

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 21-2729 Caption [use short title]

Motion for: leave to file amicus curiae brief in support of appellants

Set forth below precise, complete statement of relief sought:
Movant seeks leave to file the attached brief in support of appellant arguing that the PREP Act is a complete preemption statute

Solomon v. St. Joseph Hospital

MOVING PARTY: Chamber of Commerce of the United States OPPOSING PARTY: Zachary Solomon

Plaintiff Defendant
Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Jeffrey S. Bucholtz OPPOSING ATTORNEY: N/A
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Court- Judge/ Agency appealed from: EDNY - Hon. Frederic Block

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has this request for relief been made below? Yes No
Has this relief been previously sought in this court? Yes No
Requested return date and explanation of emergency:

Opposing counsel's position on motion:
Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
Yes No Don't Know

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)
Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney:

/s/ Jeffrey S. Bucholtz Date: 2/23/23 Service by: CM/ECF Other [Attach proof of service]

No. 21-2729

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, No. 20-cv-3213

**MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE*
THE CHAMBER OF COMMERCE OF THE UNITED STATES OF
AMERICA, AMERICAN HOSPITAL ASSOCIATION, AMERICAN
MEDICAL ASSOCIATION, AND MEDICAL SOCIETY OF THE
STATE OF NEW YORK IN SUPPORT OF APPELLANTS**

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February 23, 2023

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America (“Chamber”) 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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The American Medical Association (“AMA”) is a non-profit, tax-exempt organization incorporated in the state of Illinois. AMA has no parent company, and no publicly held company has 10% or greater ownership in the AMA.

The Medical Society of the State of New York (“MSSNY”) is a non-profit, tax-exempt organization incorporated in the state of New York. MSSNY has no parent company, and no publicly held company has 10% or greater ownership in MSSNY.

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICI CURIAE*

The Chamber of Commerce of the United States of America, the American Hospital Association, the American Medical Association, and the Medical Society of the State of New York respectfully move for leave to file the accompanying brief as *amici curiae* in support of Defendants-Appellants. Counsel for *amici* sought consent from the parties, who all consented. Counsel also sought consent from the court-appointed *amicus*, who stated that he takes no position on this motion.

The Chamber 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.

The American Hospital Association is a national organization that represents nearly 5,000 hospitals, healthcare systems, networks, and other providers of care. AHA members are committed to improving the health of the communities that they serve and to helping ensure that care is available to and affordable for all Americans. The AHA provides extensive education for healthcare leaders and is a source of valuable information and data on healthcare issues and trends. It ensures that members' perspectives and needs are heard and addressed in national health-policy development, legislative and regulatory debates, and judicial matters. One way in which the AHA promotes the interests of its members is by participating as *amicus curiae* in cases with important and far-ranging consequences for its members.

The American Medical Association is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of

public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including New York. The AMA and the Medical Society of the State of New York join this brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state and the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

MSSNY is an organization of over 20,000 licensed physicians, medical residents, and medical students in New York State. Members participate in both the state society and in their local county medical societies. MSSNY is a non-profit organization committed to representing the medical profession as a whole and advocating health-related rights, responsibilities, and issues. MSSNY strives to promote and maintain high standards in medical education and in the practice of medicine in an effort to ensure that quality medical care is available to the public.

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 *amici* and their members.

Accordingly, *amici* have 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, 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.

The Chamber has also filed briefs in numerous other cases, including two pending appeals in this Court, that present similar issues: *Leroy v. Hume* (2d Cir. Jan. 3, 2022) (No. 21-2158); *Rivera-Zayas v. Our Lady of Consolation Geriatric Care Ctr.* (2d Cir. Jan. 3, 2022) (No. 21-2164); *Maglioli v. Alliance HC Holdings, LLC* (3d Cir. Nov. 23, 2021) (No. 20-2833); *Mitchell v. Advanced HCS, L.L.C.* (5th Cir. Aug. 10, 2021) (No. 21-10477); *Hudak v. Elmcroft of Sagamore Hills* (6th Cir. June 8, 2022) (No. 21-3836); *Martin v. Petersen Health Operations, LLC* (7th Cir. Jan. 31, 2022) (No. 21-2959); *Cagle v. NHC Healthcare-Maryland Heights, LLC* (8th Cir. Nov. 4, 2022) (No. 22-2757); *Saldana v. Glenhaven Healthcare LLC* (9th Cir. Mar. 30, 2022) (No. 20-56194); *McCalebb v. AG*

Lynwood, LLC (9th Cir. Oct. 20, 2021) (No. 21-55302); *Lyons v. Cucumber Holdings, LLC* (9th Cir. Aug. 17, 2021) (No. 21-55185); *Garcia v. Welltower OpCo Grp. LLC* (9th Cir. June 16, 2021) (No. 21-55224); and *Schleider v. GVDB Operations, LLC* (11th Cir. July 27, 2021) (No. 21-11765).

Amici believe that their perspective on the issue presented and its proper resolution may assist the Court in its deliberations as it considers this appeal. The Court's appointment of an *amicus*, and the Court's receipt of a brief from another *amicus*, Dkt. 86, testify to the importance of this case and the issues it raises. To avoid delay, *amici* are filing this motion and the attached brief on the due date for the parties' responses to the court-appointed *amicus's* brief, and *amici* have limited the brief to ten pages, consistent with the Court's June 16, 2022 order. Dkt. 53. Accordingly, *amici* respectfully request that the Court grant leave to file the attached brief.

Respectfully submitted,

s/ Jeffrey S. Bucholtz

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February 23, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 931 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This motion 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 proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Date: February 23, 2023

s/ Jeffrey S. Bucholtz _____
Jeffrey S. Bucholtz

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Jeffrey S. Bucholtz _____
Jeffrey S. Bucholtz

No. 21-2729

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INTEREST OF *AMICI CURIAE*¹

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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 *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

As a result of the once-in-a-century worldwide health emergency created by COVID-19, healthcare providers have faced dire challenges. Within three years, despite the heroic efforts of America's healthcare workers, more than a million Americans have died.² Meanwhile, hospitals struggled to keep their doors open as they confronted surges in COVID-19 and other respiratory illnesses, sharp drop-offs in revenue-generating non-emergency procedures, and staffing shortages.³

These serious challenges have been compounded by the threat of thousands of lawsuits alleging injuries relating to the administration of COVID-19 countermeasures. 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. While some cases arising from COVID-19

² CDC, *Weekly Updates by Select Demographic and Geographic Characteristics* (Feb. 22, 2023), https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm#SexAndAg.

³ Andrew Jacobs & Roni Caryn Rabin, *Flu and R.S.V. Hit the Holidays, Heightening Demand for Antibiotics and Antivirals*, N.Y. Times (Nov. 23, 2022), <https://www.nytimes.com/2022/11/23/health/drug-shortages-flu-holidays.html?>; John Tozzi et al., *Omicron Lands in U.S. With Hospitals Still Battered by Covid*, Bloomberg (Dec. 2, 2021), <https://www.bloomberg.com/news/articles/2021-12-02/omicron-lands-in-u-s-with-hospitals-already-battered-by-covid>.

may be appropriately adjudicated in state court, in other cases, including this one, defendants are entitled to a federal forum.

Over a decade ago, Congress recognized the possibility of a public health emergency much like COVID-19 and enacted the PREP Act to guarantee protections for front-line responders. The PREP Act affords broad immunity from suit and liability for claims “relating to” the administration or use of pandemic countermeasures. 42 U.S.C. § 247d-6d(a)(1). Rather than leave the adjudication of such disputes to state courts across the country, Congress established an exclusive federal remedial scheme. Together, the provisions of the PREP Act manifest the “extraordinary pre-emptive power” that the Supreme Court has identified as the hallmark of a “complete preemption” statute. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987).

ARGUMENT

I. COVID-19 Has Posed Unprecedented Challenges for Healthcare Providers.

The COVID-19 pandemic has tested the resilience of the American healthcare system like nothing before. At the outset of the pandemic, healthcare providers confronted a novel, fast-moving threat that no one, not even the nation’s top public health experts, fully understood or

anticipated.⁴ In responding to this emergency, healthcare providers had to adapt to rapidly changing circumstances and evolving scientific information about issues such as the utility of face masks,⁵ the mode of viral transmission,⁶ and best practices for patients on ventilators.⁷

The strain on hospitals and healthcare workers has been extreme.⁸

Despite the best efforts of the nation's healthcare workers, who delivered

⁴ See Liz Szabo, *Many U.S. Health Experts Underestimated the Coronavirus . . . Until It Was Too Late*, Kaiser Health News (Dec. 21, 2020), <https://khn.org/news/article/many-us-health-experts-under-estimated-the-coronavirus-until-it-was-too-late/>.

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 Carrie MacMillan, *Ventilators and COVID-19: What You Need to Know*, Yale Med. (June 2, 2020), <https://www.yalemedicine.org/news/ventilators-covid-19#:~:text=If%20lung%20function%20has%20been,to%20support%20breathing%20during%20surgery.>

⁸ HHS, Office of the Assistant Sec'y for Planning & Evaluation, HP-2022-13, *Impact of the COVID-19 Pandemic on the Hospital and Outpatient Clinician Workforce: Challenges and Policy Responses 1* (May 3, 2022), <https://aspe.hhs.gov/sites/default/files/documents/9cc72124abd9ea25d58a22c7692dcc6/aspe-covid-workforce-report.pdf> (noting that “[t]he COVID-19 pandemic has put extreme stress on the health care workforce . . . leading to workforce shortages as well as increased health care worker burnout, exhaustion, and trauma” which “will likely persist” even after the pandemic).

care under extraordinary circumstances to protect the vulnerable, the sheer scale of the tragedy makes the potential for litigation enormous. Nearly 20,000 lawsuits have already been filed.⁹ With inflation rising and federal aid dwindling, the nation faces more hospital closures and reduced access to care for patients in need.¹⁰

II. The PREP Act Is a “Complete Preemption” Statute.

In enacting the PREP Act, Congress sought to shield those on the front line defending the American population against a pandemic—including those involved in administering federally designated countermeasures—from liability that might prevent them from continuing to perform their critical functions. The Act also ensures that those front-line responders have access to a federal forum. Under the “complete preemption” doctrine, claims pleaded under state law are removable to federal court where a federal statute has such “unusually ‘powerful’ pre-emptive force” that the claims are deemed to arise under

⁹ Hunton Andrews Kurth, *COVID-19 Complaint Tracker* (2023), <https://www.huntonak.com/en/covid-19-tracker.html>.

¹⁰ *Report: Hospitals face worst year financially since start of COVID-19 pandemic, jeopardizing access to patient care*, Am. Hosp. Ass’n (Sept. 15, 2022), <https://www.aha.org/news/headline/2022-09-15-report-hospitals-face-worst-year-financially-start-covid-19-pandemic>.

federal law. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 7 (2003). Both the Department of Health and Human Services and the Department of Justice have identified the PREP Act as such a “complete preemption” statute. *See* Advisory Op. No. 21-01 at 1 (HHS Jan. 8, 2021); DOJ Statement of Interest, *Bolton v. Gallatin Ctr. for Rehab. & Healing, LLC*, No. 20-cv-00683 (M.D. Tenn. Jan. 19, 2021), ECF No. 35-1.

A. The Text, Structure, and Purpose of the PREP Act Establish That It Completely Preempts State-Law Tort Claims Within Its Scope.

To trigger complete preemption, a federal statute need only (1) “preempt[] state law” and (2) “substitute[] a federal remedy for that law, thereby creating an exclusive federal cause of action.” *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 305 (2d Cir. 2004). The PREP Act does both. First, the Act preempts state-law tort claims within a particular area. *See* 42 U.S.C. § 247d-6d(a) (providing “immun[ity] from suit and liability . . . 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 (express preemption clause). Second, the Act provides substitute remedies for claims within that preempted area. *See* § 247d-6d(d)(1),

(d)(5) (“exclusive Federal cause of action” in D.D.C. for claims of “willful misconduct”); *id.* § 247d-6e(a) (no-fault administrative claim with “Covered Countermeasure Process Fund”).

This structure, combining preemption with exclusive federal remedies, is the defining feature of a “complete preemption” statute. *See, e.g., Beneficial Nat’l Bank*, 539 U.S. 1 (National Bank Act); *Metro. Life*, 481 U.S. 58 (ERISA); *In re WTC Disaster Site*, 414 F.3d 352 (2d Cir. 2005) (Air Transportation Safety and System Stabilization Act, or “ATSSSA”); *Briarpatch*, 373 F.3d at 305 (Copyright Act). Like these statutes, the PREP Act “supersede[s] both the substantive and the remedial provisions” of the relevant state law “and create[s] a federal remedy . . . that is exclusive.” *Beneficial Nat’l Bank*, 539 U.S. at 11. And the Act likewise “set[s] forth procedures and remedies governing that cause of action.” *Id.* at 8; *see* 42 U.S.C. § 247d-6d(e). The Act bears an especially close resemblance to ATSSSA, 49 U.S.C. § 40101, whose main components included immunity for the airlines, a Victim Compensation Fund, and an exclusive cause of action in S.D.N.Y. *See In re WTC Disaster Site*, 414 F.3d at 373. Based on these features, which closely parallel the

components of the PREP Act, this Court identified ATSSSA as a “complete preemption” statute. *Id.* at 373, 380.

Some district courts have attempted to distinguish ATSSSA from the PREP Act on the ground that ATSSSA provided a broader substitute remedy. *See, e.g., Dupervil v. All. Health Operations, LLC*, 516 F. Supp. 3d 238, 249–52 (E.D.N.Y. 2021). The court-appointed amicus makes the same error. *See* Br. 22–23 (asserting that negligence is “entirely different” from “willful misconduct” (emphasis and quotation marks omitted)). But that mirror-image approach to complete preemption is neither logical nor consistent with precedent. 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 Inc. v. Davila*, 542 U.S. 200, 215–16 (2004). Indeed, this Court has already held that a difference in scienter does not render a state law claim “qualitatively different” from a federal claim for purposes of complete preemption. *Briarpatch*, 373 F.3d at 306. If that kind of distinction is not sufficient, neither is the fact that the PREP Act’s federal cause of action is limited to claims alleging “serious injury or death.” *See*

Court-Appointed Amicus Br. 2, 23–24 (attempting to distinguish *Briarpatch* on that ground).¹¹

B. Complete Preemption Under the PREP Act Encompasses All Claims Related to the Use or Administration of Covered Countermeasures.

Consistent with the Act’s purpose of providing “targeted” liability protection and facilitating the efficient deployment of countermeasures, the Act provides immunity only for claims “relating to . . . the administration to or the use by an individual of a covered countermeasure.” 42 U.S.C. § 247d-6d(a). The HHS Secretary’s Declaration designating COVID-19 countermeasures defines “administration” to include “physical provision” of countermeasures as well as “activities and decisions directly relating to . . . dispensing” of countermeasures. 85 Fed. Reg. 15,198, 15,200 (Mar. 17, 2020). This category may include even a “slip-and-fall injury . . . by a recipient receiving a countermeasure at a retail store.” *Id.*; see, e.g., *Storment v. Walgreen, Co.*, No. 1:21-CV-00898, 2022 WL 2966607, at *3 (D.N.M. July 27, 2022).

¹¹ In any event, the district court here found that Plaintiff’s complaint “alleged willful misconduct.” JA73 n.1. The complaint also expressly alleges “severe and serious” injuries. JA25 ¶ 23.

Here, the district court acknowledged that Plaintiff's injuries occurred while he was being treated for COVID-19 with a ventilator, which is "undisputed[ly]" a covered countermeasure. JA71. Yet the court held that the claims were not "inextricably intertwined" with the use of the ventilator. JA72. That reasoning misstates the relevant standard. PREP Act immunity extends to "*all* claims for loss . . . *relating to*" the administration or use of a covered countermeasure. 42 U.S.C. § 247d-6d(a)(1) (emphasis added). "The ordinary meaning of ['relating to'] is a broad one." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992); *see also id.* at 383–84 ("deliberately expansive" and "conspicuous for its breadth" (quotation marks omitted)). Under ERISA, for example, a state law "relate[s] to" a benefit plan if it has a "connection with" that plan. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987) (quotation marks omitted). Given Congress's use of identical language in the PREP Act, this Court should give it similar effect here.

CONCLUSION

This Court should vacate the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Second Circuit Local Rule 32.1(a)(4) because this brief is not longer than 10 double-spaced pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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 this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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