No. 22-192

In The
Supreme Court of the United States

GLENHAVEN HEALTHCARE LLC, et al.,

Petitioners,

v.

JACKIE SALDANA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation (ALF) is a national, nonprofit, nonpartisan, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, property rights, limited and responsible government, sound science in judicial and regulatory proceedings, and effective education, including parental rights and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court, federal courts of appeals, and state supreme courts. *See* atlanticlegal.org.

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Despite the American public's seeming return to "normalcy," the COVID-19 pandemic appears to be far from over. *See* Centers for Disease Control and Prevention (CDC), *COVID Data Tracker*, Daily Update for the United States (tracking new cases,

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[1]Petitioners' and Respondents' counsel were provided timely notice in accordance with Supreme Court Rule 37.2(a) and have consented to the filing of this brief. No counsel for a party authored this brief in whole or part, and no party or counsel other than the *amicus curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

hospitalizations, and deaths);[2] Food and Drug Administration (FDA) News Release (Aug. 31, 2022) (announcing amended emergency use authorizations for "updated boosters" to protect against new Omicron variants);[3] CDC Media Statement (Sept. 1, 2022) (endorsing a CDC Advisory Committee's recommendations for immediate use of updated boosters).[4] COVID-19 not only continues to be an unprecedented public health challenge, but also, absent this Court's intervention, a potentially lucrative—*although statutorily prohibited*—font of state-court personal-injury litigation for the plaintiffs' bar.

This appeal presents an important and frequently recurring question that has enormous implications for public health as well as civil justice: Whether COVID-19-related personal-injury and wrongful-death suits, which implicate the immunity-from-suit-and-liability and additional legal protections expressly afforded to healthcare facilities and workers by the Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. §§ 247d-6d, 247d-6e, are removable from state to federal court.[5]

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[2]https://covid.cdc.gov/covid-data-tracker/#datatracker-home.

[3]https://tinyurl.com/3wdpmmfn.

[4]https://www.cdc.gov/media/releases/2022/s0901-covid-19-booster.html.

[5]Throughout this brief, PREP Act section and subsection references are to 42 U.S.C.

The PREP Act's overarching objective is to facilitate a unified, whole-of-nation response to public health emergencies such as the COVID-19 pandemic by providing broad immunity from litigation and liability for healthcare facilities (e.g., hospitals; nursing homes; assisted living facilities), healthcare workers (e.g., physicians; nurses; emergency responders), and other "covered persons" in connection with administration or use of "covered countermeasures" (e.g., diagnostic devices and procedures; exposure mitigation measures; therapeutics; vaccines). This goal cannot be achieved if the statute's sweeping immunity-from-suit-and-liability provision, § 247d-6d(a)(1)—or its narrow exception, a carefully delineated, exclusively federal, cause of action for willful misconduct, §§ 247d-6d(c) & (d)—are subject to myriad state courts' conflicting or inconsistent interpretations. Instead, removal of any and all state-court liability suits that implicate (or may implicate) the PREP Act promotes uniformity of decision, and in turn, confidence that the statute's immunity provision and additional legal protections for healthcare facilities and workers will be enforced.

The Atlantic Legal Foundation is filing this amicus brief in support of Petitioners because COVID-19-related liability suits belong, if anywhere, in federal—not state—court. This Court's urgent review of the PREP Act removal issue is needed because healthcare facilities and workers will be deterred from volunteering for essential, frontline duty during public health emergencies if they are subjected to the threat of being haled into the very type of state-court liability

suits that the PREP Act expressly and unequivocally prohibits. The Court should grant certiorari and hold that personal-injury and wrongful-death suits against PREP Act-covered healthcare facilities and workers in connection with administration or use of PREP Act-covered COVID-19 countermeasures are removable to federal court under the complete-preemption doctrine.

SUMMARY OF ARGUMENT

The PREP Act is an extraordinary statute. It expressly mandates not only immunity from liability under state and federal law, but also, *immunity from suit*. *See* § 247d-6d(a)(1). Congress recognized that immunity from suit and liability and additional legal protections are needed to mobilize healthcare workers and facilities for provision of essential medical services that are integral to a "unified, whole-of-nation response" to public health emergencies such as the COVID-19 pandemic. 87 Fed. Reg. 982, 983 (Jan. 7, 2022) (preamble to Tenth Amendment to Declaration Under the PREP Act for Medical Countermeasures Against COVID-19).

Importantly, rather than eliminating recourse for covered individuals who are injured or killed as a result of administration or use of PREP Act-covered countermeasures, the statute establishes a no-fault compensation fund for medical expenses, lost employment income, and survivor benefits. *See* § 247d-6e.

A whole-of-nation response to public health crises cannot be achieved without "uniform interpretation of the PREP Act." 85 Fed. Reg. 79,190, 79,194 (Dec. 9,

2020) (Fourth Amendment to Declaration Under the PREP Act for Medical Countermeasures Against COVID-19). Removal of COVID-19 personal-injury and wrongful-death suits to the unitary federal court system promotes uniformity of decision, especially as to the scope and application of the PREP Act's immunity provision and additional legal protections. In contrast, allowing 50 separate state-court systems to interpret the scope and applicability of the PREP Act defeats the statute's purpose by impairing and impeding the nationwide, public health emergency response that it is designed to foster.

An estimated 1,100 state-court, COVID-19-related liability suits (including a number of putative class actions) against healthcare facilities and workers have been filed around the United States—the majority in plaintiff-friendly state-court systems such as those in heavily populated California, New York, New Jersey, and Pennsylvania. This already large and still growing wave of COVID-19-related, state-court liability suits is being fueled by an echo chamber of federal court of appeals and district court decisions that reject PREP Act-based removal on complete-preemption and other grounds. *See, e.g.*, *Martin v. Petersen Health Ops., LLC*, 37 F.4th 1210, 1212, 1215 (7th Cir. 2022) (observing that "more than 80 other suits have been removed and remanded in districts throughout the nation" and asserting that "[g]iven the three existing appellate opinions [on PREP Act removal] an exhaustive treatment is not necessary").

These state-court suits—and federal courts' failure to allow them to be removed on complete-preemption

or other grounds—defeat the PREP Act's objective of providing the immediate and unambiguous immunity from suit and liability, and additional legal protections, needed to strategically mobilize healthcare facilities and workers throughout the United States for a unified response to public health emergencies. This is a compelling reason why removal of COVID-19-related, state-court liability suits to federal court is in the national interest.

ARGUMENT

Removal of COVID-19 Liability Suits To Federal Court Is Critical To Achievement of the PREP Act's Objectives

A. The PREP Act mandates immunity from suit and liability to facilitate a unified, whole-of-nation response to public health emergencies such as the COVID-19 pandemic

"COVID-19 is a global challenge that requires a whole-of-nation response." 85 Fed. Reg. at 79,197. The PREP Act thus serves the "substantial federal legal and policy interests . . . in having a unified, whole-of-nation response to the COVID-19 pandemic." *Id.*; *see also* 87 Fed. Reg. at 983. As a recently updated Congressional Research Service (CRS) report explains, "[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." Kevin J. Hickey, CRS Legal Sidebar, *The PREP Act, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures* ("CRS Rpt."), Cong. Rsch. Serv., LSB10443, at 1 (updated Apr. 13, 2022).[6]

Indeed, the PREP Act begins by unequivocally declaring that "a covered person shall be *immune from suit and liability under Federal and State law* with respect to *all claims for loss* caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration . . . has been issued with respect to such countermeasure." § 247d-6d(a)(1) (emphasis added). As HHS explains, "[i]mmunity means that courts must dismiss claims brought against any entity or individual covered by the PREP Act. . . . The only exception is for claims of willful misconduct." HHS, PREP Act Q&As.[7]

The Secretary of HHS issued such a PREP Act Declaration at the outset of the COVID-19 pandemic, *see* 85 Fed. Reg. 15,198 (Mar. 20, 2020), and to date, has amended the Declaration ten times, repeatedly expanding the scope of immunity coverage. *See* HHS, COVID-19 PREP Act Declarations;[8] 87 Fed. Reg. at 983 (summarizing the Amendments to the Declaration); *Cannon v. Watermark Ret. Cmty., Inc.*,

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

[7]https://www.phe.gov/Preparedness/legal/prepact/Pages/prepqa.aspx#immune1 (July 6, 2022).

[8]https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx.

No. 21-7067, 2022 WL 3130653, at *2 (D.C. Cir. Aug. 5, 2022) ("In March 2020, the Secretary triggered PREP Act immunity to *encourage* the government, the *medical profession*, and *other key actors* to take countermeasures against the novel COVID-19 coronavirus.") (emphasis added).

To reinforce the immunity-from-suit-and-liability mandated by the PREP Act, the statute also includes a broad express preemption provision. *See* § 247d-6d(b)(8) (Preemption of State law) ("no State or political subdivision of a State may establish, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that—is different from, or is in conflict with, any requirement that is applicable under [the PREP Act]; and relates to the . . . use . . . by qualified persons of the covered countermeasure").

As the United States explained in a January 2021 Statement of Interest supporting removal of state-law claims involving administration or use of covered countermeasures, "PREP Act immunity is *sweeping*, applying 'to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure.'" Statement of Interest of the United States at 2, *Bolton v. Gallatin Ctr. For Rehab. & Healing, LLC*, 535 F. Supp. 3d 709 (M.D. Tenn. 2021) (No. 3:20-cv-00683) (quoting § 247d-6d(a)(2)(B)) (emphasis added)).[9]

"In the PREP Act, Congress made the judgment that, in the context of a public health emergency,

[9] *Available at* https://tinyurl.com/4emrxu2m.

immunizing certain persons and entities from liability was necessary to ensure that potentially life-saving countermeasures will be efficiently developed, deployed, and administered." CRS Rpt., *supra* at 1. "Congress determined that the deterrent and compensatory effects of tort liability, which might be salutary in other contexts, would undermine the nation's ability to protect itself from epidemics and pandemics." U.S. Stmt. of Int., *supra* at 9.

Nonetheless, as the Third Circuit has explained, "Congress did not leave those injured by covered countermeasures without recourse." *Maglioli v. All. HC Holdings,* 16 F.4th 393, 401 (3rd Cir. 2021). "In place of tort remedies," Congress created a federally funded Countermeasures Injury Compensation Program ("CICP"), administered by HHS's Health Resources and Services Administration, "to compensate eligible individuals for serious physical injuries or deaths from pandemic, epidemic, or security countermeasures." U.S. Stmt. of Int., *supra* at 3; *see* § 2476d-6e(a) (establishment of "Covered Countermeasure Process Fund"). "An individual seriously injured or killed by the administration of a covered countermeasure, whether or not as a result of willful misconduct, may seek compensation through CICP." CRS Rpt., s*upra* at 4. "In general, eligible individuals (or their survivors) who suffer death or serious physical injury directly caused by the administration of a covered countermeasure may receive reimbursement for reasonable medical expenses, loss of employment income, and survivor benefits in the case of death." *Id.*

"The sole exception to PREP Act immunity is for death or serious physical injury caused by 'willful misconduct.'" *Id.* at 1; *see* § 247d-6d(d)(1) ("the *sole exception* to the immunity from suit and liability of covered persons . . . shall be for an *exclusive Federal cause of action* against a covered person for death or serious physical injury proximately caused by willful misconduct, as defined by subsection (c), by such covered person"); *see also Maglioli,* 16 F.4th at 409-10 ("The PREP Act unambiguously creates an *exclusive* federal cause of action. . . . Congress said the cause of action for willful misconduct is exclusive, so it is.").

This congressionally created cause of action for "willful misconduct" is an exceedingly narrow exception to the PREP Act's broad grant of immunity from suit and liability. "The process by which injured persons (or their representatives) may prove willful misconduct under the PREP Act is limited in several ways." CRS Rpt., *supra* at 3. More specifically, "[t]he first nine paragraphs of [§247d-6d(e)] describe the carefully limited procedural path that remains open to a plaintiff bringing a willful misconduct claim against a covered person." *Cannon*, *supra* at *2. For example, the statute "establishes an exclusive venue for such excepted claims: 'only' before a three-judge panel of the United States District Court for the District of Columbia." U.S. Stmt. of Int., *supra* at 8 (quoting § 247d-6d(e)(1)); *see also Cannon*, *supra* at *6 (the statute "channels" the "carefully controlled set of pretrial and trial procedures for . . . willful misconduct cases . . . to the D.D.C."). Further, the statute defines "willful misconduct" narrowly, *see* § 247d-6d(c)(1)(A),

and requires that the definition "be construed as establishing a standard for liability that is *more stringent* than a standard of negligence in any form or recklessness." § 247d-6d(c)(1)(B) (emphasis added); *see also* § 247d-6d(e) (Procedures for suit); CRS Rept., *supra* at 3 ("Such [willful misconduct] lawsuits must meet heightened standards for pleading and discovery, and are subject to procedural provisions generally favorable to defendants.").

Even if a plaintiff does not satisfy the statute's rigorous criteria for pursuing a willful misconduct suit, he or she can seek compensation through the CICP fund. In fact, "[b]efore filing a lawsuit claiming willful misconduct, injured persons must first seek compensation through CICP, and they cannot sue if they elect to receive that compensation." *Id.* at 3; *see* § 247d-6e(d).

As the Fifth Circuit recently explained,

> [i]n sum, once the Secretary promulgates a declaration, most injuries caused by a covered person administering a covered countermeasure are subject to the sole remedy of a compensation fund. There is a narrow exception for willful-misconduct claims, which proceed under an exclusive federal cause of action in the United States District Court for the District of Columbia, but only after the claimant has exhausted administrative remedies.

Mitchell v. Advanced HCS, LLC, 28 F.4th 580, 586 (5th Cir. 2022).

These multiple statutory layers of litigation and liability protection for healthcare facilities and workers—immunity from suit and liability for administration or use of covered countermeasures, express preemption of conflicting state-law requirements, an exclusive federal cause of action and federal judicial forum for statutorily circumscribed "willful misconduct" claims, and the HHS-administered, CICP no-fault compensation fund for eligible personal-injury or wrongful-death claims—facilitate a unified, whole-of-nation response to public health crises such as the COVID-19 pandemic. Indeed, in an Advisory Opinion that "re-emphasizes the breadth of PREP Act immunity," the HHS Office of General Counsel explained that "[t]he PREP Act exists, in part, to remove legal uncertainty and risk" that "may hinder [the] essential efforts" of "public and private individuals and organizations as they combat the pandemic." HHS, Office of the Secretary, General Counsel, Advisory Op. 20-04 at 1 (Oct. 23, 2020).[10]

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[10] https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/AO4.2_Updated_FINAL_SIGNED_10.23.20-2.pdf.

The Secretary of HHS's Declaration Under the PREP Act for Medical Countermeasures Against COVID-19, as amended, "expressly incorporates," and "must be construed in accordance with" the HHS General Counsel's Advisory Opinions. 85 Fed. Reg. at 79,191, 79,192.

B. A whole-of-nation response cannot be achieved without uniform interpretation and application of the PREP Act's immunity provision and additional legal protections

The same critical federal legal and policy interests that underlie the need for a "unified, whole-of nation response" to the COVID-19 pandemic compel "a uniform interpretation of the PREP Act." 85 Fed. Reg. at 79,197. Uniformity of decision helps to ensure that the PREP Act's immunity and additional legal protections are construed and applied throughout the nation in as consistent and predicable manner as possible. This in turn helps to eliminate or reduce the legal uncertainty or risk— the "chilling" effect of "apprehension about. . . litigation exposure," 151 Cong. Rec. 30727 (2005)—that otherwise may deter healthcare workers and facilities from providing frontline medical services during public health emergencies. *See* 85 Fed. Reg. at 79,191, 79,194, 79,197 (a "consistent pathway" is needed for nationwide administration or use of covered countermeasures).

Removal of state-court, COVID-19-related liability suits to federal court facilitates uniform interpretation and application of the PREP Act's immunity provision and additional legal protections. "[O]rdaining 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." HHS,

Office of the Secretary, General Counsel, Advisory Op. 21-01 at 5 (Jan. 8, 2021).[11]

Consider, for example, the PREP Act's "exclusive Federal cause of action" for "willful misconduct," § 247d-6d(d)(1), which provides that "[a]ny action" for willful misconduct "shall be filed and maintained only in the United States District Court for the District of Columbia," § 247d-6d(e)(1) (Exclusive federal jurisdiction). This mandatory venue provision, requiring all eligible willful-misconduct claims to be filed in a single, specific, federal district court—and assigning motions to dismiss and for summary judgment to a three-judge panel of that court, § 247d-6d(e)(5), and authorizing immunity-based interlocutory appeals to the U.S. Court of Appeals for the D.C. Circuit if such motions are denied, § 247d-6d(e)(10)—vividly reflects Congress' intent that there be nationally uniform, federal rules of decision governing such actions. There is no reason to believe that Congress intended the interpretation and application of the PREP Act's immunity-from-suit-and-liability provision, § 247d-6d(a)(1), be treated differently, *i.e.*, subjected to the conflicting, inconsistent, or differing views of numerous state trial and appellate courts that are part of 50 separate state-judicial systems—many of which already have demonstrated their resistance to the statute's grant of

[11] https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/2101081078-jo-advisory-opinion-prep-act-complete-preemption-01-08-2021-final-hhs-web.pdf.

immunity by ruling in COVID-19-related liability suits that the PREP Act does not apply.[12]

The Petition For a Writ of Certiorari argues persuasively that state-court, COVID-19-related liability suits, regardless of their state-law veneer, are removable under the "complete preemption doctrine." *See* Pet. at 19-25; *see also* HHS, Office of the Secretary, General Counsel, Advisory Op. 21-01 at 2 ("The PREP Act is a 'Complete Preemption' Statute"); U.S. Stmt. of Int., *supra* at 7 (same).[13]

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[12] *See, e.g.*, *Lloyd v. Heights Rehab. & Healthcare Ctr.*, No. CV-21-956977 (Ohio Ct. Com. Pl. Aug. 15, 2022); *Cacace v. Grandell Rehab. & Nursing Ctr., Inc.*, Index No. 610351/2021 (N.Y. Sup. Ct. July 18, 2022); *Crupi v. Heights of Summerlin LLC*, No. A-21-832741-C (Nev. Dist. Ct. June 20, 2022); *Scanlon v. The Heights of Summerlin LLC*, No. A-21-837212-C (Nev. Dist. Ct. June 15, 2022); *Whitehead v. Pine Haven Operating LLC*, Index No. E012022017995 (N.Y. Super. Ct. June 8, 2022); *Raquel v. Riverside Healthcare Ctr., Inc.*, Dkt. No. HHDCV216142225S, (Conn. Super. Ct. Feb 15, 2022); *Diarrassouba v. Elevate Care Chicago North, LLC*, No. 2020-L-11762 (Ill. Cir. Ct. Nov. 2, 2021).

[13] In *Martin v. Petersen Health Ops.*, *supra*, a Seventh Circuit panel asserted that the United States has not "filed a brief as *amicus curiae*, in any court, elaborating on the thinking behind the General Counsel's declarations." 37 F.4th at 1214. To the contrary, the Statement of Interest of the United States, filed in the U.S. District Court for the Middle District of Tennessee in *Bolton v. Gallatin Ctr. For Rehab. & Healing, LLC*, *supra*, is functionally equivalent to such a brief. *See* 28 U.S.C. § 517 (Interests of the United States in pending suits). The government's brief argues that the PREP Act is a "complete-preemption statute . . . [a covered] claim is necessarily federal and removable," and also that the HHS General Counsel's

The Court's opinion in *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308, 312-15 (2005), underscores the reasons why state-court liability suits that implicate the PREP Act's immunity or additional legal protections should be adjudicated solely by federal courts. In *Grable* the Court explained that it long has recognized "that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Id.* at 312. This doctrine "captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the *experience, solicitude, and hope of uniformity that a federal forum offers on federal issues*." *Id.*(emphasis added)*; see also England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 415-16 (1964) (acknowledging "the primacy of the federal judiciary in deciding questions of federal law"). Because one purpose of federal courts is to "secure the supremacy of federal law . . . a necessary corollary of supremacy is uniformity in the interpretation and application of federal law throughout the United States." Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 Loyola L. Rev. 535, 536 (2010); *see id.* at 540 (discussing "The Importance of Uniformity In the Interpretation of Federal Law").

Imagine the *lack* of national uniformity that would ensue if, absent the right to remove, 50 States' judicial

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Advisory Opinions construing the PREP Act should be accorded "considerable weight." U.S. Stmt. of Int. at 7, 13 n.5.

systems (and a multitude of state trial and appellate courts within each state system) were able to independently interpret PREP Act-related questions of federal law such as—

- the parameters of the PREP Act's *pivital* immunity-from-suit-and-liability provision, § 257d-6d(a), *e.g.*, the scope, meaning, or applicability of "covered person," "claims for loss," "causal relationship," and "covered countermeasure";

- the criteria governing the PREP Act's express preemption provision, § 247d-6d(b)(8), *e.g.*, the meaning of "a requirement applicable to a covered countermeasure," or of a State "provision of law or legal requirement that . . . is different from, or is in conflict with, any" applicable PREP Act requirement; or

- the scope, applicability of, and procedural and substantive requirements for, the PREP Act's "willful misconduct" exception to immunity, §§ 247d-6d(c) & (d).

Given the PREP Act's unique nature and overarching goal of providing immunity from both suit and liability to healthcare facilities and workers for the purpose of "*encouraging* the . . . dispensing, prescribing, administration . . . and use" of covered countermeasures that are urgently needed to address public health emergencies, § 247d-6d(b)(6) (emphasis added), it would defy common sense to believe that Congress wanted to relegate interpretation and application of the statute's key provisions to 50 state-judicial systems, rather than treating the PREP Act

as a "complete preemption" statute for removal purposes. In fact, there already are numerous COVID-19-related liability suits in which state courts have unjustifiably given short shrift to congressional intent and denied PREP Act-based motions to dismiss. *See, e.g.*, *supra* n.12.

Unlike state courts, "[t]he federal courts comprise a single system applying a single body of law." *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962). The federal judicial system—not 50 independent state-judicial systems—provides the appropriate judicial forum for interpreting and applying the PREP Act's immunity provision.

An article quoting the views of Professor James G. Hodge Jr., an expert on public health law at the Sandra Day O'Connor College of Law, Arizona State University, highlights the reasons why interpreting and applying the PREP Act should not be left to a multitude of state courts:

> Congress "didn't write the PREP Act to let it be subject to 50 states' interpretations," said James G. Hodge Jr., a professor at the Sandra Day O'Connor College of Law at Arizona State University.
>
> The 2005 law was designed to provide a uniform level of protection for entities addressing emergencies, and having nursing homes subject to massive claims in one state but not in the next is at odds with responding on a national basis to threats like COVID-19, Hodge said.

> "You cannot tamp down a national pandemic with some loosey-goose series of claims that can rise in some states but not others," Hodge said. "The PREP Act —can't be any clearer —was designed to obviate that."
>
> By allowing such state claims to go forward, "you're derailing the PREP Act," he said.

Bill Wichert, Law360, *3rd Circ. Risks Twisting COVID Immunity Law Into Pretzel* (Nov. 15, 2021).[14]

C. The continuing threat of state-court COVID-19 liability suits will deter healthcare facilities and workers from providing essential medical services during public health emergencies

The Secretary of HHS's Declaration Under the PREP Act for Medical Countermeasures Against COVID-19, and the series of Amendments to the Declaration, are intended to serve a singular, critical purpose: "to provide liability immunity for activities related to medical countermeasures against COVID-19." 85 Fed. Reg. at 15,198. Because this immunity is "without geographic limitation," *id.* at 15,201, it enables a "unified, whole-of-nation response," 87 Fed. Reg. at 983, by protecting healthcare facilities and

[14] *Available at* https://www.law360.com/articles/1440187/3rd-circ-risks-twisting-covid-immunity-law-into-pretzel.

workers from litigation and liability under state or federal law *anywhere* in the United States.

At the outset of the pandemic, the New York Times estimated that over 90,000 individuals volunteered to provide emergency medical services in New York alone.[15] An enormous number of hospitals, nursing homes, and other healthcare facilities also joined the battle. These and tens of thousands of volunteer healthcare providers throughout the United States demonstrated that "[a]n effective response to national health emergencies depends on the prompt and willing cooperation of private partners." U.S. Stmt. of Int., *supra* at 9. Indeed, the Department of Homeland Security (DHS) has designated healthcare workers as part of the nation's "essential critical infrastructure" for combatting the COVID-19 pandemic, and because they are "so vital [to] national public health," has issued guidance to protect their health and safety. *See* DHS Cybersecurity & Infrastructure Security Agency, Guidance on the Essential Critical Infrastructure Workforce (Aug. 10, 2021).[16]

But with the benefit of hindsight, it seems unlikely that during the next public health crisis, armies of healthcare providers will volunteer for frontline duty if, contrary to the PREP Act, they are vulnerable to

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[15]*See* Nicole Hong, *Volunteers Rushed to Help New York Hospitals. They Found a Bottleneck*, N.Y. Times (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/nyregion/coronavirus-new-york-volunteers.html.

[16]https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19.

high-stakes, state-court personal-injury or wrongful-death suits, much less liability for the essential medical services that they provide. In other words, enabling 50 state-court systems to interpret and apply the PREP Act's exceedingly strict limitations on pursuing liability suits would chill both intrastate and interstate volunteerism. Federal district courts and courts of appeals, however, can be expected to provide a more uniform approach to the PREP Act's immunity provision and additional legal protections. This uniformity of decision will make public health emergency volunteers' legal exposure more manageable and legal risks more predictable, and thus much less of a deterrent.

For all of these reasons, removal of state-court suits that implicate the PREP Act is an essential adjunct to the nearly absolute immunity from suit and liability that this completely preemptive federal statute guarantees to healthcare facilities and workers. Therefore, an opinion by this Court holding that such suits are removable is critical to the nation's ability to address public health crises such as the ongoing COVID-19 pandemic.

CONCLUSION

The Petition For a Writ of Certiorari should be granted.

Respectfully submitted,

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