No. 20-56194

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JACKIE SALDANA; CELIA SALDANA; RICARDO SALDANA, JR.; MARIA SALDANA, as individuals and as successors and heirs to Ricardo Saldana, deceased,

Plaintiffs-Appellees,

v.

GLENHAVEN HEALTHCARE LLC, a California corporation; CARAVAN OPERATIONS CORP., a California corporation; MATTHEW KARP, an individual; BENJAMIN KARP, an individual,

Defendants-Appellants.

On Appeal from the United States District Court for the Central District of California, No. 2:20-cv-05631-FMO-MAA
The Honorable Fernando M. Olguin, District Judge

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN HOSPITAL ASSOCIATION IN SUPPORT OF THE PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the Chamber of Commerce of the United States of America states that it is a non-profit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* the American Hospital Association states that it is a non-profit corporation organized under the laws of Illinois. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

Date: March 30, 2022

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INTEREST OF *AMICI 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.

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

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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. The parties have consented to the filing of this brief.

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, like this one, with important and far-ranging consequences for its members.

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, 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, nearly a million 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 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

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[2] CDC, *Weekly Updates by Select Demographic and Geographic Characteristics* (Mar. 23, 2022), https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm#SexAndAg.

[3] *See, e.g.*, John George, *'A Heck of a Beating': Staffing and Funding Shortages Have Many Nursing Homes on the Ropes*, Phila. Bus. J. (Dec. 2, 2021), https://www.bizjournals.com/philadelphia/news/2021/12/02/.

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 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, 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. Instead of recognizing the PREP Act as a "complete preemption" statute and 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 "is not a complete preemption statute." ECF No. 57-1 ("Op.") at 14–15. This holding contradicts the Third Circuit's conclusion that the PREP Act *is* a complete preemption statute—at least with respect to willful misconduct claims. *See Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 409 (3d Cir. 2021). And as to the negligence claims, the panel-imposed 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 panel's holding in the alternative—that even if Plaintiffs' willful misconduct claim is completely preempted, there is no federal jurisdiction because the other claims are not completely preempted, *see* Op. 15–16—conflicts with Ninth Circuit precedent rejecting that exact argument. The Chamber accordingly urges this 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

[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.

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. 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 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.[7] Despite the efforts of the

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[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* 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,*

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. More than 200,000 residents and staff of long-term care facilities have died as a result of COVID-19,[8] and 32 to 40 percent of current residents live in facilities that could close due to financial strain,[9] leaving vulnerable seniors in search of new homes, caretakers, and communities. 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.[10] By weakening the PREP Act's

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Wash. Post (June 4, 2020), https://www.washingtonpost.com/business/2020/06/04/nursing-homes-coronavirus-deaths/.

[8] Kaiser Family Found., *Over 200,000 Residents and Staff in Long-Term Care Facilities Have Died From COVID-19* (Feb. 3, 2022), https://www.kff.org/policy-watch/over-200000-residents-and-staff-in-long-term-care-facilities-have-died-from-covid-19/.

[9] Press Release, Am. Health Care Ass'n/Nat'l Ctr. for Assisted Living, *AHCA Releases Report Highlighting Unprecedented Economic Crisis in Nursing Homes* (Mar. 2, 2022), https://www.ahcancal.org/News-and-Communications/Press-Releases/Pages/AHCA-Releases-Report-Highlighting-Unprecedented-Economic-Crisis-in-Nursing-Homes.aspx.

[10] 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.

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 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 tort lawsuits, 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 hindered the rollout of vaccines that could have saved untold numbers of lives.[11]

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

[11] *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/.

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.[12] The panel's decision allows plaintiffs to plead around the PREP Act's complete preemption regime by couching their claims in state tort law. By diverging from the Third Circuit's reasoning in *Maglioli*, the decision also opened a rupture in how that important federal statute applies in different regions of the country.

COVID-19 will not be the last public health emergency the nation faces. Ultimately, if courts continue to disregard the statute's guarantees of broad immunity and exclusive federal jurisdiction, despite the plain text and the HHS Secretary's consistent interpretation of it, private-sector companies that relied on those promises of forum exclusivity and

[12] 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 Complaint Tracker* (2022), https://www.huntonak.com/en/covid-19-tracker.html.

immunity from liability will be less likely to put their trust in such guarantees the next time around. The PREP Act incentivizes the private sector to work with the government and take the necessary risks to address public health crises. Failure to enforce the PREP Act according to its terms therefore has serious implications not only for the current crisis, but for future emergencies, in which private-sector coordination may "become more cumbersome and expensive for the Government, and willing partners more scarce." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 191–92 (2012) (citing *United States v. Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion)). The result will be a less effective national emergency response and needless loss of lives and livelihoods.

In sum, the PREP Act reflects Congress's recognition that a national emergency like COVID-19 requires a whole-of-nation response. The Act 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 not a complete preemption statute, the panel thwarted that congressional

design and made removal of tort claims turn not on their substance but on how plaintiffs choose to label those claims. That decision was inconsistent with precedents of the Supreme Court, this Court, and other courts of appeals.

II. The Panel's Decision Creates a Circuit Split and Conflicts With Precedents of the Supreme Court and the Ninth Circuit

The panel's holding that the PREP Act is "not a complete preemption statute"—full stop—creates a clear split with the Third Circuit's decision in *Maglioli*, 16 F.4th 393. In *Maglioli*, the Third Circuit recognized that "[t]he PREP Act's language *easily* satisfies the standard for complete preemption" of claims alleging willful misconduct because "[i]t provides an 'exclusive cause of action . . . and also set[s] forth procedures and remedies governing that cause of action.'" *Id.* at 409 (emphasis added) (quoting *Beneficial Nat'l Bank*, 539 U.S. at 8). The court found that the complete preemption regime did not apply in that case only because it read the complaint as "alleg[ing] negligence, not willful misconduct." *Id.* at 410. Here, in contrast, the panel acknowledged that the complaint asserts claims for *both* negligence *and* willful misconduct, Op. 5—and yet the panel rejected complete

preemption categorically, even for the willful misconduct claim, Op. 14–16. That direct conflict by itself warrants rehearing en banc.

The panel's decision also contravenes important precedents of the Supreme Court and this Court. The well-established test for complete preemption is whether Congress "(1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action." *City of Oakland v. BP PLC*, 969 F.3d 895, 906 (9th Cir. 2020), *as amended* (Aug. 12, 2020); *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. *Id*. § 247d-6d(d)(1). For other tort claims, the Act does not leave plaintiffs without a remedy, but sets up a no-fault administrative compensation fund. *Id*. § 247d-6e(a).

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. 15. 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 "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).

Moreover, puzzlingly, despite acknowledging that "Congress intended a federal claim . . . for willful misconduct claims," the panel did not carry that premise to its logical conclusion and uphold complete preemption of at least willful misconduct claims. Op. 15. The panel instead held that the PREP Act "is not a complete preemption statute," even for willful misconduct claims, because while the willful misconduct claim "*may* be preempted" the Act does not "'*entirely supplant[ ]* state law causes of action'" such as Plaintiffs' negligence-based claims. Op. 15–16 (quoting *Retail Prop. Tr. v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 947 (9th Cir. 2014)). This reasoning ignores basic principles of federal jurisdiction, which allow for supplemental jurisdiction over state-law claims. *See* 28 U.S.C. § 1367. It also squarely conflicts with this Court's precedent, which holds unequivocally that "[w]e evaluate whether an individual *claim* is completely preempted" and "[i]f it is, the existence of other nonpreempted claims will not save the case from federal removal jurisdiction." *Melamed v. Blue Cross*, 557 F. App'x 659, 660–61 (9th Cir. 2014) (citing *Fossen v. Blue Cross & Blue*

Shield of Mont., Inc., 660 F.3d 1102, 1109–10 (9th Cir. 2011)). In addition to the importance of the issue in its own right, these conflicts with established precedent make the case for en banc review all the more compelling.

CONCLUSION

This Court should grant Appellants' petition for rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

This brief complies with the length limitations of Ninth Circuit Rule 29-2(c)(2) because it contains 3,272 words, 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 it has been prepared using Microsoft Word 365ProPlus in Century Schoolbook 14-point font.

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