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Liability for Deadly Failure: Rejecting the Push for PREP Act Preemption and Restraining PREP Act Immunity for Senior Living Facilities and Nursing Homes

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Liability for Deadly Failure: Rejecting the Push for PREP Act Preemption and Restraining PREP Act Immunity for Senior Living Facilities and Nursing Homes

Abstract

In the wake of COVID-19, there has been a surge of wrongful death cases filed by plaintiff families in state courts. These families allege that their loved one contracted and died from COVID-19 because the nursing home or senior living facility at which their loved one resided failed to take proper COVID-19 prevention measures. In response, defendant facilities have removed these actions to federal court, arguing that the PREP Act preempts plaintiffs' state-law claims and grants facilities immunity from liability for loss related to qualified actions taken during a public health emergency.

This Comment rejects facilities' push for preemption which has been used as a tactic to stretch out litigation and to encourage plaintiff families to settle their cases for less. This Comment also encourages amendment of the PREP Act immunity laws to clarify that the Act does not preempt state-law claims but does restrict senior living facilities and nursing homes from the privilege of immunity for loss resulting from a failure to act. Restraining immunity in this way will hold facilities accountable for their deadly failure to take COVID-19 safety precautions and will incentivize facilities to take more stringent precautions when caring for their elderly residents in the future.

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I. INTRODUCTION: THE DEATH OF GILBERT GARCIA

On August 17, 2017, eighty-seven-year-old Gilbert Garcia moved to Sunrise Senior Living (Sunrise) in Orange County, California.[1] Despite his older age, Garcia was in "relatively good health and spirits," "mentally alert," and "enjoyed a high level of independence" at Sunrise.[2] He joined his fellow residents for community meals, enjoyed watching Southern California sports teams on television, and frequently visited with friends and family, always sharing stories with them.[3] Because of his past health problems, though, Garcia relied on the Sunrise staff for assistance in performing some of his daily living activities.[4]

In January 2020, while Garcia still resided at Sunrise, COVID-19, the soon-to-be global pandemic, began spreading to the United States.[5] On March 4, 2020, California's Governor, Gavin Newsom, declared a state health emergency, emphasizing the vulnerability of the elderly and directing those vulnerable Californians and their caretakers to cancel nonessential appointments and travel plans, practice social distancing, and prudently watch for COVID-19 symptoms.[6]

Sunrise, however, failed to carefully adhere to the Governor's guidelines.[7] Throughout the spring and summer of 2020, Sunrise allowed residents to leave the facility with friends and family, organized group dining, permitted

1. *See* First Amended Complaint for Damages at 6–7, Garcia v. Welltower OpCo Grp. LLC, 522 F. Supp. 3d 734 (C.D. Cal. Dec. 23, 2021) (No. 8:20-cv-02250-JVS) (describing the events leading up to the death of Gilbert Garcia as alleged by Garcia's plaintiff sons who seek to hold liable for wrongful death Sunrise Senior Living, the assisted living home at which Garcia resided when he contracted COVID-19 and subsequently passed away).

2. *Id.* at 8.

3. *See id.*; *Gilbert Alonzo Garcia*, BROWN COLONIAL MORTUARY, https://www.browncolonial-mortuary.net/obituary/Gilbert-Garcia (last visited Sept. 21, 2022) (providing the obituary of Gilbert Garcia).

4. *See* First Amended Complaint for Damages at 7, *Garcia*, 522 F. Supp. 3d 734 (No. 8:20-cv-02250-JVS).

5. *See CDC Museum COVID-19 Timeline*, CDC, https://www.cdc.gov/museum/timeline/covid19.html (last visited Sept. 21, 2022) (providing a full timeline of events for the COVID-19 pandemic).

6. *See California Issues Directive to Fight COVID-19*, OFF. OF THE GOVERNOR OF CAL. (Mar. 16, 2020), https://www.gov.ca.gov/2020/03/16/california-issues-directive-to-fight-covid-19/ (discussing Governor Gavin Newsom's executive order for directing resources and health safety guidelines). Governor Newsom ordered that extra resources be directed toward caregivers, the elderly, and those with underlying health issues. *See id.*

7. *See* First Amended Complaint for Damages at 8, *Garcia*, 522 F. Supp. 3d 734 (No. 8:20-cv-02250-JVS).

staff members to administer medications and eyedrops to Garcia without proper personal protective equipment (PPE), and scheduled a third-party barber to enter the facility to cut Garcia's hair despite a staff member testing positive the day before.[8] On June 13, 2020, the day after his haircut, Garcia became unusually fatigued.[9] A few days later, on June 17, Garcia's health rapidly declined.[10] His son, Ronald, picked him up and took him to urgent care at Sunrise's request[11] because Garcia was experiencing chills, exhaustion, cough, and a fever of 100.4 degrees Fahrenheit.[12]

On June 20, Garcia's COVID-19 test result came back positive.[13] Two days later, Sunrise issued a notice that two residents and two staff members had tested positive for COVID-19.[14] Then on June 26, the California Department of Public Health directed long-term care facilities, including senior living facilities like Sunrise, to continue cancelling communal dining and all group activities, and restrict interactions with those outside the facility.[15] That same day, Sunrise sent a notice stating it would be resuming communal dining, small group activities, and outdoor visitation.[16] On July 3, Gilbert Garcia passed away from COVID-19.[17]

Garcia's sons, Paul, Gary, and Ronald, filed suit in California state court against Sunrise and its managing companies for wrongful death.[18] They allege that their father died from COVID-19 because Sunrise failed to take the proper preventative measures to mitigate the spread of COVID-19 in the senior living

8. *See id.* at 8–9 (describing how Sunrise resumed group dining in May, the same day it sent pleas to the state government for more personal protective equipment and administered medications and eyedrops without gloves or medical gowns).

9. *See id.* at 9. *See generally Symptoms of COVID-19*, CDC (last updated Aug. 11, 2022) https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (providing a full updated list of COVID-19 symptoms which includes fatigue).

10. *See* First Amended Complaint for Damages at 9, *Garcia*, 522 F. Supp. 3d 734 (No. 8:20-cv-02250-JVS).

11. *See id.* at 10 (explaining how Sunrise expressed that it did not have the medical equipment to properly care for Garcia).

12. *See id. See generally Symptoms of COVID-19, supra* note 9 (listing cough, fever, and chills as symptoms of COVID-19).

13. *See* First Amended Complaint for Damages at 11, *Garcia*, 522 F. Supp. 3d 734 (No. 8:20-cv-02250-JVS).

14. *See id.*

15. *See id.*

16. *See id.*

17. *See id.* at 12.

18. *See* Garcia v. Welltower OpCo Grp. LLC, 522 F. Supp. 3d 734, 736 (C.D. Cal. 2021) (alleging elder abuse, neglect, and intentional infliction of emotional distress).

facility.[19] Thereafter, the defendants filed a petition to remove the action to federal court, asserting that the Public Readiness and Emergency Preparedness Act (the PREP Act) shielded them from tort liability because they were acting in response to COVID-19, a public health emergency.[20] The court found that removal was proper and that the PREP Act applied, granting the defendants immunity from liability.[21] Accordingly, the case was dismissed.[22]

Fortunately, *Garcia* is an extreme outlier among the recent cases revolving around the big, new question of whether the PREP Act[23] grants immunity from tort liability to senior living and nursing homes who failed to take qualified action when caring for their elderly residents during COVID-19.[24] Of the hundreds of COVID-19 wrongful death and negligence cases, *Garcia* is the only one to have found removal proper and to have been dismissed for a finding of PREP Act immunity.[25] Since the wake of COVID-19, courts have tackled two main questions: 1) Does the PREP Act require the plaintiff's claims to be heard in federal court? 2) Do the plaintiff's claims, alleging defendant facilities' failure to act, fall within the scope of the PREP Act?[26] The vast majority of courts, unlike the *Garcia* court, have found that 1) the PREP Act does not mandate a federal forum and 2) the plaintiff's claims for failure to act do not fall under the Act.[27] The courts then remand the case back to state court.[28]

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19. *See* First Amended Complaint for Damages at 8–13, *Garcia*, 522 F. Supp. 3d 734 (No. 8:20-cv-02250-JVS).

20. *See Garcia*, 522 F. Supp. 3d at 737.

21. *See infra* Section III.B.3 (criticizing the *Garcia* court's oversimplified holding that PREP Act immunity extended to the defendant facility because the facility did not completely fail to uphold federal care regulations and only made "momentary lapses" in adhering to federal health care protocols).

22. *See Garcia*, 522 F. Supp. 3d at 746. Plaintiffs have appealed the dismissal though. *See* Plaintiff's Opening Brief, Garcia v. Welltower OpCo Grp., LLC, No. 21-55224 (9th Cir. May 11, 2021).

23. *See* 42 U.S.C. § 247d-6d. The PREP Act extends to qualified actors, such as vaccine manufacturers, immunity from liability for loss related to qualified actions taken during a public health emergency. *See infra* Section II.A.

24. *See, e.g.*, Dupervil v. All. Health Operations, LLC, 516 F. Supp. 3d 238 (E.D.N.Y. 2021) (discussing whether failure to act or use covered countermeasures falls within the scope of the PREP Act).

25. *See infra* Section III.B.3 (providing and critiquing the reasoning behind the *Garcia* court's holding).

26. *See, e.g.*, *Dupervil*, 516 F. Supp. 3d 238 (separating analysis into two parts: complete preemption—which would mandate a federal court—and scope of the PREP Act).

27. *See infra* Section III.B (detailing the caselaw holding that the PREP Act does not mandate a federal forum and that the plaintiffs' claims do not fall within the scope of the Act).

28. *See, e.g.*, Estate of Maglioli v. Andover Subacute Rehab. Ctr. I, 478 F. Supp. 3d 518, 533

Unfortunately, after district courts order cases to be remanded, the defendants usually appeal the decision.[29] To date, only six appellate courts have heard the defendants' appeals—each of which affirmed the district court order to remand.[30] We await the fate of families like the Garcias. Compensation for these families, if any, will likely take a very long time because courts have only ruled on the question of jurisdiction and have not yet ruled on whether the PREP Act extends immunity from liability to the defendants, let alone the merits of the case.[31] While these COVID-19 cases should be analyzed carefully, they also should be resolved quickly because the law simply does not support the defendants' push for removal or immunity.[32] Further, the more defendants stretch out litigation, the more plaintiff families will end up settling for less.[33]

This Comment agrees with the majority view that the PREP Act is not a complete preemption statute and that therefore, remand is appropriate.[34] In anticipation of the decisions answering the immunity question, this Comment argues that courts should find that the PREP Act does not extend immunity to senior living facilities and nursing homes.[35] Finally, because the road to recovery for these plaintiff families is not only uncertain, but also extremely lengthy, this Comment argues for amending the statutory and administrative law governing PREP Act immunity to make clear that the Act does not entitle senior living facilities and nursing homes to immunity from liability, thus streamlining litigation.[36]

Part II of this Comment discusses the birth of the PREP Act, how the Act

(D.N.J. 2020) (reflecting a major trend whereby the federal court simply decides that the PREP Act does not mandate a federal forum and leaves the question of PREP Act immunity for the state court to decide on remand) ("I pause to state what I am not deciding. I do not rule that the Defendants are, or are not, entitled to a PREP Act defense to this or that claim. That is for the state courts to decide on remand.").

29. *See infra* Part IV (describing the arduous appeals process for a plaintiff).

30. *See* Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393 (3d Cir. 2021); Saldana v. Glenhaven Healthcare LLC, 27 F.4th 679 (9th Cir. 2022); Martin v. Filart, 2022 U.S. App. LEXIS 5130 (9th Cir. 2022); Mitchell v. Advanced HCS, LLC, 28 F.4th 580 (5th Cir. 2022); Perez v. Se. SNF, LLC, 2022 U.S. App. LEXIS 8599 (5th Cir. 2022); Manyweather v. Woodlawn Manor, Inc., 40 F.4th 237 (5th Cir. 2022). This Comment incorporates relevant caselaw and legal precedent as of July 30, 2022. See infra Part III.

31. *See infra* Part IV.

32. *See infra* Part IV.

33. *See infra* Part IV.

34. *See infra* Section IV.B.1.

35. *See infra* Section IV.B.2.

36. *See infra* Part V.

functions to provide immunity to certain players during a public health emergency, and how the Act attempts to provide compensation for loss related to a public health emergency through a government fund as an alternative to judicial recourse.[37] Part III provides an overview of PREP Act case law as well as the administrative law and guidance accompanying the PREP Act in the COVID-19 context.[38] Part IV presents the legal reasons why future courts should affirm decisions to remand and hold that the PREP Act does not extend immunity to senior living facilities and nursing homes.[39] Given the large, negative impact that removal proceedings have on plaintiff families, Part V offers a solution of amending the current statutory and administrative law governing PREP Act immunity.[40] Part VI concludes.[41]

II. BACKGROUND

In 2005, Congress passed the PREP Act in response to a "growing fear of a potential avian flu [H5N1] pandemic."[42] The avian influenza had sprung up in East Asia and was steadily spreading west, encouraging scientists from around the world to begin developing a vaccine to combat the virus.[43] In the United States, vaccine manufacturers, somewhat reluctant to develop a pandemic strain vaccine, lobbied for legislation that would preempt state vaccine laws and protect them from future lawsuits arising from such a vaccine.[44] In

37. *See infra* Part II.

38. *See infra* Part III.

39. *See infra* Part IV.

40. *See infra* Part V.

41. *See infra* Part VI.

42. Chanlon Kaufman, *In the Wake of COVID-19: The Uphill Battle of Litigation for Nursing Homes,* 42 U. LA VERNE L. REV. 57, 77 (2021) (providing a detailed background of the birth of the PREP Act and arguing that nursing homes should be afforded PREP Act immunity in the COVID-19 context).

43. *See* Robert Roos, *Year-End Review: Avian Flu Emerged as High-Profile Issue in 2005,* CTR. FOR INFECTIOUS DISEASE RSCH. AND POL'Y (Jan. 5, 2006), https://www.cidrap.umn.edu/news-perspective/2006/01/year-end-review-avian-flu-emerged-high-profile-issue-2005 ("When 2005 dawned, only 45 human cases of H5N1 avian flu, including 32 deaths, had been counted by the World Health Organization (WHO). All of those were in Vietnam and Thailand. . . . The virus's westward spread drew unprecedented attention around the world, fueling a flurry of planning efforts and a rush for [an] antiviral drug.").

44. *See* Kenya S. Woodruff, *COVID-19 and PREP Act Immunity,* NAT'L L. REV. (Aug. 5, 2020), https://www.natlawreview.com/article/covid-19-and-prep-act-immunity (providing a succinct overview of the PREP Act and the scope of the immunity it affords).

response, Congress passed the PREP Act[45] to ensure that, in the event of a pandemic, the United States could "get and deliver a vaccine" to its people.[46]

A. The PREP Act: Qualified Immunity from Liability

The PREP Act provides immunity from liability to covered persons for covered actions taken during a public health emergency.[47] Within the boundaries of the PREP Act, the Secretary of the Department of Health and Human Services (HHS) controls the scope of immunity by issuing declarations of public emergency.[48] Such declarations may immediately brand a disease, other health condition, or threat to health as a public health emergency, while others warn of the credible risk that such disease or threat may become a future public health emergency.[49] In either case, once the Secretary declares the

45. *See Final Vote Results for Roll Call 669*, CLERK OF U.S. HOUSE OF REPRESENTATIVES, https://clerk.house.gov/evs/2005/roll669.xml (last visited Sept. 28, 2022). Congress adopted the PREP Act as part of the Department of Defense Appropriations Act which passed with a vote of 308–106, with two voting "present" and eighteen not voting. *See id.*

46. 151 CONG. REC. H12264 (daily ed. Dec. 18, 2005) (statement of Sen. John Nathan Deal). Congress adopted the PREP Act as part of the Department of Defense Appropriations Act. *Id.* Congress passed the Act because of "the need to begin to have the manufacturing capacity to produce pandemic flu vaccine." *Id.* More specifically, Congress noted that there was "no business model that would have vaccine manufacturers take on the tremendous liability risks to produce [a pandemic flu vaccine]." *Id.* Thus, the Act would give "the Secretary the ability to declare limited liability protection . . . to make sure the vaccine gets developed and to make sure doctors are willing to give it when the time comes." *Id.*

47. *See* 42 U.S.C. § 247d-6d. "[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." 42 U.S.C. § 247d-6d(a)(1).

48. *See* 42 U.S.C. § 247d(b). "[T]he Secretary may specify[] the manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures." 42 U.S.C. § 247d-6d(b)(1). The Secretary publishes the declarations in the Federal Register and identifies "for each countermeasure the particular disease, time period, population, and geographical area that the declaration covers." KEVIN J. HICKEY, CONG. RSCH. SERV., LSB10443, THE PREP ACT AND COVID-19, PART 1: STATUTORY AUTHORITY TO LIMIT LIABILITY FOR MEDICAL COUNTERMEASURES 2 (last updated Apr. 13, 2022). In the past, the Secretary has issued other declarations of public health emergencies, such as for the 2009 H1N1 pandemic and the 2016 Ebola outbreak. *See* Kenneth Yood & Genta Iwasaki, *Senior Living Communities, Liability for COVID-19 Countermeasures, and the PREP Act: Is the Tide Turning for Providers?*, NAT'L L. REV. (Mar. 8, 2021), https://www.natlawreview.com/article/senior-living-communities-liability-covid-19-countermeasures-and-prep-act-tide (providing a brief overview of past PREP Act declarations and discussing PREP Act immunity in the COVID-19 context in the wake of Mr. Garcia's case).

49. *See* 42 U.S.C. § 247d-6d(b)(1). The PREP Act affords the Secretary broad discretion in determining what constitutes a public health emergency and this decision is beyond the reach of judicial review. *See* 42 U.S.C. § 247d-6d(b)(7).

public health emergency, the PREP Act grants immunity to covered persons or entities from tort liability[50] for claims of "loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure."[51] Covered entities include manufacturers and distributors of medical equipment or drugs,[52] as well as program planners such as senior living facilities.[53] When a covered entity is immune from tort liability for claims of loss, it cannot be sued for money damages.[54] Claims of loss encompass "death . . . physical, mental, [and] emotional injury, illness, [and] disability."[55] Covered countermeasures include drugs and devices created to "mitigate, prevent, treat, or cure a pandemic or epidemic."[56] In the COVID-

50. *See* 42 U.S.C. § 247d-6d(c). The Secretary extends immunity from all tort liability except that involving willful misconduct. *See id.* For more information about the willful misconduct exception, see HICKEY, *supra* note 48.

51. 42 U.S.C. § 247d-6d(a)(1). The PREP Act, legislation passed by Congress, gives power to the Secretary of HHS to determine which events, players, and items fall under the purview of the PREP Act which effectively grants immunity. *See* 42 U.S.C. § 247d-6d(b). The Secretary's declarations and amendments are administrative law, which "focuses on the exercise of government authority by the executive branch and its agencies. These agencies are created by Congress through 'enabling legislation,' and are authorized to promulgate regulations which have the same force as statutory law." *Federal Administrative Law*, DUKE UNIV. SCH. OF L.: J. MICHAEL GOODSON L. LIBR., 1, 1, https://law.duke.edu/sites/default/files/lib/adminlaw.pdf (last visited Sept. 28, 2022).

52. *See* 42 U.S.C. § 247d-6d(i)(2)(B). In large part, "[t]he PREP Act was designed to encourage drug manufacturers to rapidly produce vaccines, which would protect American citizens during a public health crisis." James O'Shea, II & Ryan White, *PREP Act Offers Immunity to Product Manufacturers and Premises Owners from COVID-19 Liability,* JDSUPRA (Aug. 9, 2021), https://www.jdsupra.com/legalnews/prep-act-offers-immunity-to-product-1827440/.

53. *See* 42 U.S.C. § 247d-6d(i)(2)(B); Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration, 85 Fed. Reg. 79190, 79195, 79195 n.20 (Dec. 9, 2020) [hereinafter Fourth Amendment to the Declaration] (declaring "[a]ny person authorized in accordance with the public health and medical emergency response . . . to prescribe, administer, deliver, distribute or dispense the Covered Countermeasures . . . [,]" including "Nursing Homes . . . and other Congregate Facilities").

54. *See* HICKEY, *supra* note 48 (providing a full overview of the scope of PREP Act immunity).

55. 42 U.S.C. § 247d-6d(a)(2).

56. 42 U.S.C. § 247d-6d(i)(7)(A)(i). Covered countermeasures must also be approved by the FDA, authorized by an EUA (Emergency Use Authorization used by the FDA), described in an EUI, or used under an Investigational New Drug (IND) application or an Investigational Device Exemption (IDE). *See* Dep't of Health & Human Servs., Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration Under the Act (May 19, 2020) (clarifying the scope of PREP Act immunity because of the confusion over which activities, such as donating medical goods and services, qualify for immunity). Covered countermeasures have been expanded to include a wide variety of items; the PREP Act originally covered only "emergency vaccines during an epidemic" and thus only granted immunity to those drug developers. Tom Hals, *At the Urging of Nursing Homes, a Law is Amended and COVID Court Claims are Slowed,* REUTERS,

19 context, the most common covered countermeasures include COVID-19 vaccines, face masks, face shields, and gloves.[57] They do not include practices such as social distancing.[58]

On March 17, 2020, in response to the COVID-19 pandemic outbreak, former Secretary of HHS, Alex Azar, issued a declaration under the PREP Act granting liability immunity to covered persons and entities for claims of loss related to the use of COVID-19 covered countermeasures.[59] Practically, this immunization protects not only manufacturers of covered countermeasures, like vaccines, but also entities such as nursing homes and senior living facilities from being sued if the suit relates to the facility's administration or use of covered countermeasures.[60] Since the Secretary's initial COVID-19 PREP Act declaration, there have been ten amendments making various clarifications and additions to it, such as interpreting PREP Act immunity in the COVID-19 context as existing even when a facility has failed to use a covered countermeasure.[61]

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https://www.reuters.com/article/us-health-coronavirus-usa-liability-insi/at-the-urging-of-nursing-homes-a-law-is-amended-and-covid-court-claims-are-slowed-idUSKBN29X1DG (Jan. 28, 2021). For an overview of the progression on what constituted a covered countermeasure during COVID-19, see Sarah K. Frederick, *Update on PREP Act Immunity for COVID-19 Countermeasures,* A.B.A. (Jan. 27, 2021), https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2021/update-on-prep-act-immunity-for-covid19-countermeasures/.

57. *See Technical Specifications of Personal Protective Equipment for COVID-19*, WORLD HEALTH ORGANIZATION (Nov. 13, 2020), https://www.who.int/publications/i/item/WHO-2019-nCoV-PPE_specifications-2020.1 (providing a list of PPE which qualify as covered countermeasures).

58. *See id.* Countermeasures include only tangible items, not intangible practices. *See id.*

59. *See* Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15199–15200 (Mar. 17, 2020) (providing the details of when PREP Act immunity is triggered, including who qualifies as a covered person and what qualifies as a covered countermeasure).

60. *See* Kaufman, *supra* note 42, at 79. Though seemingly troublesome to families, Congress designed PREP Act immunity for facilities "to embolden caregivers, permitting them to administer certain encouraged forms of care . . . with the assurance that they will not face liability for having done so." Estate of Maglioli v. Andover Subacute Rehab. Ctr. I, 478 F. Supp. 3d 518, 529 (D.N.J. 2020).

61. *See Public Readiness and Emergency Preparedness (PREP) Act,* U.S. DEP'T OF HEALTH & SERVICES, ADMIN. FOR STRATEGIC PREPAREDNESS & RESPONSE, https://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx (last visited Sept. 29, 2022); Fourth Amendment to the Declaration, *supra* note 53, at 79191 (explaining when failure to administer covered countermeasures may still qualify the covered entity for PREP Act immunity). This Comment will discuss in greater detail the Secretary's Fourth Amendment. *See infra* Section III.B.2. For a comprehensive summary of each of the COVID-19 PREP Act Declaration's amendments (and advisory opinions), see Jesse M. Coleman & Drew del Junco, *HHS Has Undertaken an Unprecedented Expansion of the PREP Act Over the Past Year to Combat COVID-19, But Will Litigants, and the Courts, Get the Message?,* AM. HEALTH L., https://www.americanhealthlaw.org/getmedia/1aa85119-96dc-44dd-b178-21b4fde0b3b4/Expansion-of-the-PREP-Act-Over-the-Past-Year_Seyfarth-Shaw.PDF (last visited Sept. 29, 2022).

B. The Compensation Fund: An Impossible Route to Recovery

In addition to providing immunity to entities for liability, Congress created an emergency fund through the PREP Act to compensate "eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure."[62] An individual may be eligible for compensation from the Countermeasure Injury Compensation Program (the Compensation Fund) in one of two ways.[63] First, they can show that the injury was one listed on the Countermeasure Injury Table.[64] A Countermeasure Injury Table describes specific covered countermeasures, such as a vaccine, and the accompanying physical injury or illness for which an applicant may receive compensation.[65] Like COVID-19, past viruses such as smallpox and influenza are covered by the Compensation Fund.[66] However, while past viruses have their own Countermeasure Injury Tables, no table has yet been created for COVID-19 vaccines or other COVID-19 countermeasures.[67] Therefore, COVID-19 applicants may only receive compensation through the second way to become eligible: by proving to HHS's Health Resources and Services Administration (HRSA), the delegate of HHS's Secretary, that their injury was the direct result of the administration or use of a COVID-19 covered countermeasure.[68] Proving this injury, however, has been impossible to date.[69] As such, many

62. 42 U.S.C § 247d-6e(a). *See* KEVIN J. HICKEY & ERIN H. WARD, CONG. RSCH. SERV., LSB10584, COMPENSATION PROGRAMS FOR POTENTIAL COVID-19 VACCINE INJURIES (last updated Oct. 2021) (providing an overview of how the Compensation Fund functions). HHS's Health Resources and Services Administration (HRSA) oversees the Compensation Fund and approves applicants' eligibility for compensation. *See id.* at 2. HRSA compensates for death and serious physical injury resulting from COVID-19 vaccines or COVID-19 countermeasures. *See id.*

63. *See* HICKEY & WARD, *supra* note 62, at 3.

64. *See id.*

65. *See, e.g.*, 42 C.F.R. § 110.100 (2021) (providing the Injury Table for pandemic influenza H1N1).

66. *See* 42 U.S.C. § 239b.

67. *See* HICKEY & WARD, *supra* note 62, at 3.

68. *See id.* Applicants must file a request form and may submit medical records to help prove eligibility. *See id.* If HRSA approves a claim, compensation is limited to reasonable medical expenses, loss of employment income, and/or a set death benefit. *See id.*

69. *See id.* "In light of the COVID-19 pandemic, HRSA has received a larger number of CICP [Countermeasures Injury Compensation Program] claims than it has received historically." *Id.* As of September 1, 2022, CICP has received 9,888 claims alleging injury or death relating to COVID-19 countermeasures, of which 7,084 claims (72%) relate to COVID-19 vaccines. *See Countermeasures Injury Compensation Program (CICP) Data*, HEALTH RES. SERVS. ADMIN., https://www.hrsa.gov/cicp/cicp-data (last updated Sep. 1, 2022). As of September 1, 2022, CICP has

individuals have fled to the courts seeking relief.[70]

III. PRECEDENT: A MESS OF INTERPRETATIONS AND ANALYTICAL APPROACHES

A. Pre-COVID-19 Caselaw: Supporting the PREP Act's Limited Scope

The few pre-COVID-19 cases implicating the PREP Act reflect the limited scope of PREP Act immunity.[71] In 2012, a New York state court held in *Parker v. St. Lawrence County Public Health Department* that administering a swine flu vaccine without consent fell within the scope of the PREP Act and thus granted the defendant, a state-run vaccine clinic, immunity and dismissed the case.[72] In 2014, a New York state court held in *Casabianca v. Mount Sinai Medical Center* that the failure to administer a swine flu vaccine did not implicate the PREP Act and thus denied the defendants' motion to dismiss.[73] While the pre-COVID-19 caselaw centers around a vaccine, there seems to be no court claims related to a COVID-19 vaccine, perhaps because the PREP Act and pre-COVID-19 cases make clear that the Act applies only to those who administer a covered countermeasure and not to those who fail to administer one.[74] Instead, claims of loss related to a COVID-19 vaccine seem to

compensated any claims related to COVID-19 countermeasures. *See id.* Two hundred sixty-five such claims were denied on the grounds of unmet standard of proof for causation. *See id.* Three claims, alleging injuries from a COVID-19 vaccine, "have been determined eligible for compensation and are pending a review of eligible expenses." *See id.*

70. *See, e.g.*, Estate of Maglioli v. Andover Subacute Rehab. Ctr. I, 478 F. Supp. 3d 518 (D.N.J. 2020); Brown v. Big Blue Healthcare, Inc., 480 F. Supp. 3d 1196 (D. Kan. 2020); Schuster v. Percheron Healthcare, Inc., 493 F. Supp. 3d 533 (N.D. Tex. 2021); Bolton v. Gallatin Ctr. for Rehab. & Healing, LLC, 535 F. Supp. 3d 709 (M.D. Tenn. 2021); Shapnik v. Hebrew Home for the Aged at Riverdale, 535 F. Supp. 3d 301 (S.D.N.Y. 2021); Dupervil v. All. Health Operations, LLC, 516 F. Supp. 3d 238 (E.D.N.Y 2021); Winn v. Cal. Post Acute LLC, 532 F. Supp. 3d 892 (C.D. Cal. 2021); Goldblatt v. HCP Prairie Vill. KS OpCo LLC, 516 F. Supp. 3d 1251 (D. Kan. 2021).

71. *See, e.g.*, Parker v. St. Lawrence Cnty. Pub. Health Dep't, 954 N.Y.S.2d 259 (App. Div. 2012); Casabianca v. Mount Sinai Med. Ctr., No. 112790/10, slip op. 33583 (N.Y. Sup. Ct. 2014); Kehler v. Hood, 2012 U.S. Dist. LEXIS 74502, at *1–2 (E.D. Mo. 2012).

72. *Parker*, 954 N.Y.S.2d at 261.

73. *Casabianca*, slip op. at 9–10.

74. *See Parker*, 954 N.Y.S.2d at 262*; Casabianca*, slip op. at 9–10*; see also* KEVIN J. HICKEY, ERIN H. WARD & WEN W. SHEN, CONG. RSCH. SERV., R46399, LEGAL ISSUES IN COVID-19 VACCINE DEVELOPMENT AND DEPLOYMENT 33 (2020) ("So long as the COVID-19 PREP Act Declaration remains in effect, COVID-19 vaccine manufacturers, distributors, and qualified health care providers are generally immune from legal liability for losses relating to the use or administration of that vaccine. Instead, compensation through CICP may be available for individuals who are injured or die as a result

have been filed only under the Compensation Fund.[75]

B. COVID-19 Caselaw

1. Two Main Analytical Approaches

Of the hundreds of COVID-19 court cases, most are filed against senior living facilities and nursing homes.[76] Many families who have lost loved ones to COVID-19 because of a facility's alleged failure to take proper COVID-19 preventative measures (none of which include administering a vaccine) have sought relief through the courts, bringing their claims to state court and alleging a number of state-law-based torts, namely wrongful death.[77] Typically, after plaintiff families file their claims in state court, the defendant facility removes the case to federal court, seeking to invoke the PREP Act and benefit from PREP Act immunity.[78]

Thus far, in the history of removed COVID-19 wrongful death cases, courts have only determined whether removal is proper.[79] Courts grapple with two main questions: First, does the PREP Act demand that the plaintiff's state-law claims be heard in federal court?[80] Second, does the PREP Act apply to the case at hand?[81] Some courts focus primarily on the first question, holding that where the PREP Act does not demand the claims to be heard in federal court, the case must be remanded for the state court to determine the question of immunity.[82] Other courts answer only the second question, remanding the

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of receiving a COVID-19 vaccine.").

75. *See Countermeasures Injury Compensation Program (CICP) Data*, *supra* note 69. As of September 1, 2022, there have been 7,084 CICP claims alleging injury or death from a COVID-19 vaccine. *See id.* Additionally, 2,804 CICP claims allege injury or death from other COVID-19 covered countermeasures, most overwhelmingly ventilators. *See id.*

76. *See supra* Part II.B (providing multiple COVID-19 cases all filed against senior living facilities and nursing homes).

77. *See supra* Part II.B.

78. *See, e.g.*, Estate of Maglioli v. Andover Subacute Rehab. Ctr. I, 478 F. Supp. 3d 518, 521 (D.N.J. 2020).

79. *See infra* notes 80–81.

80. *See, e.g.*, *Estate of Maglioli*, 478 F. Supp. 3d at 521 (asking whether the PREP Act is a complete preemption statute that requires plaintiff's state law claims to be heard in federal court).

81. *See, e.g.*, *id.* at 528 (asking whether claims of failure to act fall under the scope of the PREP Act).

82. *See, e.g.*, *id.* at 533 (holding the state court must rule on the immunity question but noting the Act does not apply).

case after finding the PREP Act does not apply to the case and the defendant is not immune.[83] In sum, all courts except for *Garcia* have ordered remand either because they found the PREP Act did not mandate a federal forum or because the PREP Act did not apply to the facts of the case.[84] Despite this overwhelming judicial consensus, defendants continue to remove COVID-19 related cases, exploiting the arguably ambiguous statutory and administrative laws that provide PREP Act immunity.[85]

One of the most cited cases, *Estate of Maglioli*, illustrates the reasoning of courts that rule only on the first question of whether the PREP Act mandates a federal forum.[86] The *Maglioli* case arose when, in March 2020, two nursing homes in New Jersey fell victim to the spread of COVID-19.[87] The estates of several of the decedents brought suit for negligence and wrongful death in a New Jersey state court, alleging that the defendants failed to take appropriate COVID-19 safety precautions.[88] Thereafter, the defendants removed the actions to federal court, arguing that the plaintiffs' claims were completely preempted by the PREP Act.[89]

The *Maglioli* district court tackled one main question: does the PREP Act completely preempt the state-law claims at hand and thus require a federal

83. *See, e.g.*, Brown v. Big Blue Healthcare, Inc., 480 F. Supp. 3d 1196 (D. Kan. 2020). In *Brown*, by finding the PREP Act did not apply, the court answered the jurisdictional question—ordering remand because the Act did not apply and thus a federal forum was not appropriate—as well as the immunity question—impliedly: because the Act did not apply, the defendant was not afforded immunity. *See id.* at 1207.

84. *See, e.g.*, *id.*

85. *See infra* Part IV.

86. *See generally Estate of Maglioli*, 478 F. Supp. 3d (demonstrating courts' analysis of whether a federal forum is required for cases involving the PREP Act).

87. *See id.* at 522.

88. *See id.* The plaintiffs' complaint asserted that the defendants initially provided face masks to nurses only and not to other staff members "who interacted with residents and patients, such as housekeepers, therapists, and nursing assistants." *Id.* The complaint also claimed that the defendants were liable for "failing to monitor outside visitors to the facilities, . . . food preparation and distribution, . . . employees . . . [and the] residents." *Id.* at 523.

89. *See id.* The *Maglioli* defendants insist removal is proper because the PREP Act is a complete preemption statute. *See* Opening Brief of Appellants at 34, Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393 (3d Cir. 2021). They assert that Congress intended to and did displace state causes of action for injuries related to the administration or use of covered countermeasures by providing for broad immunity, explicitly mandating a federal cause of action for claims of willful misconduct and establishing an administrative remedy—the Compensation Fund—for all other claims alleging injury caused by the administration or use of covered countermeasures. *See id.* at 45–46 (citing 42 U.S.C. § 247-6(e)(1)).

forum?[90] Under the doctrine of complete preemption, a federal question appears on the face of the complaint where Congress "so completely pre-empt[s] a particular area that any civil complaint raising [the] select group of claims is necessarily federal in character."[91] To determine whether a federal statute completely preempts a plaintiff's state-law claim, courts ask 1) whether Congress intended to displace the state causes of action and 2) whether Congress provided a substitute cause of action.[92] The *Maglioli* court reasoned that the Act did not completely preempt state claims of negligence and wrongful death because the Act expressly provided that only claims of willful misconduct required a federal forum.[93] The *Maglioli* court reasoning reflects the view of many courts which have held that the PREP Act is not a complete preemption statute.[94]

90. *See Estate of Maglioli*, 478 F. Supp. 3d at 528. There are three types of preemption: express, implied (or field), and conflict. *See id.* at 529. Express preemption applies "when Congress expressly states its intent to preempt state law." *Id.* Implied preemption applies when "'Congress' intent to preempt all state law in a particular area may be inferred [because] the scheme of federal regulation is sufficiently comprehensive' or 'the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *Id.* (citing Fellner v. Tri-Union Seafoods, LLC, 539 F.3d 237, 242–43 (3d Cir. 2008)). Finally, conflict preemption applies when "'state law is nullified to the extent that it actually conflicts with federal law,' even though Congress has not displaced all state law in a given area." *Id.* (citing *Fellner*, 539 F.3d at 242–43). The *Maglioli* court explained that express and implied preemption were potentially applicable here. *See id.* at 530.

91. Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393, 407 (3d Cir. 2021).

92. *See id.* "Notably, the Supreme Court cases establishing the doctrine of complete preemption have sent conflicting signals regarding" when the doctrine applies. Karen A. Jordan, *The Complete Preemption Dilemma: A Legal Process Perspective*, 31 WAKE FOREST L. REV. 927, 928 (1996). Thus, the circuit courts are split in regard to the specific test for complete preemption. *See id.* at 965. "The Third, Sixth, Seventh, and Ninth Circuits have tended to place primary importance on the existence of a federal cause of action." *Id.* "[S]ome courts have required a clear manifestation of congressional intent" to displace state causes of action. *Id.* at 970. The Second, Fourth, and Fifth Circuits "permit[] removal only if the state law claims are both preempted and fall within the scope of [the] federal . . . provision[]." *Id.* at 971–72. Thus, while the vast majority of courts have held that remand was appropriate because the doctrine of complete preemption did not apply, the courts have varied in the combination of their reasonings to achieve that nearly unanimous holding. *See id.*

93. *See Estate of Maglioli*, 478 F. Supp. 3d at 530–31 (citing 42 U.S.C §§ 247d-6d(d), 247d-6d(e)(1)). Here, the court rules out *implied* preemption as a form of preemption applicable to the case at hand. *See id.* (emphasis added). The Act provides that actions claiming the defendant's willful misconduct "shall be filed and maintained only in the United States District Court for the District of Columbia." *Id.* at 530. The court reasoned that such provision reflects "that Congress knew very well how to provide for an exclusive federal forum when it wanted to—*i.e.,* for actions [of willful misconduct], which this is not." *Id.*

94. *See* Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393 (3d Cir. 2021). Like the district court, the appellate court in *Maglioli* reasoned that there is no federal subject-matter jurisdiction because the PREP Act does not provide an exclusive cause of action for negligence claims against nursing homes, but rather only creates an exclusive cause of action for willful misconduct claims. *See id.*

Separate from the preemption discussion, the *Maglioli* court held that the PREP Act did not apply to the case at hand because the Act only covers use of countermeasures, not failure to use them.[95] Highlighting the popular use versus nonuse distinction relied upon by many courts, the *Maglioli* court reasoned that defendants' alleged failure to comply with social distancing and quarantining requirements were "not covered 'countermeasures' under the PREP Act at all."[96] Because the alleged failure did not exist within the Act's scope, the claims did not mandate a federal forum.[97] And again, even if the claims *did* fall under the PREP Act, the Act is not a complete preemption statute, so the plaintiffs' state-law claims were not required to be heard in federal court.[98] In conclusion, the court answered the preemption question, remanded the case back to state court, and left the question of immunity up to the state court.[99]

Unlike the *Maglioli* court, other courts analyze only whether the specific allegations fall within the scope of the PREP Act.[100] For example, like the *Maglioli* court, the Kansas district court in *Brown v. Big Blue Healthcare, Inc.* set up the question of whether the PREP Act was a complete preemption

at 406–11. The court held that there was no federal question jurisdiction because the plaintiffs did not assert a federal cause of action and the defendant's PREP Act preemption defense was not "necessarily raised" by the plaintiff's state law negligence claim, and thus failed the first prong of the test for federal question jurisdiction. *Id.* at 413. *See also* Dupervil v. All. Health Operations, LLC, 516 F. Supp. 3d 238, 250 (E.D.N.Y. 2021) (holding that "the PREP Act does not provide the exclusive [federal] cause of action for claims that fall within its scope; in fact, for the most part, the Act provides no causes of action at all."); Shapnik v. Hebrew Home for the Aged at Riverdale, 535 F. Supp. 3d 301, 315 (S.D.N.Y. 2021) (holding the same); Estate of Judith Joy Jones v. St. Jude Operating Co., 524 F. Supp. 3d 1101, 1108–09 (D. Or. 2021) (holding the same).

95. *See Estate of Maglioli*, 478 F. Supp. 3d at 531 (noting the Act "protect[s] those who *employ* countermeasures, not those who decline to employ them.") (emphasis added); *see also Dupervil*, 516 F. Supp. 3d 238, 254–55 (reasoning that even if the PREP Act did completely preempt state law claims within its scope, the plaintiffs' claims here did not fall within the scope of the Act because the claims allege defendants' failure to enforce social distancing and other measures that are not covered countermeasures).

96. *Estate of Maglioli*, 478 F. Supp. 3d at 533. Covered countermeasures do not include practices of social distancing or quarantine; rather, they include only tangible qualified items such as vaccines and face masks. *See* 42 U.S.C. §§ 247d-6d(i)(1), 247d-6d(i)(7); *Technical Specifications of Personal Protective Equipment for COVID-19*, *supra* note 57.

97. *See Estate of Maglioli*, 478 F. Supp. 3d at 533.

98. *See id.* ("Nothing in the PREP Act suggests a legislative intent to prohibit the states from imposing higher or additional measures through the case by case operation of negligence law.").

99. *See id.* ("I pause to state what I am not deciding. I do not rule that the Defendants are, or are not, entitled to a PREP Act defense to this or that claim. That is for the state courts to decide on remand.").

100. *See, e.g.*, Brown v. Big Blue Healthcare, Inc., 480 F. Supp. 3d 1196 (D. Kan. 2020).

statute; however, rather than proceed with a full preemption analysis, it reasoned that "the claims at issue must fall within the scope of the [Act] for complete preemption to apply."[101] The *Brown* court then held that the PREP Act did not apply because the plaintiff's claim—that the nursing home permitted a symptomatic nurse to continue working without the use of PPE, such as a facemask—was not related to the administration or use of a covered countermeasures.[102] Because the PREP Act did not apply, the court saw there was no need to determine whether the Act was a complete preemption statute that required a federal forum.[103] As such, the case was remanded.[104]

Courts differ in their removal analysis.[105] Some, like *Maglioli*, hold that remand is proper because the PREP Act does not completely preempt plaintiffs' state-law claims, and others, like *Brown*, hold that remand is proper because the claims do not fall within the scope of the PREP Act.[106] The former route provides the most logical reasoning.[107] Courts like *Maglioli* look at the *type* of claim brought, such as wrongful death, negligence, or willful

101. *Brown*, 480 F. Supp. 3d at 1202; *see also* Winn v. Cal. Post Acute LLC, 532 F. Supp. 3d 892, 899 (C.D. Cal. 2021) (holding that the claims did not fall within the PREP Act's scope and even if they did, the Act was not a complete preemption statute); Grohmann v. HCP Prairie Vill. KS OPCO LLC, 516 F. Supp. 3d 1267, 1275, 1281 (D. Kan. 2021) (reasoning that the fact that the claims did not fall within the scope of the Act contributed to determining the complete preemption question).

102. *See Brown*, 480 F. Supp. 3d at 1204 ("Plaintiff's claim . . . is not causally connected or related to the administrati[ve] . . . use of covered countermeasures" because the claim asserts "that inaction rather than action caused the death.").

103. *See id.* at 1207 ("Because the PREP Act does not apply, it cannot be used to establish federal question jurisdiction under the doctrine of complete preemption.").

104. *Id.*

105. *See generally* Gil Seinfeld, *The Puzzle of Complete Preemption,* 155 U. OF PA. L. REV. 537, 548 (2007). Complete preemption allows defendants to remove cases to federal court if the defendant can demonstrate that the plaintiff's claim is completely preempted by federal law, that is "when federal law provides the exclusive cause of action for plaintiffs who wish to seek relief for the harm alleged." *Id.* Complete preemption allows removal on the basis of federal question jurisdiction in cases where a plaintiff's complaint does not implicate federal law. *See id.* at 549. "'[A]ny complaint that comes within the scope of the federal cause of action' even if it relies exclusively on state law, 'necessarily "arises under" federal law.'" *Id.* at 552 (quoting Franchise Tax Bd. v. Constr. Laborers Vacation Tr., 463 U.S. 1, 24 (1983)).

106. *Cf.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1 (2003). The *Beneficial* court, faced with a case where plaintiffs asserted the defendant bank was liable for usury, held that only where "Congress intended [] to provide the exclusive cause of action for usuary claims against national banks would the statute" completely preempt the plaintiffs' state-law usuary claims. *Id.* at 9. The Court held that since the National Bank Act provides an "exclusive federal cause of action for usury against national banks," the plaintiffs' state-law usuary claims are preempted. *Id.* at 10.

107. *See infra* notes 108–113 and accompanying text.

misconduct.[108] Courts like *Brown*, on the other hand, focus on the specific *facts* supporting the allegation: whether the plaintiff asserts failure to use covered countermeasures or actual use of covered countermeasures to support a claim of negligence, wrongful death, etc.[109] To determine whether removal is proper, the court must determine whether the federal Act invoked by defendants provides the exclusive cause of action for claims of negligence, wrongful death, etc., not whether the specific allegations fall under the specific provisions of the federal Act.[110] Subsequently, regardless of whether the court removes or remands, the next court may then proceed to determine whether the specific allegations fall within the scope of the Act, and thus whether the defendant is immune from suit.[111] Thus, future courts deciding whether removal is proper need only focus on whether the PREP Act provides the exclusive cause of action for the type of claim asserted.[112] Such focus may expedite the COVID-19 PREP Act hearings and trials.[113]

2. Conflicting Interpretations: HHS's Fourth Amendment & AO-21-1

On December 9, 2020, HHS Secretary Alex Azar issued the Fourth Amendment to his COVID-19 PREP Act Declaration, clarifying the scope of the PREP Act and insisting the Act qualified for federal question jurisdiction.[114] The Secretary stated that the amendment was necessary to "make explicit that there can be situations where not administering a covered countermeasure . . . can fall within the PREP Act and [the] Declaration's liability

108. *See* Estate of Maglioli v. Andover Subacute Rehab. Ctr. I., 478 F. Supp. 3d 518 (D.N.J. 2020); *see also supra* note 93 and accompanying text.

109. *See* Brown v. Big Blue Healthcare, Inc., 480 F. Supp. 3d 1196 (D. Kan. 2020); *see also supra* notes 102–103 and accompanying text.

110. *See supra* note 106 (explaining how the *Beneficial* court held that a national law providing an exclusive cause of action for usury of national banks preempts the state law claim of usury against a national bank).

111. *See Estate of Maglioli*, 478 F. Supp. 3d at 533 (making clear that the court was ruling only on whether the PREP Act is a complete preemption statute and leaving it up to the state court to decide whether the defendants were entitled to PREP Act immunity because their actions fell within the scope of the Act).

112. *Cf.* Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 9 (2003) (holding that complete preemption exists where Congress intended to provide the exclusive cause of action for plaintiffs' state law claims).

113. *See infra* Section IV.A (discussing how the COVID-19 PREP Act cases have spiraled into long-winded litigation).

114. *See* Fourth Amendment to the Declaration, *supra* note 53.

protections."[115] He provided an example for COVID-19 vaccinations: where a facility has only one dose of a COVID-19 vaccine, but one vulnerable resident requests it and another less vulnerable resident also requests it, the healthcare professional will administer the vaccine to the more vulnerable resident.[116] In that case, the failure to administer the vaccine to the less vulnerable resident "relates to" the administration to the more vulnerable resident.[117] According to the Secretary, conscious prioritization or purposeful allocation of resources, which can result in a failure to administer covered countermeasures to some, are instances that still afford PREP Act immunity to the entity.[118] Additionally, the Secretary insisted that the Act satisfied the test for federal question jurisdiction and mandated a federal forum.[119]

On January 8, 2021, HHS's General Counsel, Robert Charrow, issued a new advisory opinion (AO-21-1), mirroring the Secretary's Fourth Amendment by broadly interpreting PREP Act immunity and insisting that the PREP Act is a complete preemption statute.[120] The opinion criticized courts' interpretation of the PREP Act as requiring literal "use" of countermeasures.[121] According to HHS, such a "black and white" interpretation conflicts with another key phrase in the immunity clause: "relating to."[122] HHS used the same vaccination example previously published in the Secretary's Fourth Amendment to illustrate when a nonuse could still be related to the administration of a covered countermeasure.[123]

115. *Id.* at 79194.

116. *Id.* at 79197.

117. *Id.*

118. *See id.*

119. *See id.* at 79197 ("COVID-19 is a global challenge that requires a whole-of-nation response. There are substantial federal legal and policy issues, and substantial federal legal and policy interests within the meaning of *Grable*."); *see also* Grable & Sons Metal Prods., Inc. v. Darue Eng'g. & Mfg., 545 U.S. 308, 314 (2005) (establishing the test for federal question jurisdiction: whether "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial").

120. *See* Dep't of Health & Human Servs., Advisory Opinion 21-01 on the Public Readiness and Emergency Preparedness Act: Scope of Preemption Provision (Jan. 8, 2021) [hereinafter AO-21-1]. All of HHS's advisory opinions, including AO-21-1, do "not have the force or effect of law." *Id.* at 5.

121. *See id.* at 2; 42 U.S.C. § 247d-6d(a)(1) (extending to covered entities immunity from "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").

122. *See* AO-21-1, *supra* note 120, at 3; 42 U.S.C. § 247d-6d(a)(1) (extending to covered entities immunity from "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").

123. AO-21-1, *supra* note 120, at 3. Where a facility has only one dose of a COVID-19 vaccine,

Though seemingly an aid to defendant facilities, the HHS Secretary's Fourth Amendment and AO-21-1 include irrelevant illustrations to support their broad interpretation of the PREP Act's scope and reveal inaccurate understandings of both complete preemption and federal question jurisdiction.[124] First, HHS's broad interpretation of the PREP Act (illustrated with an example of conscious prioritization of resources) provides immunity to facilities when they fail to use covered countermeasures but still try their best given their limited resources.[125] The Fourth Amendment and AO-21-1 thus reflect HHS's concern for the facilities that were dealt an enormous responsibility during a state of emergency with initially limited resources.[126] However, HHS's conscious prioritization scheme is largely irrelevant in the context of the COVID-19 wrongful death cases because most cases allege defendants' failure to carry out non-covered countermeasures—safety precautions, such as social distancing, which are not covered countermeasures at all.[127] Second, in AO-21-1, HHS states that the PREP Act completely preempts state law because the statute "establishes . . . a federal cause of action, administrative or judicial."[128] However, the PREP Act provides neither a federal judicial cause of action[129] nor a federal administrative cause of action.[130] Third, in both the Fourth Amendment and AO-21-1, HHS insists that the PREP Act passes the test for federal question jurisdiction.[131] However, plaintiffs do not

but one vulnerable resident requests it and another less vulnerable resident also requests it, the healthcare professional will administer the vaccine to the more vulnerable resident. *Id.* In that case, the *failure* to administer the vaccine to the less vulnerable resident *relates to* the administration to the more vulnerable resident. *Id.* Thus, this failure to use still triggers the PREP Act and extends immunity to the facility against the claim of the less vulnerable patient. *Id.* In contrast, the failure to use or purchase any PPE, without some kind of decision-making, would likely not be enough to trigger the PREP Act. *Id.*

124. *See supra* notes 116–117 and accompanying text (describing the vaccine hypothetical to illustrate when a nonuse of a covered countermeasure may still be covered by the PREP Act).

125. *See supra* notes 116–117 and accompanying text.

126. *See infra* Section IV.B (discussing the defendants' amici argument that facilities had to deal with lack of resources).

127. *See infra* Section IV.B.2.

128. AO-21-1, *supra* note 120, at 2.

129. *See* Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393, 411 (3d Cir. 2021) ("The compensation fund is not a cause of action."); *see also infra* Section IV.B.1.

130. *See* 42 U.S.C § 247d-6e(a); *supra* Section II.B (explaining how the Compensation Fund normally functions as a remedial route, but how there has been no relief for applicants suffering from the administration of COVID-19 countermeasure practices).

131. *See* Fourth Amendment to the Declaration, *supra* note 53, at 79197; AO-21-1, *supra* note 120, at 4–5 ("[A] substantial federal question is implicated, for example, where 'the interpretation of a federal statute [ ] actually is in dispute in the litigation and is so important that it sensibly belongs in

necessarily raise federal issues in their well-pleaded complaints, so the first element of *Grable* fails and there is no federal question jurisdiction.[132]

3. *Garcia*: The Stark Outlier

The Secretary's Fourth Amendment and AO-21-1 have influenced two courts in interpreting the immunity clause of the PREP Act.[133] The most prominent and controversial case is *Garcia v. Welltower OpCo Grp. LLC*.[134] Decedent Gilbert Garcia was a resident at Defendant's senior living residence.[135] After Garcia's death, allegedly from COVID-19, his sons brought suit against the facility alleging wrongful death.[136] Plaintiffs claimed that the facility's failure to take proper infection control measures or to follow COVID-19 public health guidelines caused their father's death.[137]

The court determined that removal was proper, but also that the PREP Act applied and afforded defendants immunity.[138] The court supported defendants' reliance on AO-21-1, reasoning that although HHS's advisory

federal court.' . . . Here, ordaining 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.") (quoting Grable & Sons Metal Prods. v. Darue Eng'g & Mfg., 545 U.S. 308, 315 (2005)).

132. *See* Grable & Sons Metal Prods., 545 U.S. at 313. The *Grable* test has four parts: the federal issue must be "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Gunn v. Minton, 568 U.S. 251, 258 (2013); *see* Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393, 413 (3d Cir. 2021) (dismissing the defendants' federal question jurisdiction argument because the estates can "properly plead their state-law negligence claims without mentioning the PREP Act" so the first element of *Grable*—necessarily raised—is not met).

133. *See* Garcia v. Welltower OpCo Grp. LLC, 522 F. Supp. 3d 734 (C.D. Cal. 2021); Rachal v. Natchitoches Nursing & Rehab. Ctr. LLC, 2021 U.S. Dist. LEXIS 105847, at *13–*14 (W.D. La.) (holding that "HHS's interpretation of the PREP Act and its scope is reasonable" and ordering "the parties to engage in a period of limited jurisdictional discovery" so that the court could later determine whether "the Plaintiff's claims relate to 'the administration or the use by an individual of a covered countermeasure'").

134. *See Garcia*, 522 F. Supp. 3d at 734.

135. *See id.* at 736.

136. *See id.* (alleging, in addition, elder abuse and neglect, and intentional infliction of emotional distress).

137. *See id.* at 737. Specifically, Plaintiffs alleged that Defendants "sent mixed messages regarding the availability of personal protective equipment," allowed third parties into the facility despite a staff member testing positive for COVID-19 the day before and sent out a facility-wide notice stating that the facility "had not had a confirmed COVID-19 case for 14 days" despite the decedent's positive result six days prior. *Id.*

138. *See id.* at 743–46.

opinions are not binding, they are still relevant to the court's consideration.[139] The court interpreted AO-21-1 as providing that the PREP Act completely preempts state-law claims "when a party attempts to comply with federal guidelines."[140] Only in situations where defendants failed to make any decisions whatsoever or failed to comply with federal guidelines completely would complete preemption not apply and defendants would not be entitled to PREP Act immunity.[141] Ultimately, the *Garcia* court held that the PREP Act applied because Garcia's injuries related to defendant's "momentary lapses" of compliance with government guidelines.[142] Since such lapses were not complete inaction, the decedent's death related to the administration or use of covered countermeasures.[143] Because the court found that the PREP Act applied, it extended immunity to the facility and dismissed the case.[144]

The *Garcia* court's test for determining PREP Act immunity erroneously glosses over a key statutory provision—covered countermeasures—and ignores plaintiffs' specific allegations.[145] The court states that partial compliance with government guidelines is enough to trigger immunity, but compliance with government guidance includes use of covered countermeasures as well as adherence to practices that are not covered countermeasures, such as social distancing.[146] Thus, under the *Garcia* court's reasoning, a defendant facility could enforce social distancing—complying with one government guideline that is not a covered countermeasure—and be entitled to PREP Act

139. *See id.* at 742 ("That the Advisory Opinions are not binding law or formal rules issued via notice and comment does not render them irrelevant.").

140. *Id.* (alluding to HHS's conscious prioritization illustration which explains that even a failure to administer can constitute compliance with federal guidelines, such as federal guidance in prioritizing those at greater risk of the virus); *see supra* notes 113–114 and accompanying text (illustrating conscious prioritization).

141. *See id.* at 743 (citing AO-21-1, *supra* note 120 at 4) ("According to the OGC [HHS], only instances of nonfeasance, i.e., where 'defendant's culpability is the result of its failure to make any decisions whatsoever, thereby abandoning its duty to act as a program planner or other covered person' would complete preemption not attach.").

142. *Id.* at 745 (citing 42 U.S.C. § 247d-6d(a)(1)) (holding that momentary lapses in compliance with local or federal guidelines "are not instances of nonfeasance" and thus "the losses caused related to 'the administration or the use . . . of a covered countermeasure'").

143. *Id.*

144. *See id.* at 745–46.

145. *See infra* notes 146–151 and accompanying text.

146. *See, e.g.*, *California Issues Directive to Fight COVID-19*, *supra* note 6 (discussing California Governor Gavin Newsom's health safety guidelines, including canceling travel plans and practicing social distancing).

immunity.[147] However, even if *Garcia* maintained the important element of covered countermeasures in its assessment of PREP Act immunity, its test for what triggers PREP Act immunity still overlooks plaintiffs' specific allegations.[148] The court reasoned that so long as the defendant complied with government health guidelines, with only momentary lapses of compliance, it was entitled to immunity.[149] But instead of determining whether a defendant attempted to comply with federal guidelines to use a covered countermeasure, courts should focus on each alleged decision and each failure.[150] For example, in *Garcia*, the notice sent by the facility that it's community had no positive tests for the past fourteen days, despite Garcia's positive test result just a few days prior, is an instance of dangerous oversight which courts should not disregard simply because the facility complied with federal guidelines at some other point in time during the pandemic.[151]

IV. THE PROBLEM WITH REMOVAL PROCEEDINGS

A. Lengthy Litigation Pushes Plaintiffs to Settle for Less

Despite the nearly unanimous opinions holding that the PREP Act does not mandate a federal forum for these cases against senior living facilities, defendant facilities continue to bring removal proceedings.[152] The disputes

147. *See Garcia*, 522 F. Supp. 3d at 745 (reasoning that momentary lapses of "compliance with federal or state guidelines" entitle a defendant to PREP Act immunity).

148. *See infra* notes 149–151 and accompanying text.

149. *See Garcia*, 522 F. Supp. 3d at 745.

150. *See* Grohmann v. HCP Prairie Vill. KS OPCO LLC, 516 F. Supp. 3d 1267, 1279 (D. Kan. 2021) (citations omitted) (noting that the Fourth Amendment explains that "an 'inaction claim' is not necessarily beyond the scope of the PREP Act" but that a facility simply "using covered countermeasures somewhere in the facility is [in]sufficient to invoke the PREP Act as to all claims that arise in that facility" because the statute "still requires a *causal connection* between the injury and the use or administration of covered countermeasures"); 42 U.S.C. § 247d-6d(a)(2)(B) ("[I]mmunity . . . applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure."); *see also* Winn v. Cal. Post Acute LLC, 532 F. Supp. 3d 892, 899 (C.D. Cal. 2021) (emphasis added) (holding that despite the Fourth Amendment, "Here, there [were] no allegations that Decedent's death was the result of *purposeful allocation* of personal protective equipment or care to other individuals," but rather there were only allegations that defendant did not provide proper care and attention to prevent decedent from contracting COVID-19 and other health issues).

151. *See Garcia*, 522 F. Supp. 3d at 737.

152. *See, e.g.*, Lutz v. Big Blue Healthcare, Inc., 480 F. Supp. 3d 1207 (D. Kan. 2020); Hatcher v. HCP Prairie Vill. KS Opco LLC, 515 F. Supp. 3d 1152 (D. Kan. 2021); Dupervil v. All. Health Operations LLC, 516 F. Supp. 3d 238 (E.D.N.Y. 2021); *Grohmann*, 516 F. Supp. 3d at 1272; Goldblatt

over the appropriate court—state or federal—have resulted in months and even years of delays for families waiting for their cases to be heard on the merits.[153] Today, nearly two years after the initiation of many of these suits, not a single case has been decided on the merits.[154] Courts, already years behind on their dockets due to the pandemic,[155] have only ruled on the appropriate forum.[156] Nearly all courts have granted plaintiffs' requests to remand to state court.[157] After such rulings, though, many defendants have appealed these decisions to remand, stretching out litigation even further.[158]

Defendant facilities' removal of claims to federal court and subsequent appeals of remand decisions negatively impact plaintiff families seeking relief for the loss of a loved one.[159] Defendant facilities remove the claims to federal court to raise federal PREP Act immunity, a defense with the potential to completely eliminate their liability for any tort action except willful misconduct.[160]

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v. HCP Prairie Vill. KS Opco LLC*,* 516 F. Supp. 3d 1251 (D. Kan. 2021).

153. *See, e.g*, Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393 (3d Cir. 2021).

154. *See* Drew Graham & Teresa Pike Tomlinson, *How (to This Point) Has PREP Act Application Gone So Wrong?*, N.Y. L.J. (Dec. 10, 2021), https://www.law.com/newyorklawjournal/2021/12/10/how-to-this-point-has-prep-act-application-gone-so-wrong/ (explaining how "PREP Act remand issues" are "pending in seven other circuits" besides the Third Circuit, which heard *Maglioli*).

155. *See* Melissa Chan, *'I Want This Over' for Victims and the Accused, Justice is Delayed as COVID-19 Snarls Courts*, TIME (Feb. 23, 2021), https://time.com/5939482/covid-19-criminal-cases-backlog/ (discussing how, because of health officials' urge for social distancing in light of the pandemic and the limitations of courtroom space, hearings and trials were postponed and "[e]ven the U.S. Supreme Court postponed oral arguments for the first time in more than 100 years").

156. *See* Graham & Tomlinson, *supra* note 154.

157. *See* Garcia v. Welltower OpCo Grp. LLC, 522 F. Supp. 3d 734, 745 (C.D. Cal. 2021). Only *Garcia* has dismissed plaintiffs' request for remand. *See id.*

158. *See, e.g.*, Estate of Maglioli v. Andover Subacute Rehab. Ctr. I, 478 F. Supp. 3d 518 (D.N.J. 2020). The factual and procedural history of *Maglioli* illustrates the usual lengthy litigation process of wrongful death claims against senior living facilities and nursing homes in the COVID-19 realm. *See id.* On April 9, 2020, Joseph Maglioli allegedly died from COVID-19. *See id.* at 523. On April 28, 2020, his sons filed a wrongful death claim in New Jersey state court. *See* Plaintiff's Brief in Support of Their Motion to Remand at 4–5, *Estate of Maglioli*, 478 F. Supp. 3d at 518. On May 29, 2020, the defendants filed a Notice of Removal to federal court. *See id.* On August 12, 2020, the U.S. District Court for the District of New Jersey held that the matter would be remanded back to state court. *See id.* The defendants appealed the decision to remand, and the Court of Appeals affirmed on October 20, 2021. *See* Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393 (3d Cir. 2021). Now, nearly three years later, Joseph Maglioli's sons still wait for their case to be heard on the merits. *See id.*, *reh'g denied*, U.S. App. LEXIS 20345 (3d Cir. 2022).

159. *See* Hals, *supra* note 56 (discussing one plaintiff's stress while waiting for the outcome of the claim she filed on behalf of her mother and explaining defendant facilities' unfair tactic of extending litigation to force settlement).

160. *See, e.g.*, 42 U.S.C. § 247d-6d(c); *Maglioli*, 478 F. Supp. 3d at 518.

Problematically, raising this defense adds a layer of complexity to wrongful death claims that hinders a plaintiff family's ability to find a lawyer willing to take on their case.[161] Tactically, extending litigation may play to defendants' advantage because the defendant facilities have more resources than the individuals who bring the wrongful death claims, allowing facilities to withstand long-winded litigation.[162] In contrast, lengthy litigation drains limited resources from plaintiff families and encourages them to dismiss their claims and settle.[163] As District Court Judge Dale Fischer posits: lengthening litigation by removing the case to federal court and appealing a remand order raises "a serious possibility of such removals being used in a cynical, strategic way to stall cases and to extract concessions . . . from opposing plaintiffs."[164] On the other hand, counsel for defendants insist the defendant facilities "are not unreasonably delaying discovery, but are applying the law and HHS guidance."[165]

B. Defendants' Faulty Legal Footing

1. The PREP Act is Not a Complete Preemption Statute

Those in favor of immunity root their arguments in the text of the PREP Act and HHS authority.[166] The *Garcia* defendants' amici brief asserted that federal courts have jurisdiction over plaintiffs' wrongful death cases related to COVID-19 because the PREP Act is a complete preemption statute.[167] For

161. *See* Hals, *supra* note 56. "Time is money and complexity is time and the more complexity in a case means the less likely the wrongful death claimants will find lawyers to represent them," says Mike Duff, a professor at the University of Wyoming College of Law. *Id*.

162. *See id.*

163. *See id.*

164. *Id.*

165. *Id.*

166. *See, e.g.*, Brief for Argentum, et al. as Amici Curiae Supporting Defendants-Appellees, Garcia v. Welltower OpCo Grp. LLC, (No. 21-55224) (9th Cir. Nov. 18, 2022) [hereinafter Amici Curiae Brief for Appellees].

167. *See id.* at 30. The doctrine of "complete preemption" applies where a federal statute is so broad that it completely displaces claims pleaded under state law. *See Complete Preemption*, THOMSON REUTERS, https://content.next.westlaw.com/4-518-3498?__lrTS=20210216221421319&transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited Oct. 1, 2022) (paraphrasing Aetna Health Inc. v. Davila, 542 U.S. 200, 207 (2004)). Thus, even when the plaintiff pleads a claim under state law, the claim will be considered to be based on federal law and the defendant may remove the claim to federal court. *See id.* (paraphrasing Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 8 (2003)). As the amici point out, both HHS and the U.S. Department of Justice have recognized the

Congress to "so completely preempt a particular area"[168] of law such that any state-law claims within that area become federal in character, Congress must have "(1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action."[169]

Proponents of immunity assert that both prongs required for complete preemption have been satisfied.[170] First, immunity proponents argue the PREP Act displaces state-law tort claims within a particular area simply by virtue of the immunity provision, effectually extending immunity from claims for loss related to the administration or use of a covered countermeasure.[171] The PREP Act also provides its own preemption provision, which provides no state may establish or enforce a law regarding covered countermeasures that conflicts with the PREP Act.[172] Such language, immunity proponents posit, evidences Congress's intent to give the PREP Act preemptive effect.[173] Second, the PREP Act provides a substitute cause of action for claims concerning injuries related to covered countermeasures.[174] Through the Act, Congress required a federal forum for claims of willful misconduct and created the Compensation Fund for other claims besides willful misconduct.[175]

However, the amici seem to misunderstand what qualifies as a substitute

PREP Act as triggering complete preemption. *See* Amici Curiae Brief for Appellees, *supra* note 166; Fifth Amendment to Declaration Under the PREP Act, 86 Fed. Reg. 7872, 7874 (Feb. 2, 2021) ("The plain language of the PREP Act makes clear that there is complete preemption of state law as described above."); Bolton v. Gallatin Ctr. for Rehab. & Healing, LLC, 535 F. Supp 3d 709, 721 (M.D. Tenn. 2021) (noting that HHS itself has "opined that the PREP Act is a complete preemption statute").

168. Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393, 407 (3d Cir. 2021).

169. See Brief of Appellees at 29, *Garcia*, (No 21-5524) (filed June 16, 2021) (quoting City of Oakland v. BP PLC, 969 F.3d 895, 906 (9th Cir. 2020)).

170. *See id.*

171. *See, e.g.*, Amici Curiae Brief for Appellees, *supra* note 166, at 8.; 42 U.S.C. § 247d-6d(a)(1) ("[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.").

172. 42 U.S.C. § 247d-6d(b)(8) ("[N]o 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 applicable under this section.").

173. *See* Amici Curiae Brief for Appellees, *supra* note 166, at 8.

174. *See id.* at 9.

175. *See* 42 U.S.C § 247d-6e(a) ("[It] is hereby established in the Treasury an emergency fund designated as the 'Covered Countermeasure Process Fund' for purposes of providing timely, uniform, and adequate compensation to eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure."); *supra* Section II.B (explaining how the Compensation Fund functions).

cause of action.[176] Congress only created an exclusive cause of action for willful misconduct claims.[177] Beyond willful misconduct, the Act provides no other cause of action; thus, complete preemption only applies to the cause of action for willful misconduct.[178] Indeed, as the *Maglioli* appellate court points out, "The compensation fund is not a cause of action."[179] The Compensation Fund has no bearing on whether a state-law claim must be removed to federal court.[180] As the *Dupervil* court correctly reasons, the PREP Act does not confer jurisdiction to the federal courts, but rather to the Secretary of HHS "who has the sole authority to administer and provide compensation from [the Fund.]"[181] The PREP Act also prevents judicial review of the Secretary's decisions regarding eligibility and compensation.[182] In light of the majority of courts' analyses, explaining that the Act does not confer jurisdiction to the federal courts except in cases of willful misconduct,[183] it seems

176. *See* Amici Curiae Brief for Appellees, *supra* note 166, at 9.

177. 42 U.S.C § 247d-6d(d)(1) ("[T]he 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.").

178. *See id.*; Dupervil v. All. Health Operations, LLC, 516 F. Supp. 3d 238, 250 (E.D.N.Y. 2021) (holding that the PREP Act does not completely preempt the plaintiff's claims because "the PREP Act does not provide the exclusive cause of action for claims that fall within its scope; in fact, for the most part, the Act provides no causes of action at all").

179. Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393, 411 (3rd Cir. 2021). In rebuttal, "The nursing homes argue that the compensation fund is nonetheless a *civil-enforcement provision* 'exclusive of any other civil action or proceeding.'" *Id.* (citing 42 U.S.C. § 247d-6e(d)(4)). But the court responds: "To be sure, the Supreme Court has occasionally asked whether Congress created an exclusive civil-enforcement provision that displaces the state-law claims. . . . Arguably, the compensation fund could be a civil-enforcement provision even if it is not a cause of action." *Id.* at 411–12. And anyway, "For our purposes, it is enough that neither the Supreme Court nor any circuit court has extended complete preemption to a statute because it created a compensation fund." *Id.* at 412.

180. *See Dupervil*, 516 F. Supp. 3d at 251.

181. *Id.* "[T]o determine whether a federal statute completely preempts a state-law claim within its ambit, we must ask whether the federal statute provides 'the exclusive cause of action' for the asserted state-law claim." *Id.* at 250 (quoting Sullivan v. Am. Airlines, Inc., 424 F.3d 267, 275–76 (2d Cir. 2005)). As in Sullivan, where the Railway Labor Act ("RLA") did not provide an exclusive cause of action for claims falling within its scope, but rather "gave primary jurisdiction over the claims at issue to 'board[s] of adjustment . . . established under the RLA," so too here, the PREP Act confers jurisdiction to the Secretary of HHS, not to the federal courts. *Id.* at 250–51 (citing *Sullivan*, 424 F.3d at 276); *see* Jordan Lipp, *The PREP Act: Defending Product Liability and Professional Liability Litigation Involving COVID-19 Countermeasures,* 88 DEF. COUNS. J. 1, 9 (2021) ("As the PREP Act largely precludes tort remedies, it has created an administrative remedy [the Fund] for those injured by covered countermeasures.").

182. *See* 42 U.S.C § 247d-6e(b)(5)(C) ("No court of United States, or of any State, shall have subject matter jurisdiction to review . . . any action by the Secretary under this paragraph.").

183. *See* 42 U.S.C §§ 247d-6d(d), 247d-6d(e)(1). Even for the willful misconduct claims, the

pointless for defendants to seek removal to federal court.[184]

2. Plaintiffs' Claims Do Not Fall Under the PREP Act

Turning to the question of whether plaintiffs' claims fall under the scope of the PREP Act, the amici insist that even a failure to administer countermeasures falls within the scope of the PREP Act.[185] The amici point to the language of the Secretary's initial COVID-19 PREP Act Declaration, which provides that a failure to use or administer covered countermeasures can still fall within the PREP Act's scope.[186] They also rely on the Secretary's Fourth Amendment and AO-21-1 (the "HHS interpretation"), which express that where failure to use a covered countermeasure results from a conscious prioritization decision, such failure still qualifies for PREP Act immunity.[187] For example, PREP Act immunity applies in a case where a covered entity might choose to administer a covered countermeasure to one person while choosing to not administer to another because of a lack of resources .[188]

However, the PREP Act does not apply to COVID-19 cases even under the HHS interpretation.[189] First, the bulk of the COVID-19 wrongful death

plaintiff "must first exhaust administrative remedies, [before] bring[ing] the claim only in the U.S. District Court for the District of Columbia." *Maglioli*, 16 F.4th at 409 (referencing 42 U.S.C §§ 247d-6d(e)(1), 247d-6e(d)(1)).

184. *See Dupervil*, 516 F. Supp. 3d at 251. The whole preemption debate is especially complex because the PREP Act is unique in that it does not require anything. *See id.* ("[T]he PREP Act is, at its core, an immunity statute; it does not create rights, duties, or obligations."). Thus, the debaters of PREP Act preemption have scant, if any, precedent on which to rely. *Cf.* J. David Prince, *The Puzzle of Parallel Claims, Preemption, and Pleading the Particulars,* 39 WM. MITCHELL L. REV. 1034, 1050–51 (2013) (citations omitted) (explaining that "state-law-based claims are expressly preempted only if they impose requirements that are 'different from, or in addition to' federal requirements" and that in the vaccine context, "[s]tate and federal requirements are not genuinely equivalent if a manufacturer could be held liable under the state law without having violated the federal law").

185. *See* Amici Curiae Brief for Appellees, *supra* note 166, at 25–29.

186. *See id.* Administration of a countermeasure need not involve a "physical provision" of the countermeasure, but also "*decisions* directly relating to public and private delivery, distribution and dispensing of the countermeasures." Declaration Under the PREP Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15200 (Mar. 17, 2020) (emphasis added). Thus, according to the amici, allegations like those in the *Garcia* complaint, which asserted the defendants lacked sufficient PPE for staff, may be covered by the PREP Act because the denial of access to resources involves decision making in light of the facility's limited resources. *See* Amici Curiae Brief for Appellees, *supra* note 163, at 27.

187. *See* AO-21-1, *supra* note 120, at 3.

188. *See id.*; *supra* Section III. B.2.

189. *See* AO-21-1, *supra* note 120, at 3.

cases do not involve conscious prioritization decisions, but rather allege defendants' failure to stick to non-tangible protocol—namely social distancing and quarantining—which have nothing to do with shortages of covered countermeasures like vaccines and face masks.[190] And second, even if a claim does include an allegation of failure to ensure all staff members wear a facemask, it may not be clear to courts that such failure resulted from a conscious prioritization or purposeful allocation of facemasks.[191] For example, allowing a staff member who showed COVID-19 symptoms to continue working without using any PPE[192] is not an instance of conscious prioritization regarding allocation of masks (a covered countermeasure) because a reasonable facility would likely prioritize masking a symptomatic staff member.[193] But allowing the symptomatic employee to work without PPE may be an instance of conscious prioritization regarding other lacking resources, such as staffing shortages (i.e., the facility made the conscious decision to prioritize the care of all residents, which allowed the symptomatic staff member to continue working because losing one staff member could cause a lack of care to residents).[194] However, HHS makes clear that conscious prioritization must be the conscious prioritization of allocation of covered countermeasures.[195] Therefore, even in light of HHS's expansion of nonuse as falling under the PREP Act, claims alleging wrongful death in the COVID-19 realm still do not fall under the Act.[196] Thus, future courts should find that the PREP Act does not extend immunity to senior living facilities and nursing homes that failed to act.[197]

190. *See, e.g.*, Garcia v. Welltower OpCo Grp. LLC, 522 F. Supp. 3d 734, 737 (C.D. Cal. 2021) (noting the facility scheduled a third-party barber to enter the facility to cut decedent's hair, despite the no-visitor policy); Lutz v. Big Blue Healthcare, Inc., 480 F. Supp. 3d 1207, 1210 (D. Kan. 2020) (noting after one staff member tested positive, the residents were still allowed to congregate in the common areas and then, days later, the seventeen residents and two more staff members tested positive).

191. *See* AO-21-1, *supra* note 120, at 3 (explaining conscious prioritization or purposeful allocation of covered countermeasures).

192. *See* Brown v. Big Blue Healthcare, Inc., 480 F. Supp. 3d 1196, 1199 (D. Kan. 2020).

193. *Cf.* AO-21-1, *supra* note 120, at 3 (providing an example of conscious prioritization: administering a vaccine to a patient at higher-risk of serious health issues and not administering a vaccine to a patient with lower risk when you only have one vaccine left).

194. *See id.* (explaining conscious prioritization).

195. *See id.* (emphasis added) ("Prioritization or purposeful allocation *of a Covered Countermeasure*, particularly if done in accordance with a public health authority's directive, can fall within the PREP Act and this Declaration's liability protections.").

196. *See id*.

197. *See id.*

V. LOOKING TO THE FUTURE: A CALL FOR AMENDMENT

So long as the PREP Act and HHS's authority provide some room for defendant facilities to argue preemption and immunity, defendants will continue to remove cases to federal court and appeal decisions to remand, harming individual plaintiffs who must wait years before their cases are heard on the merits.[198] In particular, defendants can rely on the PREP Act's arguable substitute causes of action[199] and HHS's amendment that provides that a failure to administer countermeasures may still trigger the PREP Act's immunity.[200] However, amendment of the statutory and related administrative law would expedite the road to recovery for future families who may bring COVID-19 claims or claims arising out of any future public health emergency that may fall under the PREP Act.[201] As previously discussed, the Emergency Fund established by the PREP Act is, to date, an impossible means of recovery for plaintiff families.[202] And since the birth of the pandemic and the related wrongful death suits nearly three years ago, recovery through the court system has been equally impossible as no cases have yet been decided on the merits.[203] Thus, Congress should amend the PREP Act to make clear that 1) the PREP Act is not a complete preemption statute and does not mandate a federal forum and 2) a covered entity's failure to use or administer covered countermeasures does not fall within the Act's scope.[204]

198. *See* Hals, *supra* note 56. Defendants may continue pushing for removal even if, in the currently pending cases, the circuit courts affirm the district court consensus that the PREP Act does not completely preempt state-law claims. *See id.* (discussing the tactical advantages to defendants who bring removal proceedings); *supra* Section IV.A.

199. *See supra* Section IV.B.1. Amici noted that the Act provides for an exclusive federal forum for willful misconduct cases and the Compensation Fund for all other claims. *See supra* Section IV.B.1.

200. *See* Fourth Amendment to the Declaration, *supra* note 53, at 17197 *(*noting that even allegations of a failure to administer countermeasures may relate to "the administration to or [the] use of a Covered Countermeasure.").

201. *See supra* Part IV. Recall that the Secretary's declarations and amendments must stay within the bounds of the PREP Act itself. *See supra* note 47 and accompanying text.

202. *See supra* Section II.B.

203. *See supra* Section IV.A.

204. *See supra* Section IV.B.

A. An Effort to Eliminate the Complete Preemption Argument

Congress should clarify that the PREP Act is not a complete preemption statute.[205] As currently written, the PREP Act does not completely preempt state-law claims;[206] however, proponents for immunity still argue that creation of the Compensation Fund provided a substitute cause of action.[207] Proponents contend that, by the immunity provision itself, Congress intended to displace a state-law cause of action, and therefore the Act is a complete preemption statute.[208] To clear up the disagreement, Congress should add a provision within the Compensation Fund provision or immunity provision explicitly stating that the existence of the Compensation Fund is not a substitute federal cause of action and does not completely preempt state-law claims, which would effectively preclude individuals from filing tort claims in state court.[209] For example, in 42 U.S.C. § 247d-6e(b)(1), Congress could state the following (with suggested additions in italics):

> If the Secretary issues a declaration under [42 U.S.C. § 247d-6d(b)], the Secretary shall . . . *in a purely administrative capacity*, provide compensation to an eligible individual for a covered injury directly caused by the administration or use of a covered countermeasure pursuant to such declaration. *Relief from this Compensation Fund has no bearing on whether state-law claims, outside this administrative-relief avenue, must be removed to federal court.*[210]

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205. *See infra* note 210 and accompanying text.

206. *See* Dupervil v. All. Health Operations, LLC , 516 F. Supp. 3d 238 (E.D.N.Y. 2021) (explaining that the PREP Act confers jurisdiction to the Secretary for all claims besides willful misconduct—those filed under the Compensation Fund). The "compensation fund is not a cause of action." Estate of Maglioli v. All. HC Holdings LLC, 16 F.4th 393, 411 (3d Cir. 2021). In rebuttal, "[t]he nursing homes argue that the compensation fund is nonetheless a *civil-enforcement provision* 'exclusive of any other civil action or proceeding.'" *Id.* (citing 42 U.S.C. § 247d-6e(d)(4)). But the court responds: "To be sure, the Supreme Court has occasionally asked whether Congress created an exclusive civil-enforcement provision that displaces state-law claims. . . . Arguably, the compensation fund could be a civil-enforcement provision even if it is not a cause of action." *Id.* at 411–12. Regardless, the court states, "For our purposes, it is enough that neither the Supreme Court nor any circuit court has extended complete preemption to a statute because it created a compensation fund." *Id.* at 412.

207. See supra Section IV.B.1 (discussing the complete preemption argument of the Garcia defendants' amici).

208. *See supra* Section IV.B.1.

209. 42 U.S.C. § 247d-6e (Compensation Fund provision); 42 U.S.C. § 247d-6d (immunity provision).

210. 42 U.S.C. § 247d-6e(b)(1); *see supra* Section IV.B.1.

Such a provision would likely dissolve the immunity proponents' argument that the Compensation Fund is a substitute cause of action, which helps satisfy the test for complete preemption.[211] Upsetting the complete preemption argument would force defendants to withdraw their removal petitions and appeals challenging remand.[212] Without any legal footing, defendants' motions and pleadings would be frivolous, and defendants would risk court-ordered sanctions.[213] Eliminating the issue of removal would speed up the process of litigation, encouraging plaintiffs to proceed with their court case instead of dropping the cases because of time and resources restraints.[214] Plaintiff would have fewer incentives to settle for less and lose the chance to hold defendant facilities publicly accountable.[215]

B. Clarify PREP Act Immunity's Limited Scope

More important to the fate of plaintiff families is the decision regarding whether the PREP Act grants immunity where an entity failed to use or administer covered countermeasures.[216] A call for amendment begs the question: Should immunity even be granted for failure to administer covered countermeasures?[217] On one hand, at the policy level, it seems appropriate to extend immunity to facilities due to the difficult circumstances the pandemic presented, including the difficulty in monitoring the spread of COVID-19[218]

211. *See supra* Section IV.B.1.

212. *See* FED. R. CIV. P. 11(b)(2), 11(c) (prohibiting the filing of frivolous arguments).

213. *See id.* Sanctions may not only result in monetary fines, but also negatively impact an attorney's record. *See* Robyn Hagan Cain, *Avoid Attorney Sanctions: Show Up for Your Hearing*, FINDLAW (Nov. 18, 2011), https://www.findlaw.com/legalblogs/first-circuit/avoid-attorney-sanctions-show-up-for-your-hearing/.

214. See supra Section IV.A.

215. *See supra* Section IV.A.

216. *See* 42 U.S.C. § 247d-6d; *supra* Section II.B (discussing the ineffective Compensation Fund).

217. *See, e.g.*, Dupervil v. All. Health Operations, LLC, 516 F. Supp. 3d 238, 253–54 (E.D.N.Y. 2021) (tackling the same question).

218. *See* Kaufman, *supra* note 42, at 90–92 (discussing how COVID-19 is a highly contagious virus that spreads quickly and often with little trace). Of the 624 million global COVID-19 cases at the time this Comment was written, the United States has had 98 million of those cases. *See COVID-19 Coronavirus Pandemic*, WORLDOMETER, https://www.worldometers.info/coronavirus/#countries (last visited Oct. 3, 2022). Countermeasures like wearing masks and social distancing only "help slow the spread of the virus" and do not eliminate it. *See* Kaufman, *supra* note 42, at 91 (citations omitted); *see also If You've Been Exposed to the Coronavirus,* HARV. HEALTH PUBL'G (Aug. 25, 2022) https://www.health.harvard.edu/diseases-and-conditions/if-youve-been-exposed-to-the-coronavirus (discussing how slowing the spread of COVID-19, an airborne virus, is complicated by the fact that a person may be contagious for up to two days before experiencing symptoms).

and the shortages in PPE and staff.[219]

However, there are many more policy reasons for restricting immunity to senior living facilities and nursing homes.[220] First, restricting immunity could incentivize facilities to act more responsibly when caring for residents and following safety guidelines during the pandemic.[221] It is possible for facilities to take more stringent precautions.[222] Indeed, nearly two-thirds of nursing

219. *See* Amici Curiae Brief for Appellees, *supra* note 166, at 6; Kaufman, *supra* note 42, at 82 (citing Bernard Condon et al., *Faced With 20,000 Dead, Nursing Homes Seek Shield from Lawsuits*, CLAIMS J. (May 5, 2020), https://www.claimsjournal.com/news/national/2020/05/05/296899.htm.). For example, in early 2020, a Los Angeles nursing home had "only [two] nurses . . . caring for eighty-three residents" and "[o]ne staff member claimed to be staying up [twenty] hours at a time." Anne Marie Murphy et al., *Shocking COVID Cover-up: Hollywood Nursing Home Forges Death Certificate to Hide its COVID Problem; CPM Assists Family to Sue for Accountability,* COTCHETT PITRE & MCCARTHY LLP (May 20, 2020), https://www.cpmlegal.com/news-Hollywood-Nursing-Home-Forges-Death-Certificate-to-Hide-its-COVID-Problem. Even the California National Guard had to come in to increase the facility's staff numbers. *See id.* Shortages in PPE and staff caused a vicious cycle: difficulty in caring for their elderly patients because of a lack of resources resulted in the deaths of hundreds of thousands of elderly adults in the U.S., which caused sharp declines in occupancy rates and revenue. *See* Tony Pugh, *Bankruptcies*, *Closures Loom for Nursing Homes Beset by Pandemic*, BL (Dec. 30, 2020), https://news.bloomberglaw.com/health-law-and-business/bankruptcies-closures-loom-for-nursing-homes-beset-by-pandemic. Hundreds of senior care facilities closed and filed for bankruptcy. *See id.* In 2020, long-term care facilities spent roughly $30 billion on personal protective equipment and extra staffing. *See COVID-19 Exacerbates Financial Challenges of Long-Term Care Facilities,* AM. HEALTH CARE ASS'N (Feb. 17, 2021), https://www.ahcancal.org/News-and-Communications/Press-Releases/Pages/COVID-19-Exacerbates-Financial-Challenges-Of-Long-Term-Care-Facilities.aspx. Their industry was projected to lose $94 billion between 2020 and 2021. *See id.* Despite the difficulties facing senior living facilities, many facilities battled COVID-19 incredibly well. *See, e.g.*, Caroline Pearson et al., *The Impact of COVID-19 on Seniors Housing*, NORC AT THE UNIV. OF CHI., at 2–3 (June 3, 2021), https://www.norc.org/PDFs/COVID-19%20SH/20210601%20NIC%20Executive%20Summary%20FINAL.pdf (reporting that nearly two-thirds of assisted living facilities had no deaths from COVID-19 during 2020). For more information on the worldwide nursing shortage due to COVID-19, see *The Global Nursing Shortage and Nurse Retention,* INT'L COUNCIL OF NURSES, https://www.icn.ch/system/files/2021-07/ICN%20Policy%20Brief_Nurse%20Shortage%20and%20Retention.pdf (last visited Oct. 3, 2022).

220. *See* Betsy J. Grey, *Against Immunizing Nursing Homes,* U. OF CHI. L. REV. ONLINE (June 18, 2021) https://lawreviewblog.uchicago.edu/2021/06/18/grey-nursing-homes/ (detailing the policy reasons for not granting senior living facilities and nursing homes immunity).

221. *See id.* ("Immunity removes the incentive to provide the level of care required to adequately protect nursing home residents and workers."). To illustrate: "[A] report by the New York State Attorney General on nursing homes during the pandemic found that immunity protection on the state level may have led nursing home facilities to make 'financially motivated, rather than clinically motivated' decisions." *Id.*; *see Oversight of Resident Care-Related Medical Equipment in Nursing Homes*, OFF. OF THE N.Y. STATE COMPTROLLER (Sept. 19, 2018), https://www.osc.state.ny.us/state-agencies/audits/2018/09/19/oversight-resident-care-related-medical-equipment-nursing-homes. For example, facilities would admit more patients "even when the facilities lacked sufficient staff and equipment to handle the added workload." *See* Grey, *supra* note 220.

222. See, e.g., Pearson et al., supra note 219, at 1–2.

homes had no deaths from COVID-19 during 2020.[223] Second, immunity "places the burden of avoiding infection . . . directly on patients, who cannot control their own daily activities."[224] For example, facilities may control if or when a resident may leave the premises and control residents' daily activities.[225] Third, immunity would remove the transparency and oversight that "result[s] from exposure to liability" and "is critical to monitoring the facilities."[226] Without transparency, the level of care at facilities may decline due to the lack of pressure from potential suit by individuals.[227] Finally, immunity for failure to act contradicts "the plain purpose behind PREP Act immunity: to encourage the development and use of countermeasures to combat public health emergencies."[228] If facilities were granted immunity in cases where they failed to use countermeasures, they may feel more comfortable to continue to decline to use countermeasures despite the PREP Act's purpose to promote the use of countermeasures.[229]

Not only do the policy arguments weigh against affording immunity to facilities, but the law as currently written also denies immunity for facilities who fail to administer or use covered countermeasures.[230] However, HHS's overly broad and largely irrelevant interpretation of the statute has paved the way for defendants to insist that claims based on failure to administer countermeasures trigger PREP Act immunity.[231] To dispel the defendants' relentless arguments, Congress should amend the Act to explicitly eliminate failure to administer or use as a qualifier for PREP Act immunity, and HHS should withdraw its broad interpretation of PREP Act immunity.[232] As for statutory amendment, Congress should add the following language to 42 U.S.C. § 247d-6d(a)(1) (suggestions appearing in italics):

223. *See* Pearson et al., *supra* note 219, at 1–2.
224. Grey, *supra* note 220.
225. *See id.*
226. *Id.*
227. *See id.*
228. *Id.*
229. *See id.*
230. *See supra* Section IV.B.2. Simply put, the PREP Act affords immunity to "those who employ countermeasures, not those who decline to employ them." Estate of Maglioli v. Andover Subacute Rehab. Ctr. I, 478 F. Supp. 3d 518, 531 (D.N.J. 2020); *see supra* notes 99–100 and accompanying text (discussing the *Brown* court's holding that failure to use does not fall within the scope of the PREP Act).
231. *See supra* Section IV.B.2.
232. *See* 42 U.S.C. § 247d-6d.

> [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 *active* administration to or the use by—*and strictly not from the failure to administer to or use by*—an individual of a covered countermeasure.[233]

Additionally, in an effort to dispel any more confusion around the scope of immunity, HHS should withdraw the provisions within the Fourth Amendment to the Declaration and AO-21-1 that state that nonuse or failure to administer may sometimes qualify for immunity.[234] Amendment and withdrawal of HHS interpretation would speed up the litigation process because defendants could no longer rely on the PREP Act immunity defense as their lack of action would simply not qualify them for immunity.[235] With the need for an immunity analysis eliminated, courts could proceed on the merits of a case rather than spend time analyzing a clear statute that HHS creatively but inaccurately interpreted.[236]

VI. CONCLUSION: EASE THE FRUSTRATION

The current road to recovery for plaintiff families seems hopeless.[237] Garnice Robertson, one plaintiff bringing a claim of wrongful death of her mother against a Kansas nursing home, expressed her frustration with the process for relief: "If I'm feeling the way I feel, how do you think all these other people feel? . . . It's just not right."[238] Today, hundreds of plaintiffs like Ms. Robertson wish to hold nursing homes and senior living facilities accountable for failing to adhere to COVID-19 prevention guidelines that they claim resulted

233. *Id.*; *see supra* Section IV.A. (discussing how removal proceedings have unnecessarily lengthened litigation to the detriment of plaintiff families, a result that the above amendment could assuage).

234. *See* Fourth Amendment to the Declaration, *supra* note 53, at 79192–93; AO-21-1, *supra* note 120; Grey, *supra* note 220. Amendment or withdrawal of the administrative law surrounding the PREP Act is not very likely to occur, however. *See Agency Profile: Dept of Health & Human Services,* OPEN SECRETS, https://www.opensecrets.org/federal-lobbying/agencies/summary?id=034 (last visited Oct. 3, 2022). Thousands of health care providers, who have monetary and publicity stakes in shielding nursing homes and senior living facilities, lobby HHS each year for favorable treatment. *Id.* In 2021, 1,340 companies lobbied HHS, including Pfizer, Blue Cross, and Walgreens. *Id.*

235. *See* 42 U.S.C. § 247d-6d.

236. *See supra* notes 30–31 and accompanying text (discussing the process of litigation for the COVID-19 wrongful death cases).

237. *See* Hals, *supra* note 56; *supra* Section IV.A.

238. *See* Hals, *supra* note 56.

in the death of a family member.[239] Administrative inefficiency[240] and defendants' legal tactics frustrate plaintiffs' goals, though.[241] After claims are filed, defendant facilities petition for removal.[242] Though the PREP Act is not a complete preemption statute, defendants still argue that Congress intended it as one.[243] And despite the PREP Act's language limiting immunity to defendants for injuries related to administration or use of a covered countermeasure, HHS has inaccurately expanded the statutory provision, insisting that a failure to administer or use may still be related to active administration or use.[244]

An amendment would make efficient the path of litigation.[245] Because the statutory and administrative law allow defendants to continue fighting for removal and for immunity, Congress should amend the Act itself.[246] An amendment should include provisions explicitly ruling out the complete preemption doctrine and immunity for instances of failures to act.[247] If Congress restricts immunity from the defendant facilities, it will hold senior living facilities and nursing homes accountable for their deadly failure to maintain COVID-19 safety precautions and will incentivize the facilities to take more stringent precautions when caring for their elderly residents in the future.[248]

Mai R. Contino*

239. *See, e.g.*, Garcia v. Welltower OpCo Grp. LLC, 522 F. Supp. 3d 734, 736–37 (C.D. Cal. 2021).

240. *See supra* Section II.B. (discussing how no case relating to COVID-19 has yet been compensated through the alternative Compensation Fund).

241. *See supra* Part IV (discussing the motives of defendants in stretching out litigation to force plaintiffs to settle).

242. *See supra* Part IV.

243. *See supra* Section IV.B.1 (providing the defendants' argument for preemption).

244. *See* Fourth Amendment to the Declaration, *supra* note 53, at 79192–93; AO-21-1, *supra* note 120.

245. *See supra* Part V.

246. *See supra* Part V.

247. *See supra* Part V.

248. *See* Gregory Stroud, *Before a Second Wave Hits . . . Repeal the Immunity for Nursing Homes from Civil Penalties,* CT EXAM'R (June 16, 2020), https://ctexaminer.com/2020/06/16/before-a-second-wave-hits-repeal-the-immunity-for-nursing-homes-from-civil-penalties/ ("[I]mmunity from civil suits is not simply a matter of dollars and cents."); Laura Karas, *Why We Must Hold Nursing Homes Legally Accountable for COVID-19 Outbreaks,* HARV. L.: PETRIE FLOM CTR. (Sept. 14, 2020) (emphasis omitted), https://blog.petrieflom.law.harvard.edu/2020/09/14/nursing-homes-liability-covid19-outbreaks/ ("Liability creates accountability. And liability changes behavior.").

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