunity defense only applies to claims with a "causal relationship with the administration to or use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(2)(B). None of the Families' claims has such a causal relationship; they do not allege that their loved ones died as a result of the administration of any covered countermeasure to them—or to anyone else. And neither the statutory text nor its purpose supports Southeast's suggestion that any claim that may implicate its failure to administer or use covered countermeasures falls within the statute's scope. Non-binding statements by HHS do not compel a contrary finding. HHS has suggested only that claims based on the "purposeful allocation" of a covered countermeasure to one individual but not another can implicate subsection (a)(1). There are no such allegations here.

In any event, subsection (a)(1) is not one of the rare statutes that completely preempt state-law claims. Complete preemption relies on the presence of a federal cause of action that has supplanted state-law claims. Here, no federal cause of action would allow a federal court to exercise jurisdiction—as Southeast conceded in its motions to dismiss for lack of

jurisdiction in the district court. Although Congress created an exclusive cause of action for cases involving willful misconduct under subsection (d), it did not create a cause of action for the determination of whether immunity applies pursuant to subsection (a)—leaving that determination, like other applications of ordinary preemption defenses, to state courts. The limited administrative fund Congress created does not provide federal courts with a basis to assert federal-question jurisdiction.

Second, these cases do not fall into the narrow category of actions where, despite the absence of a federal law claim, jurisdiction is appropriate due to an "embedded federal question." In adjudicating whether the Families have established the elements of negligence, it is not necessary to resolve *any* disputed federal question. Southeast's attempt to raise a federal-law defense does not show otherwise.

Finally, Southeast's suggestion that every nursing home in America became a federal agent when HHS issued infection control guidance at the onset of the pandemic lacks merit. As the Supreme Court and this Court have held, a private entity does not become a federal officer by virtue of being federally regulated, regardless of how detailed the regulation may be. Nothing in the guidance HHS issued converted Southeast into an

instrumentality of the federal government and divested the State of Texas of its authority to protect public health within its borders. Southeast accordingly was not "acting under" federal officer direction. In addition, the Families' claims are not connected to conduct Southeast took pursuant to any federal guidance, and Southeast does not have a colorable federal defense to the Families' claims, as the federal officer removal statute requires.

ARGUMENT

I. Standard of Review

This Court reviews the district court's remand order *de novo*. *See St. Charles*, 990 F.3d at 450. "A removing defendant bears the burden of pointing to the evidence demonstrating that removal is proper." *Morgan v. Huntington Ingalls, Inc.*, 879 F.3d 602, 611 (5th Cir. 2018).

II. The Families' claims do not arise under federal law.

The Families allege claims solely under Texas tort law. Nonetheless, Southeast argues that the claims actually arise under federal law and, thus, that the district court had federal-question jurisdiction under 28 U.S.C. § 1331. The district court, like dozens of other courts addressing similar arguments, correctly rejected that argument. As the court held, the PREP Act

does not completely preempt claims like the Families', and the "substantial federal question" doctrine does not provide a basis for federal jurisdiction.

A. The PREP Act does not completely preempt the Families' claims.

Southeast argues that the Families' claims are barred by the immunity provision of section (a)(1) of the PREP Act and therefore are completely preempted by that statute. This argument rests on both an erroneous interpretation of the PREP Act and a misunderstanding of the complete preemption doctrine.

It is "settled law that a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). Distinct from "defensive preemption," complete preemption describes the rare circumstance where "what otherwise appears as merely a state law claim is converted to a claim 'arising under' federal law for jurisdictional purposes because the federal statute so forcibly and completely displaces state law that the plaintiff's cause of action is either wholly federal or nothing at all.'" *Elam v. Kansas City S. Ry. Co.*, 635 F.3d 796, 803 (5th Cir. 2011) (quoting *New Orleans & Gulf Coast Ry. Co. v. Barrois,* 533 F.3d 321, 330 (5th Cir. 2008)). A state-law claim is completely preempted only where: (1) there is "a civil enforcement provision

that creates a cause of action that both replaces and protects the analogous area of state law;" (2) "there is a specific jurisdictional grant to the federal courts for enforcement of the right;" and (3) Congress has clearly intended "that the federal action be exclusive." *Gutierrez v. Flores*, 543 F.3d 248, 252 (5th Cir. 2008). A removing defendant bears the burden of not just pointing to a completely preemptive statute, but also of demonstrating that the specific claims at issue are within the statute's preemptive scope. *See, e.g.*, *Spear Mktg., Inc. v. BancorpSouth Bank*, 791 F.3d 586, 594 (5th Cir. 2015) (deploying two-step analysis to determine whether state-law claims fell within scope of Copyright Act's complete preemption); *Hood ex rel. Mississippi v. JP Morgan Chase & Co.*, 737 F.3d 78, 89 (5th Cir. 2013) (holding that, though National Bank Act has complete preemptive effect, such effect did not apply to claims before the Court).

As the district court here, like dozens of others, concluded, the PREP Act does not completely preempt claims based on nursing homes' negligent failures to take adequate safety measures to protect residents from COVID-19, for two reasons: Such claims do not fall within the scope of the PREP Act,

and, even if they did, subsection (a)(1) provides for ordinary, defensive preemption—not complete preemption.[8]

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[8] *See Schuster v. Percheron Healthcare Inc.*, 493 F. Supp. 3d 533, 536–37 (N.D. Tex. 2021) (discussing "growing consensus"); *see also, e.g.*, *Rivera-Zayas v. Our Lady of Consolation Geriatric Care Ctr.*, 2021 WL 3549878, at *2 (E.D.N.Y. Aug. 11, 2021); *Romeo v. Canoga Healthcare, Inc.*, 2021 WL 3418730, at *3 (C.D. Cal. Aug. 5, 2021); *Estate of Acosta v. WDW Joint Venture*, 2021 WL 3089332, at *2–5 (C.D. Cal. July 21, 2021); *Jones v. Legacy Mgmt. Grp. of La. LLC*, 2021 WL 3416993, at *2–6 (W.D. La. July 7, 2021), *report and recommendation adopted*, 2021 WL 3416974 (W.D. La. Aug. 4, 2021); *Acra v. Cal. Magnolia Convalescent Hosp.*, 2021 WL 2769041, at *5–6 (C.D. Cal. July 1, 2021); *Elliot v. Care Inn of Edna LLC*, 2021 WL 2688600, at *3–4 (N.D. Tex. June 30, 2021); *Reed v. Sunbridge Hallmark Health Servs., LLC*, 2021 WL 2633156, at *3–7 (C.D. Cal. June 25, 2021); *Khalek v. South Denver Rehab., LLC*, 2021 WL 2433963, at *5–6 (D. Colo. June 11, 2021); *Thomas v. Century Villa Inc.*, 2021 WL 2400970, at *4–6 (C.D. Cal. June 10, 2021); *Brannon v. J. Ori, LLC*, 2021 WL 2339196, at *3 (E.D. Tex. June 8, 2021); *Rae v. Anza Healthcare*, 2021 WL 2290776, at *2–3 (S.D. Cal. June 4, 2021); *Riggs v. Country Manor La Mesa Healthcare Ctr.* , 2021 WL 2103017, at *2 (S.D. Cal. May 25, 2021); *Schleider v. GDVB Ops., LLC*, 2021 WL 2143910, at *3 (S.D. Fla. May 24, 2021); *Roebuck v. Mayo Clinic*, 2021 WL 1851414, at *3–5 (D. Ariz. May 10, 2021); *Estate of Parr v. Palm Garden of Winter Haven, LLC*, 2021 WL 1851688, at *2 (M.D. Fla. May 10, 2021); *Golbad v. GHC of Canoga Park*, 2021 WL 1753624, at *2–3 (C.D. Cal. May 4, 2021); *Evans v. Melbourne Terrace RCC, LCC*, 2021 WL 1687173, at *2 (M.D. Fla. Apr. 29, 2021); *Shapnik v. Hebrew Home for the Aged at Riverdale*, 2021 WL 1614818, at *10–16 (S.D.N.Y. Apr. 26, 2021); *Bolton v. Gallatin Ctr. for Rehab. & Healing*, 2021 WL 1561306, at *5–8 (M.D. Tenn. Apr. 21, 2021); *Padilla v. Brookfield Healthcare Ctr.*, 2021 WL 1549689, at *4–5 (C.D. Cal. Apr. 19, 2021); *Hopman v. Sunrise Villa Culver City*, 2021 WL 1529964, at *4–6 (C.D. Cal. Apr. 16, 2021); *Winn v. Cal. Post Acute*, 2021 WL 1292507, at *4–5 (C.D. Cal. Apr. 6, 2021); *Nava v. Parkwest Rehab. Ctr.*, 2021 WL 1253577, at *2–3 (C.D. Cal. Apr. 5, 2021); *Mitchell v. Advanced HCS, LLC*, 2021 WL 1247884, at *2–5 (N.D. Tex. Apr. 5, 2021); *Estate of Cowan v. LP Columbia KY, LLC*, 2021 WL 1225965, at *3–6 (W.D.

1. The families' claims are not within the scope of the PREP Act.

To begin with, the Families' "claims do not fall under the PREP Act, thus making it irrelevant whether the PREP Act is a complete preemption statute." *Thomas*, 2021 WL 2400970, at *4. Subsection (a)(1)'s immunity provision, and the exceptions to that immunity provided for in subsections

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Ky. Mar. 31, 2021); *Maltbia v. Big Blue Healthcare*, 2021 WL 1196445, at *4–12 (D. Kan. Mar. 30, 2021); *Gibbs v. Southeast SNF LLC*, 2021 WL 1186626, at *2–3 (W.D. Tex. Mar. 30, 2021); *Wright v. Encompass Health Rehab. Hosp. of Columbia, Inc.*, 2021 WL 1177440, at *2–5 (D.S.C. Mar. 29, 2021); *Stone v. Long Beach Healthcare Ctr., LLC*, 2021 WL 1163572, at *4–6 (C.D. Cal. Mar. 26, 2021); *Lopez v. Life Care Ctrs. of Am.*, 2021 WL 1121034, at *7–15 (D.N.M. Mar. 24, 2021); *Smith v. Colonial Care Ctr., Inc.*, 2021 WL 1087284, at *3–6 (C.D. Cal. Mar. 19, 2021); *Estate of McCalebb v. AG Lynwood, LLC*, 2021 WL 911951, at *3–6 (C.D. Cal. Mar. 1, 2021); *Estate of Jones v. St. Jude Operating Co.*, 2021 WL 900672, at *3–8 (D. Or. Feb. 16, 2021), *report and recommendation adopted*, 2021 WL 886217 (D. Or. Mar. 8, 2021); *Robertson v. Big Blue Healthcare, Inc.*, 2021 WL 764566, at *6–10 (D. Kan. Feb. 26, 2021); *Lyons v. Cucumber Holdings, LLC*, 2021 WL 364640, at *3–6 (C.D. Cal. Feb. 3, 2021); *Dupervil v. Alliance Health Ops., LCC*, 2021 WL 33517, at *8 (E.D.N.Y. Feb. 2, 2021); *Goldblatt v. HCP Prairie Vill. KS OPCO LLC*, 2021 WL 308158, at *4–11 (D. Kan. Jan. 29, 2021); *Estate of Smith v. Bristol at Tampa*, 2021 WL 100376, at *1 (M.D. Fla. Jan. 12, 2021); *Parker v. St. Jude Operating Co., LLC*, 2020 WL 8362407, at *5–6 (D. Or. Dec. 28, 2020); *Gunter v. CCRC Opco-Freedom Square, LLC*, 2020 WL 8461513, at *3–5 (M.D. Fla. Oct. 29, 2020); *Sherod v. Comprehensive Healthcare Mgmt. Servs., LLC*, 2020 WL 6140474, at *1 (W.D. Pa. Oct. 16, 2020); *Saldana v. Glenhaven Healthcare LLC*, 2020 WL 6713995, at *2 (C.D. Cal. Oct. 14, 2020); *Martin v. Serrano Post Acute LLC*, 2020 WL 5422949, at *2 (C.D. Cal. Sept. 10, 2020); *Eaton v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1184, 1189–95 (D. Kan. 2020); *Estate of Maglioli v. Andover Subacute Rehab. Ctr. I*, 478 F. Supp. 3d 518, 528–33 (D.N.J. 2020).

(d) and (e) of the Act, applies only to "claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(1); *see also* 42 U.S.C. § 247d-6d(a)(2)(B) (limiting scope of subsection (a) immunity to claims that have "a causal relationship with the administration to or use by an individual of a covered countermeasure"). But the Families do not allege their loved ones died due to Southeast's "administration to or use by an individual of a covered countermeasure." In fact, the pleadings do not mention covered countermeasures at all. Rather, the Families allege that Southeast failed to adopt an adequate infection control policy, that it was persistently understaffed, and that it failed to provide adequate post-diagnosis medical care. As a district court stated in a similar case, such allegations "refer to policies and a failure to protect, not to any covered countermeasure, *i.e.*, drug, product, or device. Thus, the square peg of Plaintiffs' allegations does not fit into the round hole of the PREP Act's definition of a covered countermeasure." *Smith v. Colonial Care*, 2021 WL 1087284, at *4.

a. Southeast attempts to fit the Families' claims into the PREP Act's immunity provision by expanding the statutory text in two ways. First, it

treats all measures that would protect against the spread of COVID-19 as "covered countermeasures." Appellants' Br. 46. Under the statute, however, only drugs, biological products, and medical devices can be a covered countermeasure. 42 U.S.C. § 247d-6d(i)(1), (7). Despite Southeast's assertion, Appellants' Br. 46, "visitation and access restrictions" and "screening requirements" are not "covered countermeasures."

Second, Southeast asserts that *any* negligence claims relating to COVID-19 "necessarily implicate" the "use" and "administration of various 'covered countermeasures,'" Appellant Br. 47, and thus fall under the statutory immunity provision. Essentially, Southeast argues that its decision *not* to use covered countermeasures is protected by subsection (a)(1) of the PREP Act. This argument is contrary to both the text and purpose of the statute.

Several provisions of the PREP Act show that it applies only to claims based on injuries attributable to the actual administration or use of a countermeasure. For instance, subsection (a)(3) states that the subsection (a)(1) defense "applies only if … the countermeasure *was administered or used* during the effective period" of a PREP Act declaration. 42 U.S.C. § 247d-6d(a)(3) (emphasis added). In addition, the statute's list of protected

activities includes only affirmative acts, not inaction: "the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of [a covered] countermeasure." *Id.* § 247d-6d(a)(2)(B). The only entities that can invoke PREP Act immunity are those authorized to administer countermeasures "under the law of the State in *which the countermeasure was prescribed, administered, or dispensed*." *Id.* § 247d-6d(i)(8)(A) (emphasis added). And the willful misconduct claim under the Act's exclusive federal cause of action requires proof that the underlying "injury or death was proximately caused by the administration or use of a covered countermeasure." *Id.* § 247d-6d(e)(4)(C)(i). None of these provisions would make sense if the PREP Act applied where a countermeasure was *not* "administered or used."

The statutory text reflects the Act's purpose. The Act was intended to encourage the manufacture and distribution of covered countermeasures by eliminating the risk of liability if those covered countermeasures ended up causing injuries. Supporters explained that the bill was designed to ensure that a pandemic flu "vaccine gets developed and to make sure doctors are willing to give it when the time comes." 151 Cong. Rec. H12244-03 (daily ed.

Dec. 18, 2005) (statement of Rep. Deal); *see also* 151 Cong. Rec. S14242-01 (daily ed. Dec. 21, 2005) (statement of Sen. Clinton, noting that the "provision is being billed as a simple liability protection to help those who would manufacture avian flu vaccine"). Likewise, Congress added NIOSH-approved respiratory protective devices to the scope of covered countermeasures last March to "boost the availability and supply of critically needed respirator [masks]." 166 Cong. Rec. H1675-09 (daily ed. Mar. 13, 2020) (statement of Rep. Walden); *see also* Coronavirus Preparedness and Response: Hearing Before the H. Comm. on Oversight & Reform, Serial No. 116-96 at 43 (2020) (testimony of Dr. Robert Kadlec, HHS Asst. Secretary for Preparedness and Response, urging addition of respiratory protective devices to PREP Act as a means to boost supply). Immunity for *non*-use of masks or other devices would do nothing to further this purpose.

When Congress intends to protect entities from liability for *inaction*, it knows how to do so. For example, in the CARES Act, Congress immunized volunteer healthcare professionals for harm caused by "an act *or omission* of the professional in the provision of health care services during the public health emergency with respect to COVID–19." Pub. L. No. 116-136, § 3215(a), 134 Stat. at 374 (emphasis added). And throughout 2020, Congress

debated—but ultimately did not enact—liability protections for claims like those asserted by the Families. *See*, *e.g.*, 106 Cong. Rec. S2358 (daily ed. May 12, 2020) (statement of Sen. McConnell, discussing a proposal to "raise the liability threshold for COVID-related malpractice lawsuits" and to "create a legal safe harbor" for entities that are "following public health guidelines to the best of their ability"). The debate in the spring and summer of 2020 over whether to immunize entities sued for failing to take infection-control measures confirms that Congress had not already created such immunity when it added NIOSH-approved respiratory protective devices to the list of covered countermeasures in March 2020.

Had the Families' loved ones developed a rash from a NIOSH-approved respiratory device, or had they been injured by the administration of a COVID-19 test, claims based on those injuries might be subject to PREP Act immunity. *Cf. Parker v. St. Lawrence County Public Health Department*, 102 A.D.3d 140 (N.Y. App. Div. 2012) (finding Act applied to battery and negligence claim based on administration of vaccine). But because the Families do not allege injuries resulting from the administration or use of a covered countermeasure, the statute has no relevance.

b. Rather than engage with the statutory text, Southeast relies on statements by HHS that it claims supports its views and on an outlier district court opinion that purported to defer to the agency. HHS's view that *some* claims of non-use may be subject to the subsection (a)(1) defense does not help Southeast here, however, and, regardless, that counter-textual view is not owed any deference.

Southeast quotes language from the Fourth Amendment's preamble stating that "there can be situations where not administering a covered countermeasure to a particular individual can fall within the PREP Act and this Declaration's liability protections." 85 Fed. Reg. at 79,191, *cited in* Appellant Br. 49–50. Later in that document, though, the HHS Secretary identified what those situations were: "Where there are limited Covered Countermeasures, not administering a Covered Countermeasure to one individual in order to administer it to another individual." *Id.* at 79,197. The Secretary gave the example of a situation where a healthcare professional had a single dose of a vaccine and had to choose between administering it to "a person in a vulnerable population and a person in a less vulnerable population both request it from a healthcare professional." *Id.* Whether or not this statutory interpretation is correct, it has nothing to do with these

cases. Here, the Families allege that Southeast failed to establish and implement infection control protocols, not that Southeast purposefully allocated covered countermeasures to some and not others. Nothing in the Fourth Amendment suggests that the PREP Act immunizes entities from the consequences of failing to adopt infection control policies, contrary to public health authority directives. *See Robertson*, 2021 WL 764566, at *9; *Dupervil*, 2021 WL 355137, at *12.

Advisory Opinion 21-01, which Southeast cites, Appellants' Br. 48, is similarly narrow: It states that subsection (a)(1) applies to claims arising out of non-use of covered countermeasures when the claims relate to "allocation which results in non-use," but *not* to claims of "nonfeasance … that [] result[] in non-use." MJN Ex. 8 at 4.[9] Again, even if this view that allocation decisions fall within the scope of PREP Act immunity were correct, it does not help Southeast. For the distinction made in the advisory opinion to have any

[9] The one district court to hold COVID-related claims against a nursing home completely preempted by the PREP Act did so based on deference to Advisory Opinion 21-01, and what it deemed to be "allegations of use and misuse of PPE" in that case, which are not present here. *See Garcia v. Welltower OpCo Grp. LLC*, 2021 WL 492581, at *7–9 (C.D. Cal. Feb. 10, 2021). *But see Parr*, 2021 WL 1851688, at *2 (noting "all of the federal district court decisions reported on Westlaw that cite to and consider *Garcia* have declined to follow its lead").

meaning, "cases of general neglect," like the one at issue here, must "fall outside the protection of the PREP Act. Otherwise, the [Opinion's] limiting language and illustration would be superfluous, if not confounding." *McCalebb*, 2021 WL 911951 at *5. Here, "[t]he gravamen of the Complaint is that [the defendant] was generally neglectful in operating the Facility," *id.*, not that it misallocated a scarce covered countermeasure. Thus, even if the PREP Act applies in some circumstances involving non-use, it does not apply here.

Notably, the United States explicitly declined to take a position on whether claims like the Families' fall within the scope of subsection (a) of the PREP Act. In a statement of interest filed in *Bolton*, the government stated that it did not disagree with district courts that remanded claims like the Families' to state court and acknowledged that claims that do not arise out of the use or administration of a covered countermeasure are not completely preempted. ROA.21-50399.64 n.4 ("This is not to say that the *Maglioli* court got the result there incorrect as well. It may be that the complaint there raised only claims outside subsection (a)'s ambit (i.e., claims that were not subject to complete preemption) such that it was correct to remand that case.").

Because neither the Fourth Amendment nor Advisory Opinion 21-01 supports Southeast's theory of PREP Act immunity, this Court need not address Southeast's suggestion that *Chevron* deference applies to these documents. *See* Appellants' Br. 42. In any event, no deference is warranted. An "administrative implementation of a particular statutory provision qualifies for *Chevron* deference [only] when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). Here, although HHS has issued regulations implementing the PREP Act, *see* 42 C.F.R. part 110, HHS has not issued regulations defining the terms "administration to or use by." Neither the Advisory Opinion nor the Fourth Amendment purports to be an exercise of any delegated regulatory authority with respect to defining that phrase. Indeed, the Advisory Opinion rightly disclaims having the force of law, because "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000);

see also Wos v. E.M.A. ex rel. Johnson, 568 U.S. 627, 643 (2013). The very case that OGC cites for its authority to issue advisory opinions, *see* MJN Ex. 8 at 5, states that advisory opinions "are not entitled to any deference in the federal courts." *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 645 (6th Cir. 2004).

The assertions in both the Fourth Amendment and Advisory Opinion 21-01 about what injuries have a causal relationship to the administration or use of a covered countermeasure are therefore evaluated under the rubric of *Skidmore* deference, which accords interpretations "respect proportional to [their] power to persuade." *Mead*, 533 U.S. at 235; *see also Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805 (5th Cir. 2010), *aff'd on other grounds*, 566 U.S. 624 (2012). Under *Skidmore v. Swift & Co.*, deference to an agency's interpretation "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. 134, 140 (1944). Here, to the extent that HHS asserted that the PREP Act provides immunity for claims based on injuries that were *not* caused by the actual administration or use of a covered countermeasure, it did not ground that conclusion in the statutory text, history, or purpose. As this Court has explained, to be entitled to *Skidmore*

deference, an agency "must provide some manner of statutory interpretation that would bolster its position;" a "conclusory statement" will not suffice. *Freeman*, 626 F.3d at 806. Accordingly, no deference is owed here.

2. Subsection (a)(1) does not completely preempt claims even where it does apply.

Because the Families' claims do not relate to the administration to or use by an individual of a covered countermeasure, the Court need not determine whether the PREP Act completely preempts claims that *do* fall within its scope. The district court was correct to conclude, though, that, even in such cases, subsection (a)(1) provides an ordinary preemption defense—not complete preemption.

"Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar*, 482 U.S. at 392. Complete preemption is not an exception to this rule; rather, it recognizes rare circumstances where Congress has converted certain state-law causes of actions into exclusively federal ones. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Accordingly, "complete preemption requires that a federal cause of action be available to the plaintiff," even if "it does not ensure that the plaintiff will find the remedy she seeks." *Johnson v. MFA*

Petroleum Co., 701 F.3d 243, 251 (8th Cir. 2012). "[W]ithout a federal cause of action … complete preemption is off the table." *Krakowski v. Allied Pilots Ass'n*, 973 F.3d 833, 837 (8th Cir. 2020).

Here, "[n]o specific federal cause of action is set forth in the statute that would be available to the plaintiffs in this case," because the PREP Act "does not serve to 'create' a cause of action in either state or federal court in the circumstances before us." *Aaron v. Nat'l Union Fire Ins. Co. of Pittsburg, Pa.*, 876 F.2d 1157, 1164 (5th Cir. 1989); *see also Gutierrez*, 543 F.3d at 255 (holding that the Civil Service Reform Act did not completely preempt claims where it did not "create a cause of action that replace[d] and protect[ed]" the state-law claims at issue). "Had Congress wished to create a cause of action in federal court solely to determine whether a state-law claim" fell within the scope of the PREP Act's immunity provision, "it could have done so." *Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 277 (2d Cir. 2005). It did not. Rather, Congress preempted claims for negligence or recklessness, and replaced them with no cause of action at all. Such legislation does not create complete preemption because "the express denial of a cause of action will always be present where federal law preempts state law." *Aaron*, 876 F.2d at 1164.

As the Second Circuit has explained, when a state-law claim is removed to federal court based on one of the three statutes the Supreme Court has found to completely preempt state law claims, "the district court may then adjudicate the claim on the merits under the relevant preemptive statute." *Sullivan*, 424 F.3d at 276. Here, though, there is no federal cause of action that would give a federal court jurisdiction to adjudicate the application of the PREP Act to the Families' claims on the merits. Indeed, after it removed them, Southeast sought dismissal of each of these cases for lack of jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). *See* ROA.21-50399.113; ROA.21-50412.148; ROA.21-50413.112. *Cf. Sullivan*, 424 F.3d at 276 (declining to find complete preemption under Railway Labor Act in same circumstances).

The existence of subsection (d), the cause of action for willful misconduct claims, does not eliminate this difficulty. Rather, it "demonstrates … that Congress knew very well how to provide for an exclusive federal forum when it wanted to," *Maglioli*, 478 F. Supp. 3d at 530, that is, where an individual has suffered an injury "proximately caused by willful misconduct." 42 U.S.C. § 247d-6d(d). There is a cause of action for those claims, and only those claims, and only the District Court for the

District of Columbia has jurisdiction to hear those claims. *Id.* § 247d-6d(e)(1). The Court need not decide if claims within the scope of subsection (d) are completely preempted, because Southeast does not argue the Families have brought such claims.[10]

The PREP Act's creation of an administrative fund from which certain individuals may seek compensation also cannot stand in for the requisite federal cause of action, because it does not provide a basis for subject-matter jurisdiction in federal court.[11] As one court has explained, "an administrative remedy will not suffice because the complete-preemption doctrine rests on

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[10] It is unremarkable that one provision of a statute may provide a federal cause of action and completely preempt certain claims, while another provision of that same statute only creates an ordinary preemption defense for other claims. For example, claims within the scope of ERISA section 502(a), 29 U.S.C. § 1132(a), are subject to complete preemption, while claims that are merely subject to the ordinary preemption provision of ERISA section 514(a), 29 U.S.C. § 1144(a), are not. *See Giles v. NYLCare Health Plans, Inc.*, 172 F.3d 332, 337 (5th Cir. 1999); *see also Krakowski*, 973 F.3d at 837 (holding Railway Labor Act completely preempts "minor" disputes but not "major" disputes).

[11] This administrative fund is not available to parties like the Families, as their loved ones' injuries were not "directly caused by the administration or use of a covered countermeasure." 42 U.S.C. § 247d-6e(a); *see also* 42 C.F.R. § 110.20(d) (interpreting statute to bar remedy for those injured by "the underlying condition or disease" a covered countermeasure was designated to combat). The Families' loved ones were injured by COVID-19, not the covered countermeasures that Southeast did *not* administer or use.

the theory that any state claim within its reach is 'transformed into federal claims.'" *McCalebb*, 2021 WL 911951, at *4 (quoting *Rivet v. Regions Bank of La.*, 522 U.S. 470, 476 (1998)). This transformation, which "is the source of original federal jurisdiction by supplying a federal cause of action," *id.*, is lacking in an administrative scheme.

Southeast erroneously argues that the Second Circuit's decision in *In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005), demonstrates that an administrative compensation scheme suffices to establish complete preemption purposes. As one district court in this Circuit has explained, though, the statute at issue there, the Air Transportation Safety and System Stability Act (ATSSSA), created not only an administrative fund to provide relief for injuries resulting from the September 11, 2011, aircraft hijackings and crashes, but *also* an alternative exclusive federal cause of action for such claims. *Schuster*, 493 F. Supp. 3d at 538–39 (discussing *In re WTC*, 414 F.3d at 374). "Using the term 'ATSSSA-created cause of action' or 'ATSSSA-created federal cause of action' no fewer than five times in its discussion of complete preemption, the Second Circuit concluded that it was this exclusive federal remedy, which could be brought only in the United States District Court for the Southern District of New York, that gave the statute its extraordinary

preemptive force, such that any claim within its scope was really a federal-law claim." *Id.* at 539 (citing *In re WTC*, 414 F.3d at 375–80). "[W]hile the ATSSSA permits a (specific) federal court to adjudicate ATSSSA claims fully on the merits under section 408 of that statute, the PREP Act permits no such thing." *Id.*

A more analogous scheme was considered by the Ninth Circuit in *Moore-Thomas v. Alaska Airlines, Inc.*, 553 F.3d 1241, 1245-46 (9th Cir. 2009). There, the court held that the Railway Labor Act's creation of a procedure by which airlines and their employees could "submit disputes to internal dispute-resolution processes and then to a division of the National Adjustment Board or an arbitration board selected by the parties" was not equivalent to providing "an exclusive federal cause of action" for complete preemption purposes. *Id.* at 1245. *See also Strong v. Telectronics Pacing Sys., Inc.,* 78 F.3d 256, 261 (6th Cir. 1996) (finding administrative remedies available under the Medical Device Amendments to the Food, Drug, and Cosmetic Act were not a parallel federal cause of action and thus did not establish complete preemption).

In suggesting that the compensation fund fulfills the cause-of-action requirement, Southeast asks the Court to defer to the federal government's

statement of interest filed in *Bolton*, where the United States opined that the immunity defense and the compensation fund together meant the PREP Act is a "complete-preemption statute." Appellants' Br. 48 (citing ROA.21-0399.54). But federal agencies' views on complete preemption, a question of federal-court jurisdiction, are owed no deference. *See Texas v. EPA*, 829 F.3d 405, 417 (5th Cir. 2016); *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014); *Lopez–Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000). "[F]ederal courts have an independent obligation to determine their own subject-matter jurisdiction," and "[r]equiring that a court defer to an agency's interpretation of the court's own subject-matter jurisdiction would interfere with this independent obligation." *Shweika v. Dep't of Homeland Sec.,* 723 F.3d 710, 719 (6th Cir.2013), *quoted in Exelon Wind 1*, 766 F.3d at 392. Additionally, as the *Bolton* court explained, the Statement of Interest is not persuasive as it ignores the cause-of-action requirement. *See Bolton*, 2021 WL 1561306, at *7.

State courts "are presumed competent to resolve federal issues," *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150 (1988), and the applicability of the

ordinary immunity defense of subsection (a)(1) is no different.[12] "[I]f a plaintiff's state court petition brings a claim covered by the PREP Act, Texas courts are competent to identify and dismiss such claims as they cannot be brought in federal court but must be presented to the Fund." *Gibbs*, 2021 WL 1186626, at *3.

B. The narrow *Grable* doctrine does not apply.

Southeast also argues that the Families' cases fall into the "special and small category of cases in which arising under jurisdiction still lies" despite the absence of a federal-law claim. *Gunn v. Minton*, 568 U.S. 251, 258 (2013). Under this doctrine, identified in *Grable* and which the district court referred to as the "embedded-federal-question doctrine," ROA.21-50399.385, 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." *Gunn*, 568 U.S. at 258 (citing *Grable*, 568 U.S.

[12] *See, e.g.*, *Parker*, 102 A.D.3d at 144–45 (holding section (a)(1) preempted plaintiff's claims that an inoculation without consent constituted negligence and battery); *Casabianca v. Mt. Sinai Med. Ctr.*, 2014 WL 10413521, at *4 (N.Y. Sup. Ct. Dec. 2, 2014) (holding section (a)(1) did not preempt a malpractice claim for failure to administer vaccine).

at 313–14). Because no such issue is present here, the Families' claims "do[] not fit within the special and small category in which [Southeast] would place [them]." *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 699 (2006).

The resolution of the Families' "ordinary negligence" claims does not "turn on the answer of an important federal question." *Mitchell v. Bailey*, 982 F.3d 937, 941 (5th Cir. 2020). First, the Families' petitions do not "necessarily raise" any issues of federal law. This first *Grable* requirement is met only where, applying the well-pleaded-complaint rule, a federal issue is an "essential element" of a state-law claim. *See Grable*, 545 U.S. at 315; *Venable v. La. Workers' Comp. Corp.*, 740 F.3d 937, 942–43 (5th Cir. 2013). Because no element of a well-pleaded Texas negligence claim "requires the resolution of a federal law issue, there is no federal question jurisdiction." *Enable Miss. River Transmission, LLC v. Nadel & Gussman, LLC*, 844 F.3d 495, 499 (5th Cir. 2016).

That Southeast seeks to raise the PREP Act as a defense does not, as Southeast suggests, mean that "various elements of the PREP Act are embedded in Plaintiff's state law claims." Appellant Br. 53. "[E]ven an inevitable federal defense does not provide a basis for removal jurisdiction"

under *Grable. Bernhard v. Whitney Nat. Bank*, 523 F.3d 546, 551 (5th Cir. 2008); *see also Parish of Plaquemines v. Chevron USA, Inc.*, No. 19-030492, 2021 WL 3413161, at *9 n. 1 (5th Cir. Aug. 5, 2021) (holding jurisdiction not supported by what was "at best an argument based on defensive preemption, which is insufficient to establish federal question under *Grable*" (quotation omitted)). As the district court explained, consistent with every other court to consider similar arguments, "[b]ecause PREP Act immunity is a defense that must be pled in an answer or asserted in a motion to dismiss, it is not necessarily raised as a claim or element in Plaintiffs' negligence cases." ROA.21-50399.38.[13] There is no "necessity for a construction of the [PREP Act] in order to make a disposition of the case." ROA.21-50399.387 (quoting *Mays v. Kirk*, 414 F.2d 131, 134 (5th Cir. 1969) (alterations in original)).

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[13] *See also*, *e.g.*, *Acosta*, 2021 WL 3089332, at *5; *Acra*, 2021 WL 2769041, at *6–7; *Elliott*, 2021 WL 2688600, at *6; *Reed*, 2021 WL 2633156 at *7; *Khalek*, 2021 WL 2433963 at *7; *Thomas*, 2021 WL 2400970, at *6; *Brannon*, 2021 WL 2339196, at *4; *Rae*, 2021 WL 2290776, at *3; *Shapnik*, 2021 WL 1614818, at *14; *Bolton*, 2021 WL 1561306, at *4; *Padilla*, 2021 WL 1549689, at *6; *Winn*, 2021 WL 1292507, at *5; *Nava*, 2021 WL 1253577, at *3; *Cowan*, 2021 WL 1225965, at *6; *Maltbia*, 2021 WL 1196445, at *12 n.12; *Stone*, 2021 WL 1163572, at *7; *McCalebb*, 2021 WL 911951, at *3; *Robertson*, 2021 WL 764566, at *11 & n.19; *Jones*, 2021 WL 900672, at *7 n.8; *Lyons*, 2021 WL 364640, at *6; *Dupervil*, 2021 WL 355137, at *14–15; *Goldblatt*, 2021 WL 308158, at *11 n.7; *Martin*, 2020 WL 5422949, at *2.

Southeast also states that "Plaintiffs have made their bed by including … allegations based on federal principles," and that "federal principles" cannot be severed from their state-law claims. Appellant Br. 52. It is unclear what "allegations" or "federal principles" Southeast is referring to, but to the extent Southeast suggests that any allegation that it violated a federal standard means a federal issue is necessarily raised, this Court has held otherwise. In *American Airlines, Inc. v. Sabre, Inc.*, 694 F.3d 539, 543 (5th Cir. 2012), this Court upheld a district court award of attorney's fees against a defendant that invoked *Grable* to remove an action on a theory identical to SNF's. This Court agreed with the district court that "[n]o reasonable argument can be made that the mere fact that a federal standard is to be referenced by a state court in determining whether there has been a state-law violation causes a state-law claim to necessarily raise a stated federal issue." *Id.* (quoting *Am. Airlines, Inc. v. Sabre, Inc.*, 2011 WL 3468418, at *6 (N.D. Tex. Aug. 4, 2011)). The district court had explicitly noted the "absurdity" that would result if "federal courts could be burdened with removals from state courts of tort actions based on state-law causes of action in which the plaintiff is relying on a federally mandated standard of conduct to establish fault on the part of the defendant." 2011 WL 3468418, at *5.

Southeast urges that very absurdity here. *See also MSOF Corp. v. Exxon Corp.*, 295 F.3d 485, 490 (5th Cir. 2002) (holding that allegation that a "facility was maintained in violation of federal regulations *as well as* in violation of state and local regulations… does not suffice to render the action one arising under federal law"). "That some standards of care used in tort litigation come from federal law does not make the tort claim one 'arising under' federal law." *Bennett v. Sw. Airlines Co.*, 484 F.3d 907, 912 (7th Cir. 2007). Although the "necessarily raised" prong is met where federal law "*create[s]* a *duty* of care that does not otherwise exist under state law," *Bd. of Comm'rs of Se. La. Flood Protection Auth.-East v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 723 (5th Cir. 2017) (emphasis added), the *duties* at issue here arise out of Texas law. None of the Families' claims *requires* a showing that any federal standard was violated; thus, federal issues are not "necessarily raised."

Southeast's suggestion that the fact that its defense implicates federal policy interests satisfies the third requirement for *Grable* jurisdiction—a *substantial* federal issue—is also incorrect. *Any* preemption defense created by a federal statute necessarily reflects a substantive policy interest identified by Congress. But *Grable* requires more: a question that "is significant to the federal system as a whole." *Gunn*, 568 U.S. at 264. No such

question exists here; as noted in *Gunn*, the mere risk that a state court may resolve a novel question of federal law incorrectly in adjudicating a state-law claim does not satisfy the "substantiality" test. 568 U.S. at 263–64.

Finally, the fourth *Grable* element is not met because exercising jurisdiction over state-law negligence claims like the Families' would raise serious comity concerns and disrupt the balance Congress created. In enacting the PREP Act, Congress allowed a narrow category of state-law cases to originate in federal court: claims brought by plaintiffs alleging willful misconduct arising out of the use or administration of covered countermeasures, pursuant to 42 U.S.C. § 247d-6d(d). Southeast's theory that any cases in which a party invokes a PREP Act defense *also* belong in federal court is not "consistent with congressional judgment about the sound division of labor between state and federal courts." *Grable*, 545 U.S. at 313. "If allowed, a predictable flood of state cases will arrive at the federal doorstep." *McCalebb*, 2021 WL 911951, at *3. Such an outcome would have "much more than 'a microscopic effect' on the federal-state divide," *id.* (quoting *Grable*, 545 U.S. at 315)—particularly in the health care context, where states have "special responsibly for maintaining standards among members of the licensed professions." *Gunn*, 568 U.S. at 264.

Again, Southeast's call for *Chevron* deference to HHS's cursory assertions is misplaced. Appellants' Br. 53–55. As discussed above, an agency's views on federal courts' jurisdiction are owed no deference. *See* p. 38, *supra.* Further, HHS's analysis is not persuasive because the agency did not even address *Grable*'s four elements. Instead, HHS simply pronounced an interest in having a "unified, whole-of-nation response" to the COVID-19 pandemic, Fourth Amendment, 85 Fed. Reg. at 79,194, and the OGC simply opined that "ordaining the metes and bounds of PREP Act protection in the context of a national health emergency necessarily means that the case belongs in federal court," Advisory Opinion 21-01, MJN Ex. 8 at 5. That Advisory Opinion 21-01's analysis is based on "a selective (mis)quotation from *Grable*," which elided the Supreme Court's "essential element" language by using ellipses, makes it particularly "unpersuasive" and "unhelpful." *Dupervil*, 2021 WL 355137 at *14, *14 n.6; *see also Hopman*, 2021 WL 1529964, *6 n.4 (noting "rising tide of district court opinions that have found the OGC's opinion as to the *Grable* doctrine's relationship to the PREP Act unpersuasive").

III. Southeast has not established jurisdiction under the federal officer removal statute.

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 invoke the statute, "a defendant must show (1) it has asserted a colorable federal defense, (2) it is a "person" within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020) (*en banc*).

In this case, the district court—like every district court to consider the issue—correctly held that, under the Supreme Court's decision in *Watson v. Philip Morris Cos.*, 551 U.S. 153 (2007), nursing homes operating during the COVID-19 pandemic have not been acting under the direction of federal officers for purposes of section 1442(a)(1). ROA.21-50399.389–90.[14] Each of

[14] *See also Romeo*, 2021 WL 3418730, at *2–3; *Acosta*, 2021 WL 3089332, at *6; *Acra*, 2021 WL 2769041, at *7; *Elliot*, 2021 WL 2688600, at *5; *Reed*, 2021 WL 2633156, at *8; *Khalek*, 2021 WL 2433963, at *8; *Thomas*, 2021 WL 2400970,

the Families' actions are "exactly the type *Watson* warned could be erroneously brought within § 1442's ambit—a state court action in the highly regulated nursing home industry, where a private entity argues only that it has complied with the law." *Khalek*, 2021 WL 2433963, at *8. Moreover, even if Southeast had been subject to federal direction, the Families' claims are not connected to or associated with an act performed under such direction, and Southeast lacks a colorable federal defense.

A. The federal officer removal statute only applies to private entities acting on behalf of the federal government.

Recognizing that the federal government "can act only through its officers and agents, and [that] they must act within the States," *Tennessee v. Davis*, 100 U.S. 257, 263 (1880), section 1442(a) provides federal officers and agents with a federal forum to "protect the Federal Government from the

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at *7; *Brannon*, 2021 WL 2339196, at *3–4; *Forman v. C.P.C.H., Inc.*, 2021 WL 2209308, at *2 (C.D. Cal. June 1, 2021); *Lopez v. Greenfield Care Ctr. of S. Gate, LLC*, 2021 WL 2546756, at *1 (C.D. Cal. May 19, 2021); *Riggs*, 2021 WL 2103017, at *3–4; *Golbad*, 2021 WL 1753624, at *2; *Garcia v. N.Y. City Health & Hosps. Corp.*, 2021 WL 1317178, at *2 (S.D.N.Y. Apr. 8, 2021); *Winn*, 2021 WL 1292507, at *6; *Nava*, 2021 WL 1253577, at *1–2; *Stone*, 2021 WL 1163572, at *8; *Smith v. Colonial Care*, 2021 WL 1087284, at *7–8; *McCalebb*, 2021 WL 911951, at *6–7; *Lyons*, 2021 WL 364640, at *3; *Dupervil*, 2021 WL 33517, at *15–16; *Sherod v. Comprehensive Healthcare Mgmt. Servs., LLC*, 2020 WL 6119479, at *1 (W.D. Pa. Oct. 16, 2020); *Saldana*, 2020 WL 6713995, at *3; *Martin*, 2020 WL 5422949, at *1; *Maglioli*, 478 F. Supp. 3d at 534–36.

interference with its operations that would ensue were a State able, for example, to arrest and bring to trial in a State court for an alleged offense against the law of the State, officers and agents of the Government acting within the scope of their authority." *Watson*, 551 U.S. at 150 (quoting *Willingham v. Morgan*, 395 U.S. 402, 406 (1969)) (cleaned up). The statute applies not only to federal officers themselves but also to "any person acting under [an] officer," 28 U.S.C. § 1442(a)(1)—including "[p]rivate persons 'who lawfully assist' the federal officer 'in the performance of his official duty.'" *Watson*, 551 U.S. at 151 (quoting *Davis v. South Carolina*, 107 U.S. 597, 600 (1883)). This provision supports the statute's predominant concern: protecting vulnerable officers and employees of the federal government against prosecution or suit in state courts for the performance of their official duties. The paradigmatic application of the statute to a private person is *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926), where the Court acknowledged that a private individual hired to drive and assist federal revenue officers in busting up a still "had 'the same right to the benefit of' the removal provision as did the federal agents." *Watson*, 551 U.S. at 150 (quoting *Soper (No. 1)*, 270 U.S. at 30).

Although the federal officer removal statute is "liberally construed," *Colorado v. Symes*, 286 U.S. 510, 517 (1932), section 1442(a)(1)'s authorization of removal by those "acting under" federal officials is "not limitless." *Watson* 551 U.S. at 147. Accordingly, when defendants have attempted to stretch the scope of the "acting under" provision, the Supreme Court has rejected those efforts. *See id.* at 152–57; *Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund*, 500 U.S. 72, 79–87 (1991); *Mesa v. California*, 489 U.S. 121, 129–39 (1989). For example, in *Watson*, plaintiffs sued cigarette manufacturers for fraudulently marketing cigarettes as "light" to deceive smokers into believing that smoking them would deliver lower levels of tar and nicotine than other cigarettes and present less danger of disease. The manufacturers, citing section 1442(a)(1), removed the action, claiming that they were "acting under" a federal officer because the Federal Trade Commission regulated the way they tested their cigarettes' tar and nicotine levels. *See* 551 U.S. at 154–56. The Eighth Circuit held that the FTC's "comprehensive, detailed regulation," "ongoing monitoring," and use of its "coercive power" to persuade the tobacco industry to enter into a voluntary agreement regarding advertising disclosures, as well as a record "filled with FTC announcements of its policy as well as communications between the FTC and the cigarette

industry," were sufficient to show "that Philip Morris acted under the direction of a federal officer" in selling cigarettes. *Watson v. Philip Morris Cos., Inc.*, 420 F.3d 852, 859-61 (8th Cir. 2005).

The Supreme Court unanimously reversed. The Court explained that, as used in section 1442(a)(1), the term "under" refers to a relationship of subservience, and, therefore, the statute applies only where a private person undertakes "an effort to *assist*, or to help *carry out*, the duties or tasks of the federal superior." 551 U.S. at 151–52. Importantly, "the help or assistance necessary to bring a private person within the scope of the statute does *not* include simply *complying* with the law." *Id.* at 152. The statutory purpose would not be furthered by allowing "a company subject to a regulatory order (even a highly complex order)" to have claims against it heard in federal, not state, court. *Id.* Such a scenario, "does not ordinarily create a significant risk of state-court 'prejudice,'" and a state-court lawsuit would be "[un]likely to disable federal officials from taking necessary action designed to enforce federal law" or "deny a federal forum to an individual entitled to assert a federal claim of immunity." *Id.* (citations omitted). Accordingly, the Court held, a private company'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." *Id.* at 153.

As this Court has recognized, "the Supreme Court's decision in *Watson* instructs that even onerous and specifically enforced regulations do not suffice to show the firm was 'acting under' a federal officer." *City of Walker v. Louisiana through Dep't of Transp. & Dev.*, 877 F.3d 563, 571 (5th Cir. 2017). To take advantage of the federal officer removal statutes, defendants must show that they were more than "merely regulated entities," but "instrumentalities of the United States." *Butler v. Coast Elec. Power Ass'n*, 926 F.3d 190, 201 (5th Cir. 2019) (citing *Watson*, 551 U.S. at 151–57 and quoting *Ala. Power Co. v. Ala. Elec. Coop.*, 394 F.2d 672, 677 (5th Cir. 1968)).

B. Southeast has not established it was under the subjection or control of a federal officer.

Southeast's operation of its nursing homes since the onset of the COVID-19 pandemic is not action "under" a federal officer. Appellants' Br. 29. "[W]here removal is simply based on Defendant's compliance with various federal COVID-19 directives and regulations, the federal officer removal statute does not apply." *Lopez*, 2021 WL 2546756, at *1. As the

district court recognized, such guidance, no matter its level of detail or the possibility of penalties for non-compliance, does not transform a private actor into a federal government instrumentality. ROA.21-50399.390; *see also Elliot*, 2021 WL 2688600, at *5 (same).

Southeast suggests that *Watson* does not apply because the guidance issued here went "beyond the regulations for normal operation in normal times." Appellants' Br. 29. But *Watson* itself precludes this argument, holding that "differences in the degree of regulatory detail or supervision cannot by themselves transform [a private actor's] regulatory *compliance* into the kind of assistance that might bring the [agency] within the scope of the statutory phrase '*acting under*' a federal 'officer.'" 551 U.S. at 157. As this Court noted in *City of Walker*, it does not matter whether regulatory directives are generic or "onerous and specifically enforced." 877 F.3d at 571. Such differences are "one[s] of degree, not kind." *Watson*, 551 U.S. at 157. The "acting under" inquiry focuses not on the degree of detail of federal regulation, but on whether "the *relationship* between the removing party and the relevant federal officer" is one of subjugation and control. *St. Charles*, 990 F.3d at 455.

The essence of the relationship between America's nursing homes and the federal government did not change when federal authorities issued guidance to state and local authorities and nursing homes about the transmission of COVID-19. By statute and regulation, facilities like Southeast are heavily regulated by the federal government as a condition of their receipt of Medicare and Medicaid funding. Federal requirements include a statutory mandate that facilities like Southeast "establish and maintain an infection control program designed to provide a safe, sanitary, and comfortable environment in which residents reside and to help prevent the development and transmission of disease and infection." 42 U.S.C. §§ 1395i-3(d)(3)(A), 1396r(d)(3)(A). Regulations provide more detailed infection-control requirements. 42 C.F.R. § 483.80. None of the guidance documents that Southeast cites indicates that the federal government was asserting a different kind of control than these laws had provided prior to the onset of the pandemic. To the contrary, these documents simply provide information to facilities and state and local health departments as to how to comply with their preexisting regulatory obligations. They do not evince a federal government takeover of the nation's nursing homes.

The conclusion that COVID-19 guidance shows a relationship of federal subjection, guidance, or control "would have very far-reaching consequences." *Maglioli*, 478 F. Supp. 3d at 534. "Under the logic that such basic regulation makes a defendant a federal agent, one would be hard pressed to find a health care entity that isn't a federal agent." *Brannon*, 2021 WL 2339196, at *3. Beyond health care, as the *Maglioli* court noted, thousands of businesses and nonprofits across the United States could point to "dutiful compliance with CDC guidelines for limiting occupancy, face coverings, and health and sterilization measures." *Id.* The guidance on which Southeast relies does not show that the federal government has assumed control over nursing homes any more than it has over amusement parks, airlines, or homeless shelters—all of which have been the subject of extensive COVID-19 related guidance.[15] That Southeast's view of section 1442(a)(1) would bring all claims related to COVID-19 against such entities into federal court

[15] *See*, *e.g.*, U.S. Dep't of Transp., Fed. Aviation Admin., SAFO 20009, COVID-19: Updated Interim Occupational Health and Safety Guidance for Air Carriers and Crews (updated May 25, 2021), https://bit.ly/3ndmRZi; CDC, COVID-19 Considerations for Traveling Amusement Parks and Carnivals (updated Dec. 30, 2020), https://bit.ly/3ei4AG1; CDC, Interim Guidance for Homeless Service Providers to Plan and Respond to Coronavirus Disease 2019 (COVID-19) (updated June. 8, 2021), https://bit.ly/3sKqaIF.

illustrates the untenability of its position. *Cf. Watson*, 551 U.S. at 153 (rejecting interpretation of "acting under" provision "that 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").

Southeast's secondary argument that, by deploying infection-control measures, it was "providing a service that 'in absence of a contract with a private firm, the Government would have to perform,'" Appellants' Br. 30 (quoting *Watson*, 551 U.S. at 153–54), is meritless. First, Southeast has not demonstrated it had a contract with the federal government to provide any testing, screening, or other services. Absent any evidence that the federal government delegated authority to Southeast to take screening measures on the United States' behalf, Southeast's "analogy to Government contracting breaks down." *Watson*, 551 U.S. at 157. The mere fact that, had Southeast "not instituted the unprecedented screening, testing, infection control, and the other strategies to contain COVID-19," Appellants' Br. 30, there would have been *more* deaths at its facility does not mean that it was subject to federal control. A private entity's screening of its employees and customers is not a "basic governmental task[]," *Watson*, 551 U.S. at 143—unlike the processing

of claims for the disbursement of federal funds to federal employees, *see St. Charles Surgical Hospital, LLC v. Louisiana Health Service & Indemnity Co.*, 935 F.3d 352, 356 (5th Cir. 2019), or the repair of U.S. military ships, *see Latiolais*, 951 F.3d at 289. A private actor is not "acting under" federal officers every time it does something that the federal government appreciates, encourages, or even requires.

Southeast relies heavily on *Fields v. Brown*, 2021 WL 510620 (E.D. Tex. Feb. 11, 2021), where a district court held that the operator of a meatpacking plant was "acting under" federal direction with the onset of the pandemic. As one district court recently held, *Fields* was incorrectly decided. *Glenn v. Tyson Foods, Inc.*, No. 9:20-cv-00184-MJT, Dkt. 40 at 9–13 (E.D. Tex. Aug. 12, 2021) (printed in Addendum); *see also Fernandez v. Tyson Foods, Inc.*, 509 F. Supp. 3d 1064, 1081–82 (N.D. Iowa 2020) (holding meatpacking plants were not acting under federal officers). Even if it were not, though, nothing in the *Fields* decision's discussion of the acting-under element suggests that every private actor that undertook infection-control measures, or was subject to federal COVID-19 guidance, was acting under a federal officer. *Fields*' holding was explicitly premised on its finding that "the Department of Agriculture and the FSIS closely monitored Tyson Food's meatpacking

plants, staffing some employees onsite during the pandemic." 2021 WL 510620, at *3. There is no analogous evidence of direct interaction between Southeast and any federal entity here. The *Fields* decision was also tied to the plant's arguments that its status as "critical infrastructure" entitled it to removal. *Id.* Southeast has not made any such argument in this case. *See Masel v. Villarreal*, 924 F.3d 734, 749 (5th Cir. 2019) (noting this Court's "rule that arguments not raised below are waived on appeal"); *Valle v. City of Houston*, 613 F.3d 536, 544 n.5 (5th Cir. 2010) (holding appellants "waived [an] argument by failing to raise it in their opening brief").

Finally, section 1442(a)(1) is "an incident of federal supremacy." *Florida v. Cohen*, 887 F.2d 1451, 1453 (11th Cir. 1989) (citing *Willingham*, 395 U.S. at 405). Its "basic purpose is to protect the Federal Government from … interference with its operations" by states. *Watson*, 551 U.S. at 150. Here, the federal government explicitly contemplated that state and local governments would continue to exercise extensive authority over the operation of nursing homes within their states, as the State of Texas did. *See* pp. 4–5, *supra.* That the federal government anticipated and encouraged active state regulation of nursing homes belies the notion that federal jurisdiction is necessary to protect federal interests from state interference.

See also Mays v. City of Flint, Mich., 871 F.3d 437, 448 (6th Cir. 2017) (finding federal officer-removal not justified where the defendant faced no risk of the "historic biases that the federal-officer removal statute was designed to protect against"). Accordingly, removal here would not serve the statutory purpose.

C. Southeast's negligence was not connected or associated with federal officer directions.

In addition to failing to show that it was subject to federal officer direction, the conduct upon which the Families have based their claims is not "related to" an act under color of federal office. 28 U.S.C. § 1442(a)(1). Though this requirement is less strict than the "causal nexus" element contained in an earlier version of the statute, it still has independent force: "a defendant might be 'acting under' a federal officer, while at the same time the specific conduct at issue may not be 'connected or associated with an act pursuant to the federal officer's directions.'" *St. Charles*, 990 F.3d at 454 (quoting *Latiolais*, 951 F.3d at 296).

None of the Families' claims relate to "act[s] pursuant to" the guidance issued by HHS in the beginning of the pandemic. While Southeast cursorily asserts that "every alleged breach of duty" in the Families' petitions

"implicates Southeast's actions under the enhanced guidelines for dealing with COVID-19," Appellants' Br. 31, it fails to connect those guidelines to the claims alleged. Notably, the petitions do not reference the federal guidance at all, and many of the allegations plainly have nothing to do with the guidance—for example, those based on chronic understaffing predating the pandemic and those based on inadequate medical care *after* each of the Families' loved ones contracted COVID-19. *See, e.g.*, ROA.21-50399.32–33; ROA.21-50412.33–34; ROA.21-50413.32–33; *cf. Maglioli*, 478 F. Supp. 3d at 536 (rejecting application of federal officer removal statute where the defendants "do not contend that the purportedly negligent medical care administered was under the direct and detailed control of a federal agency or officer"). And even to the extent that the Families' claims touch on some of the same topics as the federal guidance, they are not, as Southeast claims, based on "Southeast's actions in implementing the guidelines." Appellants' Br. 33.[16]

[16] Southeast mischaracterizes the Families' allegations in stating that the "Plaintiffs' explicitly reference Southeast's failure with regard to the 'policies and procedures to prevent the spread of infection of COVID-19." Appellants' Br. 33 (quoting ROA.21-0399.32–33; ROA.21-50412.33–34; ROA.21-50413.32–33). The quoted language is not about federal policies; it is an allegation that Southeast was negligent in "[f]ailing to create, follow and implement proper policies and procedures to prevent the spread of infection

To the contrary, they are grounded on allegations that Southeast did *not* act. That some of the steps that the Families allege Texas tort law required Southeast to take may have also been required by federal guidance does not mean the Families' claims are based on Southeast's action "pursuant to" federal direction.

D. Southeast lacks a colorable federal defense.

Finally, Southeast lacks a colorable federal defense. As explained above, pp. 21–26, the deaths of Mr. Lozano, Mr. Strait, and Mr. Salinas do not have a "causal relationship with the administration to or use by an individual of a covered countermeasure," and thus the PREP Act's immunity provision does not apply. 42 U.S.C. § 247d-6d(a)(2)(B). Even under the view of PREP Act immunity espoused by HHS, the statute is inapplicable, because there is no allegation that the Families' loved ones died from non-use of a covered countermeasure that resulted from "prioritization or purposeful allocation" of such a covered countermeasure. Fourth Amendment, 85 Fed. Reg. at 79,194. Accordingly, the invocation of PREP Act immunity is "wholly insubstantial and frivolous." *Latiolais*, 951 F.3d at 297.

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of COVID-19." ROA.21-0399.32–33; ROA.21-50412.33–34; ROA.21-50413.32–33

CONCLUSION

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

Respectfully submitted,

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August 13, 2021

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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 12,996 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 2013 in 14-point Book Antiqua.

August 13, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, the foregoing brief has been served through this Court's electronic filing system upon counsel for the Defendants-Appellants:

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ADDENDUM

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

ROLANDETTE GLENN ET AL.	§	CASE NO. 9:20-CV-184
	§	
v.	§	JUDGE MICHAEL TRUNCALE
	§	
TYSON FOODS, INC. ET AL.	§	
	§	

ORDER GRANTING PLAINTIFFS' MOTION TO REMAND

Pending before the Court is Plaintiffs' Motion to Remand. (Doc. #13). Plaintiffs seek to have this case remanded to state court, alleging that the defendants, Tyson Foods, Inc. ("Tyson"), Jason Orsak, Erica Anthony, and Maria Cruz, have not carried their burden to establish federal officer or federal question jurisdiction. After considering the motion, arguments from the parties, and the applicable law, the Court grants Plaintiffs' Motion to Remand. (Doc. #13).

I. BACKGROUND

Plaintiffs are eleven past and present workers of Defendant Tyson who allege that they contracted COVID-19 while working at a Tyson poultry-processing facility and a personal representative of a twelfth worker who allegedly died as a result of contracting the virus at work. (Doc. #3, at 3–4). More specifically, Plaintiffs allege that despite a stay-at-home order issued by Governor Abbott that went into effect on April 2, 2020, Plaintiffs were required to continue working at the Tyson meatpacking plant in Center, Texas ("Center Facility"). *Id.* at 5. They assert that both before and after the April 2 stay-at-home order, Tyson failed to take adequate precautions to protect the workers at its meatpacking facilities from COVID-19. *Id.*

At all relevant times during the events alleged the first amended petition, Defendant Jason Orsak was a complex safety manager for Tyson and Defendants Erica Anthony and Maria Cruz

were safety coordinators for Tyson. *Id.* at 4. Plaintiffs allege those defendants were directly responsible for implementing and enforcing adequate safety measures to prevent the spread of COVID-19 but failed to do so. *Id.* at 5–6. More specifically, Plaintiffs allege that Orsak and Anthony failed to issue masks to employees, institute six feet barriers between employees, limit contact between employees, and create rideshare alternatives to the Center Facility's bus system. *Id.* at 6. Allegedly, as a direct result of the negligence and gross negligence of Defendants, Plaintiffs contracted COVID-19 at the Center Facility and have experienced significant injuries, including death. *Id.*

On July 23, 2020, Plaintiffs filed their first amended petition in the 273rd Judicial District of Shelby County, Texas. The petition asserts a negligence and gross negligence claim against all Defendants, a premises liability claim against Tyson, and a wrongful death and survival claim against all Defendants by Plaintiff Clifford Bell, individually and as the personal representative for the estate of Beverly Whitsey. *Id.* at 6–9.

Tyson then removed the action to federal court asserting federal officer and federal question jurisdiction. (Doc. #1). It asserts that because Tyson was under an April 28, 2020, Executive Order to continue operations pursuant to the supervision of the federal government and pursuant to federal guidelines and directives, federal court is the proper forum for resolving the case. *Id.* at 3. Plaintiffs then filed the pending motion to remand alleging that Defendants had not met their burden to prove federal jurisdiction is proper. (Doc. #13).[1]

II. LEGAL STANDARD

Federal courts are courts of limited jurisdiction and may only hear a case when jurisdiction is both authorized by the United States Constitution and confirmed by statute. *Griffin v. Lee*, 621

[1] Although there are both corporate and individual defendants, all are represented by the same attorneys. For clarity purposes, the Court will refer to all defendants as Tyson.

F.3d 380, 388 (5th Cir. 2010). Removal to federal court is proper when the federal court would have had original jurisdiction over the action. 28 U.S.C. § 1441(a). The federal court has original federal question subject matter jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Additionally, under Section 1442(a)(1), commonly referred to as the Federal Officer Removal Statute, "[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" may remove a civil action commenced in state court "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." 28 U.S.C. § 1442(a)(1).

Although usually "[a]ny ambiguities are construed against removal because the removal statute should be strictly construed in favor of remand," *Manguno v. Prudential Prop. & Cas. Ins. Co.*, 276 F.3d 720, 723 (5th Cir. 2002), the federal officer removal statute must be liberally interpreted because of its broad language and unique purpose. *Watson v. Philip Morris Cos., Inc.*, 551 U.S. 142, 147 (2007). As with any motion to remand, the removing party bears the burden of showing that federal jurisdiction exists, and that removal was proper. *De Aguilar v. Boeing Co.*, 47 F.3d 1404, 1408 (5th Cir. 1995); *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 397 (5th Cir. 1998).

III. DISCUSSION

To this Court's knowledge, there are currently three main judicial opinions that address virtually the same issue as the one in this case: *Fernandez v. Tyson Foods, Inc. et al.*, No. 20-CV-2079-LRR, 2020 WL 7867551 (N.D. Iowa Dec. 28, 2020),[2] *Fields et al. v. Brown et al.*, No. 6:20-

[2] This decision is currently on appeal before the Eighth Circuit. *Fernandez v. Tyson Foods, Inc. et al.*, No. 21-1010 (8th Cir. appeal docketed Jan. 4,2021).

CV-00475, 2021 WL 510620 (E.D. Tex. Feb. 11, 2021),[3] and *Wazelle, et al., v. Tyson Foods, Inc., et al.*, No. 2:20-CV-203-Z, 2021 WL 2637335 (N.D. Tex. June 25, 2021). *Fernandez* granted remand while *Fields* and *Wazelle* did not. For the reasons explained below, this Court agrees with *Fernandez* and Plaintiffs' motion to remand will be granted.

A. Federal Officer Jurisdiction

A defendant removing under section 1442(a)(1) must show "(1) it has asserted a colorable federal defense, (2) it is a 'person' within the meaning of the statute, (3) that has acted pursuant to a federal officer's directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions." *Latiolais v. Huntington Ingalls, Inc.*, 951 F.3d 286, 296 (5th Cir. 2020). Here, Tyson's status as a "person" is not disputed. However, elements one, three, and four are disputed.

(1) Colorable Federal Defense

To be "colorable," the asserted federal defense need not be "clearly sustainable," as section 1442 does not require a federal official or person acting under him "to 'win his case before he can have it removed.'" *Jefferson Cnty., Ala. v. Acker*, 527 U.S. 423, 431 (1999) (internal citations omitted). Instead, if an asserted federal defense is plausible, it is colorable. *Latiolais*, 951 F.3d at 297. A defense is colorable unless it is "immaterial and made solely for the purpose of obtaining jurisdiction" or "wholly insubstantial and frivolous." *Id*.

In its notice of removal, Tyson raised two federal defenses. First, it argues that the Poultry Products Inspection Act ("PPIA") expressly preempts Plaintiffs' state-law claims. (Doc. #1, at 9). Second, it claims that "Plaintiffs' claims are also preempted by the DPA ["Defense Production

[3] The district court in *Fields* gave the plaintiffs permission to apply for an interlocutory appeal of the order, but the Fifth Circuit denied the application without stating a reason. *Fields v. Brown*, No. 21-90021 (5th Cir. June 21, 2021).

Act"] and the President's [April 28, 2020] Food Supply Chain Resources executive order and related federal directions." *Id.* at 10.

i. PPIA

After pointing out that the PPIA and the Federal Meat Inspection Act ("FMIA") have substantially identical preemption provisions, Tyson maintains that the FMIA "'sweeps widely' and 'prevents a State from imposing any additional or different—even if non-conflicting—requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations." (Doc. #1, at 9–10) (quoting *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 459–60 (2012)). Specifically, Tyson argues that "the alleged failings Plaintiff pleads are 'in addition to, or different than,' the requirements that FSIS[4] [("Food Safety and Inspection Service")] has imposed regarding employee hygiene and infectious disease—and therefore are preempted under the express terms of 21 U.S.C. § 467e." (Doc. #14, at 22). Tyson asserts that "[p]reemption applies wherever Plaintiffs seek to impose, as a matter of state law, different requirements for poultry-processing employees than those adopted by the Department of Agriculture." (Doc. #14, at 23).

The PPIA's express preemption clause (which includes a savings clause) is found at 21 U.S.C. § 467e and provides:

> Requirements within the scope of [the PPIA] with respect to premises, facilities and operations of any [meat-processing] establishment . . . which are in addition to, or different than those made under [the PPIA] may not be imposed by any State . . . .
>
> This chapter shall not preclude any State . . . from making requirement [sic] or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.

Thus, for a state rule to be preempted by the PPIA, it must be within the scope of the Act. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent.

[4] The United States Department of Agriculture ("USDA") is responsible for enforcing the PPIA. FSIS is under the direction of USDA. The parties' briefing use FSIS and USDA somewhat interchangeably.

The purpose of Congress is the ultimate touchstone." *Allis–Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (internal citations omitted). "To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll–Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

Tyson's preemption argument is premised on a misunderstanding of the PPIA's breadth. The purpose of the PPIA is "to provide for the inspection of poultry and poultry products and otherwise regulate the processing and distribution of such articles . . . to prevent the movement or sale in interstate or foreign commerce of, or the burdening of such commerce by, poultry products which are adulterated or misbranded." 21 U.S.C. § 452. According to Tyson, USDA (through FSIS) has promulgated hundreds of pages of federal regulations addressing infectious diseases. However, Tyson (and the *Fields* and *Wazelle* courts) do not address the fact that the PPIA's primary purpose is to protect consumers from unsafe meat, not to protect workers from disease. In fact, FSIS itself acknowledges that it "has neither the authority nor the expertise to regulate issues related to establishment worker safety." Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,305 (Oct. 1, 2019). Instead, "OSHA [Occupational Safety and Health Administration] is the Federal agency with statutory and regulatory authority to promote workplace safety and health." *Id.* Because FSIS, the agency that enforces the PPIA, does not have authority to regulate worker safety, it follows that no state common law negligence claims based on improper workplace safety could be within the scope of the PPIA. And there is no suggestion from Tyson that the provisions OSHA administers could preempt Plaintiffs' claims.

Further, Tyson points to no evidence that Congress intended the PPIA to displace state-law actions relating to workplace safety. On the contrary, the federal agency that does regulate workplace safety, OSHA, expressly preserves a role for state-law regulation and common law

claims, including those that relate to "injuries, diseases, or death of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). Federal law gives the states express authority to develop their own health and safety standards and recognizes that the states play the primary role in protecting their workers' health and safety. *See* 29 U.S.C. § 667. And in fact, many cities and states have implemented their own COVID-19 procedures, and nothing suggests that those procedures do not apply to facilities regulated by the PPIA.

According to Tyson, FSIS has promulgated hundreds of pages of federal regulations addressing infectious diseases. But the regulatory examples Tyson cites confirm that the PPIA's concern is with food safety, not worker safety. Tyson notes that "FSIS has promulgated a specific '[d]isease control' regulation providing that '[a]ny person who has or appears to have an infectious disease . . . must be excluded from any operations which could result in product adulteration and the creation of insanitary conditions.'" (Doc. #14, at 21) (alterations in original) (quoting 9 C.F.R. § 416.5(c)). This provision highlights the PPIA's specific concern with conditions leading to "product adulteration," not the spread of disease among workers. Likewise, in noting that regulations promulgated under the PPIA require worker protective equipment, Tyson omits the other portion of § 416.5(b) which states that "garments must be changed during the day as often as necessary to prevent *adulteration of product* and the *creation of insanitary conditions*. 9 C.F.R. § 416.5(b) (emphasis added). This again demonstrates the PPIA's concern with the "adulteration of product." Because the PPIA does not govern worker safety, it does not preempt Plaintiffs' claims that Tyson negligently failed to protect workers.

The PPIA only preempts requirements within its scope—and for a duty to fall within that scope, there must be some evidence that Congress intended to preempt that duty. But Tyson has failed to point to a single provision of the PPIA that indicates any intent to preempt the common-

law duty at issue here—the duty to maintain a reasonably safe workplace. And if the PPIA does not address a duty whatsoever, than the duty is not within its scope and therefore is not preempted. Taking Tyson's argument to its logical conclusion would mean that states could not implement workplace safety regulations in any facility subject to PPIA's regulations, which is illogical and would unduly interfere with the states' police power to protect the health and safety of their citizens. Because nothing in the statutory language or in the structure and purpose of the PPIA suggest an intent for the PPIA to preempt state common-law workplace safety claims such as this one, the PPIA does not provide a colorable federal defense.

ii. DPA and the President's Executive Order

Tyson's second defense is that Plaintiffs' claims are also preempted by the DPA and the President's April 28, 2020 Food Supply Chain Resources Executive Order and related federal directions. (Doc. #1, at 10). This argument fails. As Plaintiffs point out in the motion to remand, their claims arose before the President issued his April 28 order invoking the DPA. In their petition, Plaintiffs allege that Tyson unnecessarily and recklessly exposed Plaintiffs to COVID-19 weeks before the April 28 order. Specifically, Plaintiffs state that Tyson "failed to take adequate precautions to protect the workers at its meatpacking facilities, including the Center, Texas meatpacking facility" by failing to take "significant precautions to prevent the spread of COVID-19, prior to April 2, 2020." (Doc. #3, at 6). Clearly an executive order issued after Plaintiffs contracted COVID-19 cannot preempt their claims.

Tyson raises no argument in their response to the motion to remand to refute this. Instead, Tyson merely asserts that it need not prove it will prevail on their asserted defense. However, it is Tyson's burden to show it has a colorable federal defense and although it need not prove it will prevail on the defense, it at least has to show that it is entitled to raise it. Tyson has made no such

showing under either the PPIA or the DPA. Further, it appears that Tyson's reliance on the PPIA and the DPA is made for the sole purpose of obtaining jurisdiction. *See Latiolais*, 951 F.3d at 297 ("[A]n asserted federal defense is colorable unless it is immaterial and made solely for the purpose of obtaining jurisdiction or wholly insubstantial and frivolous"). Thus, Tyson has no colorable federal defense, and federal officer removal is improper.

(2) Acted Pursuant to a Federal Officer's Directions

As the Supreme Court has emphasized, the "acting under" requirement in 28 U.S.C. § 1442(a)(1) is broad and should be liberally construed. *Watson*, 551 U.S. at 147 (2007). The phrase contemplates a relationship between a private person and a federal officer that "typically involves subjection, guidance, or control" by the federal officer and, on the part of the private person, "an effort to assist, or help carry out, the duties or tasks of the federal superior." *Id.* at 151. In other words, the relationship involves a "delegation" of authority. *Id.* at 156–57. To invoke the protection of a federal forum under 28 U.S.C. § 1442(a)(1), the private person's relationship with a federal officer must implicate a "federal interest." *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 398 (5th Cir. 1998).

Tyson points to two possible sources of direction from a federal officer: Tyson's designation as "critical infrastructure" and the President's April 28, 2020 Executive Order. As explained above, the primary allegations in Plaintiffs' petition took place before April 28, 2020. At the time the events in the petition took place, there was no executive order in place. Thus, the executive order cannot satisfy the acting under prong of § 1442.

Tyson also argues it was acting under a federal officer's directions because it "operated its facilities—including the Center facility—as critical infrastructure of the United States pursuant to 'critical infrastructure' emergency plans growing out of Presidential Policy Directive 21 of the

Obama Administration, which were followed upon declaration of a national emergency." (Doc. #14, at 16). As a preliminary matter, Tyson fails to point out that the food and agriculture sector has been designated as critical infrastructure since 2003; it is not something that arose because of the pandemic. *See Food and Agriculture Sector-Specific Plan*, FDA, vi, https://www.cisa.gov/sites/default/files/publications/nipp-ssp-food-ag-2015-508.pdf (2015).

Even though the President declared a national emergency on March 13, 2020, and issued "Coronavirus Guidelines" on March 16, 2020, the Court is unpersuaded that such declarations constitute direction under a federal officer for purposes of removal. Although Tyson claims that it was "in constant contact with federal officials at the Department of Homeland Security [("DHS")] and the USDA regarding continued operations," the evidence it attached to its response to the motion to remand does not support that assertion. (Doc. #14, at 16). The evidence Tyson uses is a declaration of an employee, two emails that establish Tyson and DHS/FSIS had each other's contact information, an essential employee verification form Tyson itself created, general guidance on the critical infrastructure workforce, general guidance from USDA, emails of Tyson trying to obtain PPE from USDA, and a USDA sheet describing COVID-19 funding for FSIS employees. Tyson has produced no evidence that any federal official directed it to do something. Many of the documents Tyson cites to are titled "guidance" which are of course not mandatory or binding.

While Tyson may have been in regular contact with USDA regarding continued operations of its facilities at the early stages of the COVID-19 pandemic, such contact under the vague rubric of "critical infrastructure" does not constitute "subjection, guidance, or control" involving "an effort to assist, or to help carry out, the duties or tasks of the federal superior." *Watson*, 551 U.S. at 151–52. Although Tyson, and the courts in *Wazelle* and *Fields*, all give great weight to the fact that USDA and FSIS closely monitored the plant and provided employees onsite during the

pandemic, all three fail to note that Tyson, as an entity subject to federal regulation, is always closely monitored by FSIS and subject to its guidance and that FSIS always has employees onsite at the plant and were not there as a direct result of COVID-19. USDA statements about protocols for how FSIS inspectors would perform their regulatory functions during the pandemic do not show government control of Tyson's own operations. Tyson did not work with USDA and FSIS, nor did it receive any concrete, binding directives from them; Tyson merely received guidance from them. And close monitoring does not entitle it to federal officer removal. *See id.* at 153. Many industries are closely monitored by the federal government, but the vast majority of them cannot claim federal officer removal. *See id.* ("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. A contrary determination 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). Tyson has not shown that its contact with USDA after the president declared a national emergency was different than its normal communication with USDA or that it constituted a delegation of authority.

The Court finds the Supreme Court's decision in *Watson* particularly helpful. In *Watson*, the defendant alleged that the Federal Trade Commission ("FTC") had delegated to the tobacco industry authority to test the tar and nicotine content of cigarettes, and that the defendant was thus acting under the FTC in performing that testing function. 551 U.S. at 154. The testing at issue had at one point been performed by the FTC itself, and the agency published the test results periodically and sent them annually to Congress. *Id.* at 155. When the FTC eventually stopped performing such tests due to cost considerations, the industry assumed that responsibility, "running the tests

according to FTC specifications and permitting the FTC to monitor the process closely." *Id.* "The FTC continue[d] to publish the testing results and to send them to Congress," just as it had done with the FTC's own test results. *Id.* Despite the close coordination alleged in that case, the Supreme Court unanimously held that the defendant was not "acting under" the FTC within the meaning of Section 1442(a)(1). Tyson attempts to distinguish this case from *Watson* by stating that the Supreme Court's decision was based on a finding that the defendant was simply complying with the law. However, the holding is more complex. The Court stressed that there was "no evidence of any delegation of legal authority from the FTC to the industry association to undertake testing on the Government agency's behalf. Nor [wa]s there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement." *Id.* at 156. Like Tyson in this case, the defendant in *Watson* pointed to numerous documents and communications in support of its claim that it was working with the FTC and acting under its direction in a relevant sense. But the Supreme Court "examined all of the documents" and found them lacking because none "establish[ed]the type of formal delegation that might authorize the defendant to remove the case." *Id.*

Although Tyson asserts that it was carrying out the duties and task of the federal superior, like in *Watson*, here there is no evidence of any delegation of legal authority from USDA to Tyson. *See id*. Nor is there evidence of any contract, any payment, any employer/employee relationship, or any principal/agent arrangement. *See id.* And although there may have been considerable regulatory detail and supervision, this Court can find nothing that warrants treating the USDA/Tyson relationship as distinct from the usual regulator/regulated relationship. While the Court agrees with the proposition from *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 994 (5th Cir. 1976), that the DPA can be exercised through informal methods, that case did

not deal with federal officer removal. Tyson cites no case where a private entity without a contract with the federal government was able to satisfy the acting under requirement.[5] *But cf. Winters*, 149 F.3d at 398 (defendant with a detailed and specific contract with the defense department to produce a product with the specifications specifically dictated by the government satisfied acting under requirement)*; St. Charles Surgical Hosp., L.L.C. v. Louisiana Health Serv. & Indem. Co.*, 935 F.3d 352, 356 (5th Cir. 2019) (because under the Federal Employees Health Benefits Act, the Office of Personnel Management was responsible for contracting with private insurance carriers to provide health benefits plans to federal employees, insurance carrier with such a contract satisfied the acting under requirement). Thus, the "acting under" requirement is not met.

(3) Connected or Associated with an Act Pursuant to a Federal Officer's Directions

Finally, Tyson must show a connection or association between the federal officer's directions and Plaintiffs' claims. *Latiolais*, 951 F.3d at 296.

The parties dispute the applicable standard for this prong. Plaintiffs, citing the Fifth Circuit's decision in *Winters*, argue that there must be a "causal nexus" between plaintiffs' claims and the directions that defendants received from a federal officer. 149 F.3d at 387. But that standard no longer governs. In 2020, the Fifth Circuit, sitting en banc, reinterpreted the 2011 statutory amendments to § 1442 in *Latiolais v. Huntington Ingalls. Inc.* 951 F.3d 286. Those amendments "alter[ed] the requirement that a removable case be 'for' any act under color of federal office and permitt[ed] removability of a case 'for or relating to' such acts." *Id.* at 291. That addition, the *Latiolais* court held, "broadened federal officer removal to actions, not just causally

[5] Tyson cites to *Maryland v. Soper (No. 1)*, a case involving federal agents directing a private person to drive a car in pursuit of bootleggers. *Maryland v. Soper (No. 1)*, 270 U.S. 9 (1926). While the Court there noted that the chauffeur and helper had the same right to the benefit of the removal provision as the federal agent, it ultimately rejected the removal efforts and thus, this comment is dicta. *Soper* also dealt with § 1442's predecessor statute, not § 1442 itself.

connected, but alternatively connected or associated, with acts under color of federal office." *Id.* at 292.

Historically, many courts considered the acting under and causation requirements together. *See, e.g. Winters*, 149 F.3d 387. Although it has now been established that they are distinct and should be considered separately, that is not possible when, as here, the court finds the defendant has not acted pursuant to a federal officer's directions. In other words, there can be no connection or association between the federal officer's directions and the plaintiffs' claims when, as here, the court has determined that there were no federal officer's directions. Thus, because the "acting under" requirement is not met, the connection or association element is also not met.

B. Federal Question Jurisdiction

Pursuant to 28 U.S.C. § 1331, federal courts have subject matter jurisdiction over civil actions "arising under" federal law. 28 U.S.C. § 1331. A federal question exists "only [in] those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 27–28 (1983). "[T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities." *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

Upon review of the petition, the Court finds that the petition does not assert federal claims, but rather asserts common law tort claims for negligence, premises liability, and wrongful death. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (providing that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded

complaint"). Additionally, Plaintiffs' claims do not allege a cause of action created by a federal statute. *See Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (providing that cases brought under federal question jurisdiction are generally cases where federal law creates the cause of action).

As to Tyson's reliance on interpretation of the DPA, the Court has already explained that its reliance on President's April 28, 2020 Executive Order invoking the DPA is misplaced because it was issued after the primary allegations in the petition had taken place. Further, Plaintiffs' generic passing references in the petition to federal regulations and guidance and their brief mention of CDC guidelines and OSHA standards do not confer federal question jurisdiction. *See Merrell Dow*, 478 U.S. at 813 (providing that "the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"); *Grable & Sons Metal Prod., Inc.*, 545 U.S. at 314 (providing that for federal courts to have jurisdiction, the state law claim must turn on an "actually disputed and substantial" issue of federal law). Accordingly, the Court concludes that the petition does not contain a federal question and, therefore, the Court lacks subject matter jurisdiction over the case.

IV. CONCLUSION

The Court finds that Tyson has failed to demonstrate (1) that it has a colorable federal defense; (2) that it acted under the direction of a federal officer; and (3) that because it does not meet the "acting under" element it cannot meet the connection or association element. Accordingly, Tyson's removal based on the federal officer removal statute is improper. The Court also finds that the petition does not contain a federal question. Therefore, the Court lacks subject matter jurisdiction over this case.

It is accordingly **ORDERED** that Plaintiffs' Motion to Remand (Doc. #13) is **GRANTED**. The Clerk is directed to **CLOSE** this case and **REMAND** it to the 273rd Judicial District Court of Shelby County, Texas, from which it was removed in accordance with the procedures set forth by the Local Rules for the Eastern District of Texas. All remaining deadlines and trial settings are **TERMINATED**, and all pending motions are denied as **MOOT**, without prejudice to reassert as necessary in state court.

SIGNED this 12th day of August, 2021.

Michael J. Truncale
United States District Judge