21-2729-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ZACHARY SOLOMON,

Plaintiff-Appellee,

v.

ST. JOSEPH HOSPITAL; CATHOLIC HEALTH SYSTEM OF LONG ISLAND, INC.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF AMICUS CURIAE VIVIAN RIVERA-ZAYAS IN SUPPORT OF NEITHER PARTY AND DISMISSAL WITH DIRECTION TO VACATE AND REMAND

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INTEREST OF AMICUS CURIAE[1]

As explained in the accompanying motion for leave to file this brief, Ms. Rivera-Zayas is the plaintiff-appellee in *Rivera-Zayas v. Our Lady of Consolation Geriatric Care Center*, No. 21-2164, pending before this Court. Seeking reversal of a district court remand order, the defendants-appellants in that case assert the same theories of federal subject-matter jurisdiction that defendants-appellants invoked in this case: that a health care facility's desire to raise a defense under the Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. §§ 247d-6d–6e, creates a federal question for purposes of 28 U.S.C. § 1331, and that the COVID-19 pandemic converted private health care facilities into agents of federal officers for purposes of 28 U.S.C. § 1442(a)(1). That appeal has been fully briefed and oral argument has been proposed for the week of October 31, 2022.

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[1] This brief is accompanied by a Motion for Leave to File as required by Federal Rule of Appellate Procedure 29(b). No party's counsel authored this brief in whole or part, no party or party's counsel contributed money intended to fund the brief's preparation or submission, and no person other than amicus curiae or her counsel contributed money intended to fund the brief's preparation or submission.

On June 16, 2022, this Court issued an order requesting briefing on two issues: (1) whether, and to what extent, the Court has appellate jurisdiction over the district court's September 29, 2021, order in this case, and (2) whether the district court had subject-matter jurisdiction over the case below. The second issue is directly presented in Ms. Rivera-Zayas's case. Therefore, should the Court resolve this appeal prior to the appeal in Ms. Rivera-Zayas's case, this appeal "may, by operation of stare decisis … materially affect" her interests. *Nat'l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

BACKGROUND

Initially enacted in 2005 "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency, the [PREP Act] authorizes the Secretary of Health and Human Services (HHS) to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines." Cong. Res. Serv., *The PREP Act and COVID-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures* 1 (updated April 13, 2022).[2]

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

The Secretary triggers the PREP Act by issuing a declaration determining that a public health emergency exists and "recommending" the "manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures," under certain conditions. 42 U.S.C. § 247d-6d(b)(1). The Secretary may designate only certain drugs, biological products, and devices authorized or approved for use by the Food and Drug Administration or the National Institute for Occupational Safety and Health as "covered countermeasures." 42 U.S.C. § 247d-6d(i)(1)(A)–(D).

Subsection (a) of the PREP Act provides "covered persons" with immunity from liability under state or federal law for "any claim for loss that has a causal relationship with the administration to or use by an individual of a [designated] covered countermeasure." *Id.* §§ 247d-6d(a)(1), (a)(2)(B). Subsection (d) creates a carve-out from such immunity for suits brought against covered persons "for death or serious physical injury proximately caused by willful misconduct." *Id.* § 247d-6d(d)(1). For claims within the carve-out, the statute creates an "exclusive Federal cause of action," *id.*, and provides special adjudicatory procedures and exclusive jurisdiction in a three-judge court of the District Court for the

District of Columbia, *id.* § 247d-6d(e). Critically, however, this exclusive cause of action is available only for claims that otherwise would fall within the immunity provision. Unless a claim would be otherwise barred by subsection (a), it cannot be brought as a subsection (d) claim. The PREP Act also creates an administrative compensation scheme that, like subsection (d), is available only to those who suffered injuries "directly caused by the administration or use of a covered countermeasure" subject to a PREP Act declaration. *Id.* § 247d-6e(a).

On March 10, 2020, HHS Secretary Azar issued a Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID–19. 85 Fed. Reg. 15,198 (published Mar. 17, 2020). The Declaration recommended the "manufacture, testing, development, distribution, administration, and use" of certain countermeasures to combat COVID-19: "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product." *Id.* at 15,202.

The Secretary amended the initial Declaration several times. In the Fourth Amendment, among other things, the Secretary incorporated by reference four advisory opinions previously issued by HHS's General Counsel. 85 Fed. Reg. 79,190, 79,191 & n.5 (Dec. 9, 2020). In January 2021, the General Counsel issued a fifth advisory opinion. HHS General Counsel, Advisory Opinion 21-01 (Jan. 8, 2021), ADD-64. That opinion stated his view that "the PREP Act is a [c]omplete [p]reemption statute" and that it applies to situations where a covered person makes a decision regarding allocation of covered countermeasures that "results in non-use by some individuals," but *not* where non-use was the result of "nonfeasance." ADD-65. He also opined that "substantial federal question" jurisdiction, recognized in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), applies to any case where a defendant invokes the PREP Act. ADD-67–68. Like the previous advisory opinions, Opinion 21-01 states that it "sets forth the current views" of OGC but "does not have the force or effect of law." ADD-68.

SUMMARY OF ARGUMENT

I. Like the Third, Fifth, Seventh, and Ninth Circuits, this Court should hold that a defendant's intent to raise a PREP Act defense to a state-law negligence claim does not create federal question jurisdiction.

A. The PREP Act does not completely preempt claims like Mr. Solomon's for two reasons: (1) those claims are not within the ambit of the PREP Act and (2) negligence-based claims like those alleged here cannot be brought under, and thus cannot be completely preempted by, the sole cause of action created by the PREP Act.

First, the text of the Act limits both its immunity and exclusive cause of action provisions to claims based on injuries with a "causal relationship" to "the administration to or use of a covered countermeasure by an individual." That immunity does not apply simply because an individual was being treated for a condition for which covered countermeasures have been authorized; the countermeasures must be the alleged cause of the injury. Here, Mr. Solomon alleges that the hospital's general neglect caused him to develop a pressure ulcer, and that St. Joseph's negligent treatment of that condition caused further injury. Because he does not allege an injury that was the result of the

administration or use of any countermeasure covered by a PREP Act declaration, the PREP Act is irrelevant to his claim.

Second, complete preemption exists only where Congress has converted state-law claims into federal claims by providing a replacement federal cause of action. Although the PREP Act creates a cause of action for the tort of "willful misconduct" as defined by the Act, St. Joseph has conceded that Mr. Solomon has not brought, and could not bring, such a claim. That Congress chose to create a federal cause of action for willful misconduct but *not* for negligence-based claims indicates that it left to state courts the application of PREP Act defenses to negligence-based claims.

B. The *Grable* doctrine cannot provide a basis for jurisdiction here either, because a potential federal defense is insufficient to bring an action in the narrow category of cases where that doctrine applies. Additionally, federal jurisdiction over all malpractice claims arising during the pandemic would massively disrupt the balance of responsibility between state and federal courts.

II. Like every federal court to have addressed the point in similar cases, this Court should reject the argument that health-care facilities

treating or taking steps to curb the transmission of COVID-19 were "acting under" federal officers for purposes of section 1442(a)(1). As the reasoning of those cases makes plain, St. Joseph's assertion in its notice of removal that its compliance with federal statutes, regulations, and guidance qualified it to invoke that statute is foreclosed by Supreme Court precedent.

For these reasons, the district court lacked subject-matter jurisdiction over this action.

ARGUMENT

This Court has an "obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even where "the parties are prepared to concede it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), *quoted in Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146, 150 n.10 (2d Cir. 2016). Here, the district court lacked jurisdiction under either basis of federal jurisdiction identified in St. Joseph's notice of removal and statement of jurisdiction on appeal.[3]

[3] This Court's June 16 Order also asks whether the Court has appellate jurisdiction over this case. Even if, as Ms. Rivera-Zayas

I. There is no federal-question jurisdiction.

In its notice of removal, St. Joseph asserted the district court had jurisdiction pursuant to 28 U.S.C. § 1331, the federal question statute. Neither of the two theories of federal question jurisdiction that defendants have raised in similar cases—complete preemption and *Grable* jurisdiction—applies here.

A. The PREP Act does not completely preempt Mr. Solomon's claims.

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). But "[u]nder the complete-preemption doctrine, certain federal statutes are construed to have such 'extraordinary' preemptive force that state-law claims coming within the scope of the federal statute are transformed, for

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believes, the Court lacks appellate jurisdiction, *see Will v. Hallock*, 547 U.S. 345, 350–53 (2006), the Court may, and should, reach the question of the district court's subject-matter jurisdiction. As the Court has held, 28 U.S.C. § 2106 provides authority to instruct a district court "to vacate its decision and order and remand the case to state court" for a lack of subject-matter jurisdiction, even where appellate jurisdiction is lacking. *BlackRock Financial Mgmt. Inc. v. Segregated Acct. of Ambac Assur. Corp.*, 673 F.3d 169, 180 (2d Cir. 2012).

jurisdictional purposes, into federal claims—i.e., completely preempted." *Sullivan v. Am. Airlines*, 424 F.3d 267, 272 (2d Cir. 2005). The key question in determining whether complete preemption exists is not whether "Congress desired … to provide a federal defense to a state law claim" or how broad that defense may be. *Wurtz v. Rawlings Co.*, 761 F.3d 232, 238 (2d Cir. 2014) (quoting 14B *Fed. Prac. & Proc. Juris.* § 3722.2). Rather, "[this Court] must ask whether the federal statute provides 'the exclusive cause of action' for the asserted state-law claim," *Sullivan,* 424 F.3d at 275–76, and thus that the state law claim is "recast as a federal claim for relief." *Vaden v. Discover Bank*, 556 U.S. 49, 61 (2009).

Here, Mr. Solomon's New York claims cannot be recast as a claim under the PREP Act, both because they are not based on an injury caused by a covered countermeasure and because the PREP Act does not demonstrate the requisite congressional intent to displace claims sounding in negligence.

1. Only claims for injuries caused by covered countermeasures come within the scope of the PREP Act.

Where a plaintiff's "claims do not fall under the PREP Act," it is "irrelevant whether the PREP Act is a complete preemption statute."

Thomas v. Century Villa Inc., 2021 WL 2400970, at *4 (C.D. Cal. June 10, 2021). Subsection (a)(1)'s immunity provision and the exceptions to that immunity provided for in subsections (d) and (e) of the Act apply only to claims for losses 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). Thus, unless a plaintiff "allege[s] loss caused by the 'administration' or 'use' of COVID-19 countermeasures," his claims cannot possibly be completely preempted by the PREP Act. *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 246 (5th Cir. 2022); *see also Martin v. Petersen Health Ops., LLC*, 37 F.4th 1210 (7th Cir. 2022) (holding that without "a contention that a covered countermeasure caused harm," a claim cannot be completely preempted by the PREP Act); *Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393, 411 (3d Cir. 2021) (holding that a claim cannot be completely preempted by the PREP Act unless it could have been brought pursuant to subsection (d)(1) of the statute).

That Mr. Solomon was receiving treatment for COVID-19 at the time he was injured by St. Joseph's is not sufficient to bring his claims within the scope of the Act. The Act would apply only if he alleged that

the administration or use of one of the specific drugs and medical devices authorized and recommended for use by the HHS Secretary was the cause of injuries. As the district court properly concluded in denying St. Joseph's motion to dismiss, Mr. Solomon did not do so: "It is apparent from the parties' submissions that Solomon's claims derive from a common type of hospital-acquired injury that results from not being rotated while stationary." A-72. Such an injury has no causal relationship with any covered countermeasure.

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

Because Mr. Solomon's 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* come within its scope. Nonetheless, the Third, Fifth, Seventh and Ninth Circuits were correct to conclude that, even in such cases, subsection (a)(1) of the statute provides only ordinary preemption, not complete preemption, of negligence-based claims like those brought here. *Martin*, 37 F.4th at 1213; *Mitchell v. Advanced HCS, LLC*, 28 F.4th 580, 586–88 (5th Cir. 2022); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 687–88 (9th Cir. 2022); *Maglioli*, 16 F.4th at 410–13.

"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). The question of complete preemption does not hinge solely on whether Congress intended to preempt state law, but on whether it intended to preempt state law *and* "substitute a federal remedy for that law." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). As this Court explained in *Sullivan*, if a claim "cannot be filed in the first instance in federal court," it cannot be completely preempted. 424 F.3d at 276.

While the PREP Act does contain a federal cause of action, that cause of action is not a substitute for claims like Mr. Solomon's for malpractice, ordinary negligence, and gross negligence. Where such claims are based on a loss caused by the administration to or use by an individual of a covered countermeasure, the PREP Act renders them "nonactionable," not completely preempted, as "such claims cannot be

litigated in state court *or* in federal court." *Romano v. Kazacos*, 609 F.3d 512, 519 n.2 (2d Cir. 2010) (citing *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 637 n. 1 (2006)). "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*, 424 F.3d at 277. It did not.

In *Sullivan*, this Court held that the plaintiffs' claims were not completely preempted by the Railway Labor Act, because they could not have brought their claims in federal court under any cause of action created by that statute. 424 F.3d at 276. The same holds true here: Mr. Solomon could not have brought any of his claims under the PREP Act subsection (d) willful misconduct cause of action—even if they *were* based on injuries caused by covered countermeasures.[4] A subsection (d) claim requires allegations that a defendant acted "(i) intentionally to achieve a wrongful purpose; (ii) knowingly without legal or factual justification;

[4] To the extent that St. Joseph's might suggest that the PREP Act's administrative compensation scheme is completely preemptive, that argument is also barred by *Sullivan*, where the Court held that the creation of non-judicial remedies (there, arbitral panels) cannot be the source of complete preemption. 424 F.3d at 276–77; *see also Maglioli*, 16 F.4th at 411–13 (rejecting complete preemption argument based on PREP Act's administrative remedy as not "plausible").

and (iii) in disregard of a known or obvious risk that is so great as to make it highly probable that the harm will outweigh the benefit." 42 U.S.C. § 247d-6d(c)(1)(A). Mr. Solomon has made no such allegations. Indeed, in its notice of removal, St. Joseph's conceded as much, stating that "[n]o willful misconduct was, or can be, alleged by plaintiff in the Complaint." A-11 ¶7.[5]

As *Sullivan* explains, when a state-law claim is removed to federal court based on one of the 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." 424 F.3d at 276. Here, though, St. Joseph's asserted that the court should assume jurisdiction simply to dismiss the claims for a lack of jurisdiction—exactly what this Court found to be problematic in *Sullivan*. *Id*. (describing this strategy as "internally inconsistent").

[5] In a footnote, the district court incorrectly stated that Mr. Solomon had "alleged willful misconduct" because had alleged "intentional wrongdoing." A-73 n.1. A claim of "willful misconduct" under the PREP Act requires more than just an allegation of intentional acts, as explained by the Fifth and Third Circuits. *Manyweather*, 40 F.4th at 245; *Maglioli*, 16 F.4th at 410.

Congress's creation of an exclusive federal cause of action for *other* countermeasure-related injuries is not sufficient to create complete preemption. That some plaintiffs may bring some federal claims relating to injuries caused by the administration or use of a covered countermeasure does not mean that *all* claims relating to such injuries are completely preempted. Case law concerning the scope of complete preemption under section 502(a) of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a), reflects this point. ERISA, like the PREP Act, has both an ordinary preemption provision, section 514(a), 29 U.S.C. § 1144(a), and an exclusive federal cause of action, section 502(a), 29 U.S.C. § 1132(a). ERISA claims are completely preempted only where a plaintiff "could have brought his claim under ERISA § 502(a)(1)(B)." *Aetna Health Inc. v. Davila*, 542 U.S. 200, 210 (2004). That the ordinary preemption provision may apply is not a basis for federal jurisdiction "regardless of the strength of the defendant's argument for § 514 preemption." *Felix v. Lucent Techs., Inc.*, 387 F.3d 1146, 1158 (10th Cir. 2004).

As the Third Circuit stated in rejecting a PREP Act complete-preemption argument in similar circumstances, "the elements of the

state cause of action need not 'precisely duplicate' the elements of the federal cause of action for complete preemption to apply." *Maglioli*, 16 F.4th at 411 (quoting *Davila*, 542 U.S. at 216)). "But complete preemption does not apply when federal law creates an entirely *different* cause of action from the state claims in the complaint. Congress could have created a cause of action for negligence or general tort liability. It did not. Just as intentional torts, strict liability, and negligence are independent causes of action, so too willful misconduct under the PREP Act is an independent cause of action." *Id.* (citations omitted). "The provision of one specifically defined, exclusive federal cause of action undermines [the] argument that Congress intended the Act to completely preempt all state-law claims related to the pandemic." *Saldana*, 27 F.4th at 688.[6]

[6] As explained by the Seventh, Fifth, Ninth and Third Circuits, HHS's unreasoned assertion that the PREP Act provides for complete preemption does not warrant any deference. *Martin*, 37 F.4th at 1214; *Mitchell*, 28 F.4th at 585 n.3; *Saldana*, 27 F.4th at 687; *Maglioli*, 16 F.4th at 403–04. *See also Bechtel v. Competitive Techs., Inc.*, 337 F.3d 469, 478 (2d Cir. 2006) (holding that deference is inappropriate "where the statutory interpretation at issue concerns the scope of federal court jurisdiction").

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

In other cases, defendants have sought to justify federal-question removal of cases involving claimed PREP Act defenses by echoing the HHS General Counsel's assertion that the 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, first set out in *Grable*, federal courts may exercise jurisdiction over state-law actions where a federal issue is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* (citing *Grable*, 568 U.S. at 313–14). As this Court has previously recognized, the "Supreme Court has been sparing in recognizing state law claims fitting this criterion," which "signals caution in identifying the narrow category of state claims over which federal jurisdiction may be exercised." *NASDAQ QMX Grp., Inc. v. UBS Sec., LLC*, 770 F.3d 1010, 1019–20 (2d. Cir. 2014).

Every federal court to consider whether *Grable* provides jurisdiction in similar cases has concluded that it does not. *See*, *e.g.*, *Martin*, 37 F.4th at 1214; *Mitchell*, 28 F.4th at 588–89; *Saldana*, 27 F.4th

at 688–89; *Maglioli*, 16 F.4th at 413.[7] This Court should conclude the same. State-law claims alleging healthcare neglect do not "necessarily raise" any issues of federal law and, therefore, raise no "substantial" or "actually disputed" issues of federal law. When considering whether a complaint necessarily raises a federal issue under *Grable*, the well-pleaded complaint rule applies. *See Tantaros v. Fox News Network, LLC*, 12 F.4th 135, 142 (2d Cir. 2021). Thus, the question in this case is whether a federal issue is an "essential element[] of a prima facie case" for one of Mr. Solomon's state-law claims. *Id.* New York common-law claims for malpractice, ordinary negligence, gross negligence do not "necessarily" raise federal questions because none of the claims is "affirmatively 'premised' on a violation of federal law." *New York ex rel. Jacobson v. Wells Fargo Nat'l Bank, N.A.*, 824 F.3d 308, 315 (2d Cir. 2016) (citing *Grable*, 545 U.S. at 314). A potential federal defense does not make federal law an "essential element" of a state-law claim. *See, e.g.*, *Tantaros*, 12 F.4th at 143.

[7] As with HHS's views on complete preemption, courts have correctly declined to give any deference to the HHS's views on *Grable*. *See, e.g.*, *Maglioli*, 16 F.4th at 403–04; *Shapnik v. Hebrew Home for the Aged at Riverdale*, 535 F. Supp. 3d 301, 320 n.13 (S.D.N.Y. 2021).

Jurisdiction is also barred by the fourth *Grable* factor, which asks whether the question is capable of resolution in federal court without disrupting the federal-state balance approved by Congress. In analyzing this factor, this Court looks to "the nature of the claim, the traditional forum for such a claim, and the volume of cases that would be affected." *Jacobson*, 824 F.3d at 316. None of these considerations supports transferring all "run-of-the-mill state-law" cases involving medical malpractice into federal court, "dramatically alter[ing] the federal-state division of labor." *Shapnik*, 535 F. Supp. 3d at 320. Such an outcome would have much more than "a microscopic effect" on the federal-state division of labor, *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.

II. This case does not meet the requirements for federal-officer removal.

To invoke the federal-officer removal statute, "a defendant who is not himself a federal officer must demonstrate that (1) the defendant is a 'person' under the statute, (2) the defendant acted 'under color of federal office,' and (3) the defendant has a 'colorable federal defense.'"

Cuomo v. Crane Co., 771 F.3d 113, 115 (2d Cir. 2014) (quoting *Isaacson v. Dow Chem. Co.*, 517 F.3d 129, 135 (2d Cir. 2008)). As each of the dozens of courts to consider the issue has held, in providing health care and related services during the pandemic, private facilities like St. Joseph's have not been acting under color of federal office—even if they received additional guidance and directives from regulatory authorities, and even if the work they did was important. *See, e.g.*, *Martin*, 37 F.4th at 1212–13; *Mitchell*, 28 F.4th at 589–91; *Saldana*, 27 F.4th at 684–86; *Maglioli*, 16 F.4th at 404–06.[8]

In assessing whether St. Joseph was acting under a federal officer, this Court's review is limited to the jurisdictional facts alleged in the notice of removal. *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 488 F.3d 112, 124 (2d Cir. 2007). There, St. Joseph asserted that Mr. Solomon's claims relate to its "compliance with federal statutes, common law and guidance, including CMS guidance specifically cited to by plaintiff, as well as guidance from the CDC, [HHS], the COVID-19 task force, the President of the United States and other federal officers

[8] Additionally, as discussed above, St. Joseph's lacks a colorable federal defense because the PREP Act has no bearing on Mr. Solomon's claims.

and agencies, as well as 85 Fed. Reg. 15198 (March 17, 2020), [42] C.F.R. § 483.21(b)(1), C.F.R. § 483.65, 42 U.S.C. § 1395(i) et seq., 42 C.F.R. Part 483 and CFR 483.21(b)(1)." A-12 ¶ 11.[9] To the extent that any such guidance, regulations, and statutes is relevant to Mr. Solomon's claims, none establishes that St. Joseph's was in a "special relationship" with any federal officer, as the federal-officer removal statute requires. *Isaacson*, 517 F.3d at 137.

To the contrary, in *Watson v. Phillip Morris Co.*, the Supreme Court expressly held that 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. *Cf. Veneruso v. Mt. Vernon Neighborhood Health Ctr.*, 586 F. App'x 604, 607 (2d Cir. 2014) (holding that "a host of federal requirements and regulations pertaining to the health services [a health center] provides,

[9] It appears this language may be boilerplate, erroneously copied from notices of removal filed in other cases by St. Joseph's counsel, as no such guidance was cited in Mr. Solomon's complaint.

and the manner in which it expends its funds" do not create an "acting under" relationship).

Nothing about COVID-19 changed the essence of the relationship between America's private health care facilities from one of "considerable regulatory detail and supervision" into "the kind of assistance that might bring [the relationship] within the scope of the statutory phrase '*acting under*' a federal officer." *Watson*, 551 U.S. at 157. By statute and regulation, facilities like St. Joseph's are heavily regulated by the federal government as a condition of their receipt of Medicare and Medicaid funding. No guidance issued in the wake of COVID-19 indicates that the federal government was asserting a different kind of control than it previously had under these laws and allows St. Joseph to "recast private healthcare companies as deputies of the federal government." *Mitchell*, 28 F.4th at 591.

CONCLUSION

The Court should dismiss the appeal and instruct the district court to vacate its decision and order and to remand the case to state court.

Respectfully submitted,

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August 12, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that this brief complies with the typeface and volume limitations set forth in Federal Rule of Appellate Procedure 29(a)(5), 32(a)(5), and 32(a)(6), and Local Rule 29.1 as follows: The proportionally spaced typeface is 14-point Century Schoolbook and, as calculated by my word processing software (Microsoft Word for Office 365), the brief contains 4,659 words, exclusive of those parts of the brief not required to be included in the calculation by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Adam R. Pulver
Adam R. Pulver