21-2164-cv

United States Court of Appeals

for the

Second Circuit

VIVIAN RIVERA-ZAYAS, as the Proposed Administrator of the Estate of ANA MARTINEZ, Deceased,

Plaintiff-Appellee,

– v. –

OUR LADY OF CONSOLATION GERIATRIC CARE CENTER DBA, Our Lady of Consolation Nursing and Rehabilitative Care Center, OUR LADY OF CONSOLATION NURSING AND REHABILITATIVE CARE CENTER,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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INTEREST OF THE *AMICUS CURIAE* [1]

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

* * *

Hundreds of millions of Americans continue to be affected by the COVID-19 pandemic. With the troubling emergence of new COVID-19 variants such as Omicron, our nation's medical professionals and facilities again could become overloaded to the breaking point.

Although each State retains police power to protect the health, safety, and

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or part, and no party or party's counsel, and no person other than the *amicus curiae*, its supporters, or its counsel, contributed money that was intended to fund its preparation or submission.

welfare of its citizens, the COVID-19 pandemic poses certain unique challenges that Congress and the Executive Branch have determined need to be addressed on a nationwide basis. One such challenge is the ability to quickly mobilize the nation's medical resources, including hospitals, nursing homes, physicians, nurses, and other healthcare professionals—despite the risks to their personal health and safety—wherever and whenever they are needed to care for persons afflicted with the virus. The Public Readiness and Emergency Preparedness Act ("PREP Act") directly addresses this challenge. It facilitates emergency deployment of the nation's medical resources by expressly providing that covered medical professionals and facilities "shall be immune from suit and liability under Federal and State law" in connection with the administration or use of "covered countermeasures," such as COVID-19 diagnostic procedures, exposure mitigation measures, therapeutics, and vaccines. 42 U.S.C. § 247d-6d(a)(1).

The threshold legal issue in this COVID-19-related wrongful death suit and many similar suits filed in state courts throughout the United States concerns removal to federal court. Whether such suits belong, if anywhere, in federal court rather than state court is a question that goes to the heart of PREP Act immunity, and in turn, to the willingness of medical professionals to volunteer for frontline duty in the ongoing war against COVID-19.

The Atlantic Legal Foundation is filing this amicus brief to emphasize the

inextricable relationship among PREP Act immunity from suit and liability, the real-world need for such immunity, and the reasons why the federal judiciary—not 50 separate state court systems—should adjudicate its scope and application.

ARGUMENT

Damages Suits That Implicate the PREP Act Belong, If Anywhere, In Federal Court

A. The PREP Act mandates a unified, whole-of-nation response to the COVID-19 pandemic

The PREP Act, 42 U.S.C. §§ 247d-6d & 247d-6e, is not only an essential, but also extraordinary, federal statute. Its provisions become active only if and when—as with COVID-19—the Secretary of HHS declares that "a disease . . . constitutes a public health emergency." *Id.* § 247d-6d(b)(1). The Secretary issued such a Declaration at the outset of the COVID-19 pandemic. *See* 85 Fed. Reg. 15,198 (Mar. 17, 2020) (Declaration Under the [PREP Act] for Medical Countermeasures Against COVID-19). To date, the Secretary has amended the Declaration nine times to expand its scope. *See* Public Health Emergency-Preparedness (Current Declarations), https://tinyurl.com/2p94tcfh (collecting PREP Act Declarations and Amendments, Advisory Opinions of the HHS General Counsel, and HHS Guidance) (last visited Dec. 21, 2021).

The PREP Act's fundamental purpose is "encouraging the design, development, clinical testing or investigation, manufacture, labeling, distribution,

formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, and use" of countermeasures needed to combat a public health emergency. 42 U.S.C. § 247d-6d(b)(6). To achieve this critical objective, the statute mandates that "a covered person *shall be immune from suit and liability under Federal and State law* with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure." *Id.* § 247d-6d(a)(1) ("Liability protections") (emphasis added); *see* Kevin J. Hickey, Legal Sidebar, Cong. Rsch. Serv., LSB10443, *The PREP Act and COVID-19: Limiting Liability for Medical Countermeasures* (updated Sept. 23, 2021) ("CRS Rep.") (summarizing the PREP Act and the COVID-19 Declaration and Amendments).[2]

The Congressional Research Report, *supra* at 1, explains that

> [t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency, the [PREP Act] authorizes [HHS] to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines. . . .
>
> In the PREP Act, Congress made the judgment that, in the context of a public health emergency, immunizing certain persons and entities from liability was *necessary to ensure that potentially life-saving*

[2] *Available at* https://crsreports.congress.gov/product/pdf/LSB/LSB10443 (last visited Dec. 21, 2021).

> *countermeasures will be efficiently developed, deployed, and administered.*

(emphasis added).

The PREP Act's scope of immunity is broad. *See* CRS Rep. at 1 ("Courts have characterized PREP Act immunity as 'sweeping.' It applies to all types of legal claims under state and federal law."). Unlike an "ordinary" federal preemption statute that supplants state-imposed regulatory requirements and tort-law duties, the PREP Act provides broad immunity "*from suit* and liability under Federal and State law." 42 U.S.C. § 247d-6d(a)(1) (emphasis added). The fact that Congress took the unusual step of mandating immunity from suit—not just from liability—where, as with COVID-19, there is a declared national public health emergency, underscores the need to protect hospitals, nursing homes, and medical professionals (as well as developers, manufacturers, and distributors of medical countermeasures) from the threat and/or burdens, costs, and risks of litigation in connection with the vital services that they perform.

"The Secretary [of HHS] controls the scope of immunity through the declaration and amendments, within the confines of the PREP Act." *Maglioli v. All. HC Holdings*, 16 F.4th 393, 401 (3rd Cir. 2021), *pet. for reh'g filed* (Nov. 17, 2021). Pandemic-related PREP Act immunity is nationwide in scope because, as the Fourth Amendment to the Declaration explains, "COVID-19 is an unprecedented global challenge that *requires a whole-of-nation response.*" 85 Fed. Reg. 79,190, 79,194

(Dec. 9, 2020) (emphasis added). More specifically, "[t]here are substantial federal legal and policy issues [and] . . . interests . . . in having a unified, whole-of-nation response to the COVID-19 pandemic among federal, state, local, and private-sector entities," including "a uniform interpretation of the PREP Act." *Id.*

B. A whole-of-nation response cannot be achieved if each State's court system can determine for itself the scope and applicability of PREP Act immunity

"The PREP Act exists in part to remove legal uncertainty and risk" that "may hinder [the] essential efforts" of "public and private individuals and organizations as they combat the pandemic." HHS, Office of the Secretary, General Counsel, *Advisory Op. 20-04* (Oct. 23, 2020) at 1.[3] This is why Congress determined that "[w]hen an individual or organization satisfies the requirements of the PREP Act and the Declaration, that 'covered person' 'shall be immune from suit and liability.'" *Id.* To eliminate, or at least significantly reduce, legal risk and uncertainty for hospitals, nursing homes, medical professionals, and other individuals or organizations engaged in the ongoing fight against COVID-19, only a whole-of-nation, i.e., nationwide, approach can ensure that the PREP Act's explicit guarantee of immunity from suit and liability is interpreted and applied throughout the nation in as consistent and predictable a manner as possible.

Allowing 50 separate state judicial systems to interpret and apply PREP Act

[3] *Available at* https://tinyurl.com/mrx7m6rz (last visited Dec. 21, 2021).

immunity to the extent—if any—each sees fit in connection with the ongoing nationwide tidal wave of COVID-19-related negligence and medical malpractice suits against hospitals, nursing homes, and medical professionals would defeat the fundamental purpose of the PREP Act. It would engender and perpetuate the very type of legal risk and uncertainty that Congress, through enactment of the PREP Act, deemed essential to eliminate in order to mobilize the nation's medical resources under extraordinarily difficult, life-threatening, circumstances. For this compelling reason, "ordaining the metes and bounds of PREP Act protection in the context of a national health emergency necessarily means that [a COVID-19-related wrongful death or personal injury] case belongs in federal court." HHS, Office of the Secretary, General Counsel, *Advisory Op. 21-01* (Jan. 8, 2021) at 5.[4]

In the only federal court of appeals decision to date on PREP Act removal, the Third Circuit got it wrong when it asserted that "[t]here is no COVID-19 exception to federalism." *Maglioli*, 16 F.4th at 400 (affirming a New Jersey federal district court's remand of a COVID-19-related wrongful death suit filed in state court by the estates of two nursing home residents). The PREP Act and implementing COVID-19 Declaration issued by the Secretary of Health and Human Services (HHS) are that nationwide exception.

Allowing 50 separate state court systems to interpret, curtail, or reject PREP

[4] *Available at* https://tinyurl.com/3x7zu274 (last visited Dec. 21, 2021).

Act immunity in the many similar COVID-19-related damages suits that have been filed (or in the future may be filed) throughout the United States—or to reject immunity from suit and liability and adjudicate such suits on the merits—would create nationwide judicial chaos. The potential for a multitude of conflicting or inconsistent state-court interpretations of the PREP Act and its implementing COVID-19 Declaration, Amendments, and HHS guidance and advisory opinions would be enormous. And where state courts proceed to trial on similar, supposedly garden-variety state-law damages suits alleging that hospitals, nursing homes, and/or medical professionals failed to adequately prevent, diagnose, and/or treat COVID-19, there would be a continually expanding, coast-to-coast tangle of unreconcilable findings of fact, conclusions of law, and damages awards.

A recent Law360 article highlighted the views of Professor James G. Hodge Jr., an expert on public health law at the Sandra Day O'Connor College of Law, Arizona State University, as to why interpreting and applying the PREP Act should not be left to the vagaries of 50 state court systems:

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

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

Bill Wichert, *3rd Circ. Risks Twisting COVID Immunity Law Into Pretzel*, Law360 (Nov. 15, 2021).[5]

Allowing state-court wrongful death or personal injury suits that implicate the PREP Act to be removed to federal court would foster uniformity of decision regarding the scope and applicability of the statute's immunity provision, and thereby facilitate accomplishment of its objectives. Unlike state courts, "[t]he federal courts comprise a single system applying a single body of law[.]" *H.L. Green Co. v. MacMahon*, 312 F.2d 650, 652 (2d Cir. 1962). The unitary federal judicial system—not 50 separate and dissimilar state court systems, some with notorious pro-plaintiff reputations—provides the appropriate judicial forum for determining whether a COVID-19-related negligence or medical malpractice suit is barred by the PREP Act's immunity provision.

The Secretary of HHS indicated in the Fourth Amendment to the COVID-19

[5] *Available at* https://www.law360.com/articles/1440187/3rd-circ-risks-twisting-covid-immunity-law-into-pretzel (last visited Dec. 21, 2021).

Declaration that the PREP Act's "[l]iability protections are afforded for the administration and use of a Covered Countermeasure *without geographic limitation*." 85 Fed. Reg. at 79,197 (emphasis added). Maintaining such nationwide uniformity would be virtually impossible if each State, through its state courts, could decide the extent to which PREP Act immunity applies within its borders. The resultant patchwork map of States that enforce PREP Act immunity likely would define the locations where physicians and nurses are willing to travel if again called upon to care for far-off victims of the virus. This is exactly the type of litigation that the PREP Act broadly and unequivocally prohibits, and that federal courts, following removal, should exercise subject-matter jurisdiction to dismiss.

C. Doctors, nurses, and other healthcare professionals will refuse to volunteer for public health emergency services if they are threatened with state-court negligence or malpractice suits

Preventing removal of state-court wrongful death or personal injury suits also threatens to chill frontline medical personnel from volunteering for emergency medical work—precisely the kind of volunteerism that the pandemic has proven to be critical, and may be critical still in the months to come given the spread of new variants.

The breadth of response from volunteer medical personnel to the pandemic, including in its nascent days, was stunning. Indeed, by April 2020, the New York Times estimated that over 90,000 individuals had volunteered to provide emergency

medical services *in New York alone*.[6] These volunteer emergency responders included not only physicians, but also nurses, respiratory therapists, and hospital workers, along with *retired* medical personnel and even medical students.[7] And they came from all across the country—medical workers flocked to New York from over *40 states*.[8]

These medical volunteers were generally placed in intensive-care settings,[9] and came at the beck-and-call of New York's political leaders, including then-Mayor de Blasio, who called for a "national draft" of medical workers to be sent to New York, explaining:

> Unless there is a national effort to enlist doctors, nurses, hospital workers of all kinds and get them where they are needed most in the country in time. . . I don't see, honestly, how we're going to have the

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

[7] See Amanda D'Ambrosio, *Medical Retirees, Students Join NYC's Coronavirus Fight*, MedPage (Mar. 27, 2020), *available at* https://www.medpagetoday.com/infectiousdisease/covid19/85655.

[8] Melanie Grayce West, *Doctors From Across Country Are Volunteering in New York City Hospitals*, Wall St. J. (Apr. 16, 2020), *available at* https://www.wsj.com/articles/doctors-from-across-country-are-volunteering-in-new-york-city-hospitals-11587054224.

[9] *See id*. ("The greatest need is for intensive-care" workers.).

professionals we need to get through this crisis.[10]

It was this overwhelming, nationwide volunteer response that prompted the federal government to make clear that PREP Act "[l]iability protections are afforded . . . without geographic limitation." 85 Fed. Reg. at 79,197.

What is past is prologue. Given the rise of new variants such as Omicron, it is entirely possible that a similar surge of medical volunteers may be needed in the future. Indeed, due to the Omicron variant, as of this writing "[i]n several states, hospitals are already close to being overwhelmed [and] intensivists are now volunteering to work for free in ICUs[.]"[11] As the New York Times recently reported, "health officials still worry that the new variant could send a medical system already under pressure to the breaking point," and "[i]n Connecticut and Maine, reports of new infections have grown by around 150 percent in the last two weeks."[12] In fact, New York and New Jersey currently have the fastest spread of the

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[10] Jonah E. Bromwich, et al., *Mayor de Blasio called for a national draft of doctors*, N.Y. Times (Apr. 3, 2020), *available at* https://www.nytimes.com/2020/04/03/nyregion/coronavirus-ny-updates.html#link-778413df.

[11] Melody Schreiber, *U.S. Hospitals Brace for Potential Omicron Surge in January*, The Guardian (Dec. 16, 2021), *available at* https://www.theguardian.com/world/2021/dec/16/us-hospitals-brace-for-potential-omicron-surge-in-january.

[12] Mitch Smith, *Doctors and Nurses Are 'Living in a Constant Crisis'*, N.Y. Times (Dec. 27, 2021), *available at* https://www.nytimes.com/2021/12/17/us/covid-

Omicron variant in the nation.[13]

The advent of the Omicron variant makes the removal issue—and the need for federal courts to respect PREP Act immunity—especially timely. A patchwork of rules and holdings across the many States with regard to immunity and malpractice liability would be disastrous to the process of recruiting medical volunteers in the future. Medical workers would have to worry about the state they are volunteering in—and its treatment of PREP Act immunity—in assessing whether or not they think it worthwhile to volunteer. The mere fact that liability and immunity is assessed on a state-by-state basis may chill volunteerism itself, given that medical workers are unlikely to have the resources or time to understand state-by-state intricacies of PREP Act immunity. By contrast, a uniform approach to PREP Act immunity in federal court would provide much clearer and discernable rules of the road for medical workers.

Patchwork, state-by-state approaches to PREP Act immunity also would lead to other ills to the extent that certain States take a narrow view of the sweep of the immunity. Increased lawsuits against volunteer medical workers arising out of the

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hospitals-omicron.html.

[13] Dave Carlin, *CDC: New York, New Jersey Have Highest Spread Of Omicron Variant In Nation*, CBS News (Dec. 15, 2021), *available at* https://newyork.cbslocal.com/2021/12/15/new-york-new-jersey-omicron-spread-covid-coronavirus/.

pandemic could lead to higher healthcare costs,[14] increased healthcare spending,[15] and higher insurance premiums for both care and malpractice coverage.[16] Increased lawsuits against medical volunteers are particularly unnecessary given that the PREP Act contains a mechanism for providing compensation to those injured by COVID-19 countermeasures, and the government has begun to pay out under this program.[17]

D. The *Grable* doctrine establishes federal question jurisdiction for PREP Act removal purposes

Amicus curiae Atlantic Legal Foundation agrees with Appellants-Defendants that (i) the complete preemption doctrine, (ii) the federal officer removal statute, 28 U.S.C. § 1447(a), and (iii) the federal question doctrine articulated in *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 545 U.S. 308 (2005), each provide a separate ground for removing this case, and similar COVID-19-

[14] Margot Sanger-Katz, *A Fear of Lawsuits Really Does Seem to Result in Extra Medical Tests*, N.Y. Times (July 23, 2018), *available at* https://www.nytimes.com/2018/07/23/upshot/malpractice-lawsuits-medical-costs.html.

[15] Congressional Budget Office, *Limit Medical Malpractice Claims*, (Dec. 8, 2016), *available at* https://www.cbo.gov/budget-options/2016/52241.

[16] American Medical Association, *Medical Liability Market Research*, *available at* https://www.ama-assn.org/practice-management/sustainability/medical-liability-market-research.

[17] Meiling Lee, *Claim Alleging Injury or Death From a COVID-19 Countermeasure to Be Compensated*, Epoch Times (Dec. 19, 2021), *available at* https://www.theepochtimes.com/claim-alleging-injury-or-death-from-a-covid-19-countermeasure-to-be-compensated_4164395.html.

related damages suits, to federal district court.

The district court held, however, that the complete preemption doctrine does not apply to the PREP Act. *Rivera-Zayas v. Our Lady of Consolation Geriatric Care Ctr.*, 2021 WL 3549878, at *2 (E.D.N.Y. Aug. 11, 2021). Further, rather than addressing either of the other two grounds for removal, the district court asserted that "[b]ecause this case is remanded for lack of subject matter jurisdiction, the court need not address Defendants' alternate arguments for removal[.]" *Id.* at n.4. Contrary to the district court's assertion, removal based on *Grable* (or on § 1447(a)(1)) is premised on federal question jurisdiction.

In *Grable*, the Supreme Court unanimously held that "the national interest in providing a federal forum for federal tax litigation is sufficiently substantial to support the exercise of federal-question jurisdiction over the disputed issue on removal, which would not distort any division of labor between the state and federal courts, provided or assumed by Congress." 545 U.S. at 310. Referring to federal question jurisdiction under 28 U.S.C. § 1331 (i.e., to civil actions "arising under the Constitution, laws, or treaties of the United States"), the Court explained as follows:

> There is, however, another longstanding, if less frequently encountered, variety of federal "arising under" jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues. The doctrine captures the commonsense notion that a federal court ought to be able to hear *claims recognized under state law that*

> *nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues. . . .*
>
> [T]he question is, does a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities.

Id. at 312, 314 (citation omitted) (emphasis added); *see also Gunn v. Minton*, 568 U.S. 251, 258 (2013) ("Where all four of these requirements are met, we held [in *Grable*], jurisdiction is proper because there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." (quoting *Grable*, 545 U.S. at 313–14)).

COVID-19-related state-law negligence or malpractice suits against hospitals, nursing homes, physicians, or other medical personnel covered by the PREP Act meet each of *Grable*'s four factors, and therefore, are removable. More specifically:

(1) a federal issue is "necessarily raised," *Gunn*, 568 U.S. at 258, because (contrary to the superficial circular reasoning in *Maglioli*, 16 F.4th at 413 and *Dupervil v. Alliance Health Operations, LCC*, 516 F. Supp. 3d 238, 258 (E.D.N.Y. 2021)), the federal PREP Act expressly mandates immunity from state-law suits and liability;

(2) the federal issue is "actually disputed," *id.*, because the plaintiffs in such

suits obviously contend that immunity does not apply;

(3) the federal issue is "substantial," *id.*, because the question of immunity is case-dispositive; and

(4) the federal issue is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress," *id.* This fourth factor is satisfied because the PREP Act's immunity provision broadly and expressly bars "all claims for loss" arising "under Federal and State law" in connection with the administration or use of covered countermeasures. 42 U.S.C. § 247d-6d(a)(1). In other words, in view of the immunity provision, state courts have no greater interest than federal courts in adjudicating suits that the PREP Act bars.

If anything, the PREP Act evinces a predominant federal interest. For example, the statute strongly suggests that federal courts are the proper forum for resolution of PREP Act immunity issues by providing that the D.C. Circuit "shall have jurisdiction of an interlocutory appeal by a covered person taken within 30 days of an order denying a motion to dismiss or a motion for summary judgment based on an assertion of immunity from suit." *Id.* § 247d-6d(e)(10). Further, in addition to mandating immunity from suit and liability, the statute expressly preempts a State from establishing or enforcing any legal requirement that "is different from, or is in conflict with" PREP Act requirements relating to administration or use of covered countermeasures. *Id.* § 247d-6d(b)(8)(A). The PREP Act also creates a federal

compensation fund for compensating eligible individuals who have been injured by administration or use of covered countermeasures. *Id.* § 247d-6e. And the PREP Act establishes "an exclusive Federal cause of action against a covered person for death or serious physical injury proximately caused by willful misconduct," *id.* § 247d-6d(d)(1).

Therefore, nothing in the PREP Act suggests that the federal-state balance would be disrupted by removal of COVID-19-related suits to federal court. Indeed, the PREP Act's implementing COVID-19 Declaration recognizes that "there are substantial federal legal and policy issues, and substantial federal legal policy interests within the meaning of *Grable* . . . in having a uniform interpretation of the PREP Act." 85 Fed. Reg. at 79, 197. Such a uniform interpretation requires that damages suits implicating PREP Act immunity be removed to federal court.

CONCLUSION

This Court should reverse the district court's remand order so that the district court, following briefing, can hold that the PREP Act's immunity provisions bar the suit.

Respectfully submitted,

s/ *Lawrence S. Ebner*

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and because this brief contains 3,964 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2013, Times New Roman 14-point.

Dated: December 28, 2021 /s/ *Lawrence S. Ebner*

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2021, I caused the foregoing to be electronically filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit via the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 28, 2021 /s/ *Lawrence S. Ebner*