Nos. 20-2833, 20-2834

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ESTATE OF JOSEPH MAGLIOLI, *et al.*,

Plaintiffs and Appellees,

v.

ALLIANCE HC HOLDINGS LLC, *et al.*,

Defendants and Appellants.

On Appeal from the United States District Court
for the District of New Jersey, No. 2-20-cv-06605
Hon. Kevin McNulty, U.S. District Judge

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

During the COVID-19 pandemic, America's businesses and healthcare providers have faced extraordinary challenges. The just and efficient resolution of tort litigation arising from the COVID-19 pandemic, and the adjudication of such disputes in a proper forum, is of great concern to the Chamber and its members.

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

Accordingly, the Chamber has a strong interest in the proper interpretation of the Public Readiness and Emergency Preparedness ("PREP") Act, 42 U.S.C. §§ 247d-6d, 247d-6e, which affords healthcare providers, manufacturers, distributors, and other entities involved in the response to the pandemic important protections, including immunity from most tort liability and access to a federal forum in cases implicating the Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents an issue of exceptional importance: the proper interpretation of a federal statute regulating the nation's emergency response during a once-in-a-century global health emergency.

The impact of the COVID-19 pandemic on American business has been felt far and wide. And healthcare providers—including the senior care and other long-term-care providers that serve America's most vulnerable populations—have faced especially severe challenges. Despite the heroic efforts of America's healthcare workers, more than

750,000 Americans have died—the vast majority of them over age 65.[2] Often short-staffed and hamstrung by nationwide shortages of personal protective equipment, testing kits, and other pandemic countermeasures, hundreds of senior care facilities have closed or today teeter on the edge of bankruptcy.[3] These serious challenges for healthcare providers are compounded by the threat of thousands of lawsuits alleging that the negligent or improper administration of infection control policies caused residents to acquire COVID-19. A major issue in many of these cases, which have been filed in state courts across the country, is the availability of federal removal jurisdiction.

Over a decade ago, Congress recognized the possibility of a nationwide public health emergency like COVID-19, and expressly

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[2] CDC, *Weekly Updates by Select Demographic and Geographic Characteristics* (Nov. 17, 2021), https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm#SexAndAg.

[3] Press Release, Am. Health Care Ass'n, *Nursing Homes Need Financial Support to Prevent Mounting Closures* (June 17, 2021), https://www.ahcancal.org/News-and-Communications/Press-Releases/Pages/Nursing-Homes-Need-Financial-Support-To-Prevent-Mounting-Closures.aspx; Tony Pugh, *Bankruptcies, Closures Loom for Nursing Homes Beset by Pandemic*, Bloomberg Law (Dec. 30, 2020), https://news.bloomberglaw.com/health-law-and-business/bankruptcies-closures-loom-for-nursing-homes-beset-by-pandemic.

provided certain protections for those on the front line of responding to it, in the PREP Act, 42 U.S.C. §§ 247d-6d, 247d-6e. The PREP Act affords broad immunity from tort liability to individuals and entities involved in the administration, manufacture, distribution, use, or allocation of pandemic countermeasures. Crucially, rather than leave the adjudication of disputes arising from a national emergency response to disparate state courts across the country, Congress established an exclusive federal remedial scheme and expressly preempted state law that might interfere with that scheme. This structure, combining preemption with exclusive federal remedies, is the defining feature of a "complete preemption" statute, which creates federal removal jurisdiction even when claims are pleaded under state law. *See, e.g.*, *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003) (National Bank Act); *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (ERISA); *Avco Corp. v. Aero Lodge No. 1735, Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968) (Labor Management Relations Act).

The panel's decision in this case upends Congress's carefully calibrated scheme. The panel correctly identified the PREP Act as a "complete preemption" statute. But then, instead of allowing removal of

a broad class of tort claims arising from the administration of pandemic countermeasures—as the text, structure, and purpose of the Act require—the panel reasoned that the Act provides an exclusive cause of action only for "willful misconduct," not negligence, and therefore completely preempts only state-law claims for willful misconduct. ECF No. 79 ("Op.") at 21–22. This requirement of a one-to-one correspondence between the state-law claim and the federal cause of action is inconsistent with Supreme Court precedent, which makes clear that the elements of a state claim need not "precisely duplicate" the federal claim for complete preemption to apply. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 215–16 (2004). The Chamber accordingly urges the Court to grant rehearing en banc.

ARGUMENT

I. The Panel's Decision Involves a Question of Exceptional Importance

A. COVID-19 Has Posed Unprecedented Challenges for American Businesses, Especially Healthcare Providers

The COVID-19 pandemic has tested the resilience of American business like nothing before. As a result of the pandemic and the ensuing lockdowns, more than a million American businesses closed their doors—

many of them permanently.[4] In responding to this emergency, businesses and healthcare providers have had to adapt to rapidly changing circumstances and evolving guidance from public health officials on key issues ranging from the utility of face masks,[5] to the mode of viral transmission,[6] to unprecedented restrictions on their operations.[7] Even today, information about COVID-19 continues to evolve.

Healthcare and senior care providers have been especially hard hit. A delayed rollout of COVID-19 test kits, followed by months of shortages, hampered detecting the virus where it might do most harm, including at senior care and other long-term-care facilities that serve predominantly the elderly and infirm. Meanwhile, a severe nationwide shortage of

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[4] Ruth Simon, *COVID-19 Shuttered More Than 1 Million Small Businesses*, N.Y. Times (Aug. 1, 2020), https://www.wsj.com/articles/covid-19-shuttered-more-than-1-million-small-businesses-here-is-how-five-survived-11596254424?mod=article_relatedinline.

[5] Zaynep Tufekci, *Why Telling People They Don't Need Masks Backfired*, N.Y. Times (Mar. 17, 2020), https://www.nytimes.com/2020/03/17/opinion/coronavirus-face-masks.html.

[6] Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors, W.H.O. Says*, N.Y. Times (July 9, 2020), https://www.nytimes.com/2020/07/09/health/virus-aerosols-who.html?.

[7] *See* U.S. Chamber of Commerce, *Why Temporary Coronavirus Liability Relief Is Needed for American Business*, https://www.uschamber.com/report/why-temporary-coronavirus-liability-relief-needed-american-businesses.

respirator masks and other personal protective equipment, which persisted well into the course of the pandemic, required difficult decisions about how to allocate scarce resources and hindered providers' ability to protect front-line workers and patients.[8]

Not surprisingly, senior care facilities, with their vulnerable populations and communal living arrangements, experienced some of the worst effects. Of the more than 750,000 Americans who have died from COVID-19, more than 185,000 have been residents or staff members of senior care facilities.[9] Despite the efforts of the nation's healthcare workers, many of whom risked their own lives to protect the vulnerable, the sheer scale of the tragedy makes the potential for litigation enormous.

The pandemic wreaked havoc that has left the long-term care sector in dire straits. There are nearly 30,000 assisted living facilities and more

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[8] *See* Andrew Jacobs, *Health Care Workers Still Face Daunting Shortages of Masks and Other P.P.E.*, N.Y. Times (Dec. 20, 2020), https://www.nytimes.com/2020/12/20/health/covid-ppe-shortages.html; Peter Whoriskey et al., *Hundreds of Nursing Homes Ran Short on Staff, Protective Gear as More Than 30,000 Residents Died During Pandemic,* Wash. Post (June 4, 2020), https://www.washingtonpost.com/business/2020/06/04/nursing-homes-coronavirus-deaths/.

[9] AARP, *AARP Nursing Home COVID-19 Dashboard* (Nov. 10, 2021) https://www.aarp.org/ppi/issues/caregiving/info-2020/nursing-home-covid-dashboard.html.

than 15,000 skilled nursing facilities nationwide.[10] The long-term care industry is expected to lose $94 billion from 2020 to 2021, and more than 1,600 skilled nursing facilities could close this year, leaving vulnerable seniors in search of new homes, caretakers, and communities.[11] Meanwhile, more and more seniors will likely need long-term care services, as the number of Americans over age 80 is expected to triple over the next three decades.[12] By weakening the PREP Act's protections for healthcare providers, the panel's decision exacerbates this mounting national crisis.

B. The Panel's Decision Undermines the PREP Act's Critical Safeguards for Front-Line Responders

Congress foresaw that a pandemic could create circumstances like those seen with COVID-19, with businesses reeling and healthcare providers struggling to protect people from novel threats under a shadow of crippling liability. In enacting the PREP Act, Congress did not

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[10] CDC, *Nursing Home Care* (Mar. 1, 2021), https://www.cdc.gov/nchs/fastats/nursing-home-care.htm.

[11] *Id.*

[12] Nat'l Ctr. for Health Statistics, Long-Term Care Providers and Services Users in the United States, 2015–2016, at 3 (2019), https://www.cdc.gov/nchs/data/series/sr_03/sr03_43-508.pdf.

preempt all tort claims arising from a pandemic. But it did seek to shield those on the front line of defending the American population against a pandemic from liability that might prevent them from continuing to operate and perform their critical functions. When those front-line responders are faced with lawsuits alleging tort liability, the Act also ensures access to a federal forum, even when plaintiffs try to plead their claims in terms of state law.

In public health emergencies, the government works hand-in-hand with private sector partners, including healthcare providers, who generally lack the protection from liability enjoyed by public officials. *See* Peggy Binzer, *The PREP Act: Liability Protection for Medical Countermeasure Development, Distribution, and Administration*, 6 Biosecurity & Bioterrorism 1 (2008). Enacted shortly after a different coronavirus outbreak, the SARS epidemic of 2003, the PREP Act addresses this concern by providing "targeted liability protection" for a range of pandemic response activities called for by the HHS Secretary, including the development, distribution, and dispensing of medical countermeasures, as well as the design and administration of countermeasure policies. *See* 42 U.S.C. § 247d-6d. That immunity has

proved crucial to America's integrated national response to COVID-19. For example, the lack of equivalent protections in other countries has hindered the rollout of vaccines that could save untold numbers of lives.[13]

At the same time, to ensure the uniform and efficient resolution of disputes relating to countermeasures, the PREP Act establishes an exclusive federal remedial scheme. *See id* §§ 247d-6d, 247d-6e (specifically noting interest in "timely" and "uniform" adjudication). Forcing litigation over the PREP Act, including the scope of its applicability and the immunity it affords, to play out across 50 state court systems would defeat Congress's purpose of ensuring uniformity and efficiency.

The stakes are high. Trial lawyers have spent tens of millions of dollars on advertisements related to COVID-19, and more than 10,000 lawsuits have already been filed—in every state, from Alaska and Hawaii to Alabama and New Hampshire.[14] The panel's decision provides a

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[13] *See, e.g.*, Neha Arora et al., *India, Pfizer Seek to Bridge Dispute Over Vaccine Indemnity*, Reuters (May 21, 2021), https://www.reuters.com/business/healthcare-pharmaceuticals/india-pfizer-impasse-over-vaccine-indemnity-demand-sources-2021-05-21/.

[14] Am. Tort Reform Ass'n, COVID-19 Legal Services Television Advertising (2021), https://www.atra.org/white_paper/covid-19-legal-services-television-advertising/; Hunton Andrews Kurth, *COVID-19*

roadmap for plaintiffs in these myriad jurisdictions to plead around the PREP Act's complete preemption regime by avoiding explicit references to scienter in describing alleged misconduct. As the first circuit court of appeals decision to address the complete preemption issue, it is especially important for the en banc court to give the question careful consideration and ensure that the proper legal framework is applied.

In sum, the PREP Act reflects Congress's recognition that a national emergency like COVID-19 requires a whole-of-nation response. And it therefore provides the Secretary with a comprehensive national regulatory tool to encourage the development of designated countermeasures, while limiting liability for loss related to the administration of such countermeasures and ensuring adjudication of such liability in a federal forum. In holding that the PREP Act is a complete preemption statute, the panel acknowledged this congressional design, but opened a gaping hole in it by making removal of tort claims turn not on their substance but on the degree of scienter (*i.e.*, negligence vs. willfulness) with which plaintiffs choose to label those claims. That

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Complaint Tracker (2021), https://www.huntonak.com/en/covid-19-tracker.html.

decision was not only illogical, but inconsistent with Supreme Court precedent.

II. The Panel's Decision Is Contrary to Supreme Court Precedent on Complete Preemption

The Supreme Court's test for complete preemption is whether federal law "not only preempts a state law to some degree but also substitutes a federal cause of action for the state cause of action, thereby manifesting Congress's intent to permit removal." *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 294 (3d Cir. 2005); *accord Beneficial Nat'l Bank*, 539 U.S. at 8. Nothing in that test suggests that the federal substitute must be coextensive with the underlying state-law claim; indeed, such a rule would be puzzling because Congress might well intend to replace certain state-law claims with more tailored federal remedies. As Judge Boudin observed, "[f]or complete preemption to operate, the federal claim need not be co-extensive with the ousted state claim." *Fayard v. Ne. Vehicle Servs., LLC*, 533 F.3d 42, 46 (1st Cir. 2008). On the contrary, "the superseding federal scheme may be more limited or different in its scope and still completely preempt." *Id.* (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n.4 (1987)).

And that is precisely how the PREP Act works. First, the Act displaces state-law tort claims within a defined area, regardless of scienter. Section 247d-6d(a) provides "immun[ity] 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." 42 U.S.C. § 247d-6d(a) (emphasis added). Then the Act creates, as the "sole exception" to the immunity conferred by subsection (a), "an exclusive Federal cause of action" for claims of willful misconduct causing death or serious injury. 42 U.S.C. § 247d-6d(d)(1).

The panel held that the Act does not completely preempt state-law negligence claims because the only judicial remedy it provides is for "willful misconduct," rather than negligence. Op. at 27–29. But the Supreme Court has rejected that mirror-image approach to complete preemption. As the Court has made clear in the ERISA context, complete preemption has never been "limited to the situation in which a state cause of action precisely duplicate[d] a cause of action under [the federal statute]." *Aetna Health*, 542 U.S. at 215–16. The Court explained that such an approach would not "be consistent with our precedent," because

"Congress's intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that *supplement* the [ERISA] remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim." *Id.* (emphasis added).

The same goes for the PREP Act. Indeed, the PREP Act's preemption provision employs the same key language—"relating to"—as ERISA. 42 U.S.C. § 247d-6d(a). The Supreme Court has repeatedly recognized that the term "relat[ing] to" has a "broad common-sense meaning." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (internal quotation marks omitted). This powerfully preemptive language confirms that state-law negligence claims—which supplement the remedies Congress chose to make available in the PREP Act—are completely preempted. In reaching the opposite result, the panel failed to apply a basic principle of federal jurisdiction: "[t]he nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy." *Caterpillar*, 482 U.S. at 391 n.4 (quoting *Avco Corp.*, 390 U.S. at 561). In addition to the importance of the issue in its own right, this

misapplication of the Court's precedent makes the case for en banc review all the more compelling.

CONCLUSION

For the reasons set forth above, this Court should grant Appellants' petition for rehearing en banc.

Respectfully submitted,

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November 23, 2021

CERTIFICATE OF COMPLIANCE

1. Pursuant to Local Rule 28.3(d), I hereby certify that the attorneys whose names appear on this brief are members of the bar of this Court.

2. This brief complies with the type-volume requirements of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2,595 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

3. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) and 3d Cir. L.A.R. 32.1(c) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in Century Schoolbook 14-point font.

4. Pursuant to Local Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the paper copies, and that it has been scanned for viruses using McAfee Endpoint Security, Version 10.7.1, and no virus was detected.

Dated: November 23, 2021

s/ Jeffrey S. Bucholtz
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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the appeal are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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