

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUN 21 2023

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RACHELLE CRUPI, as Special
Administrator, Personal Representative and
heir on behalf of Aletha Porcaro,

Plaintiff-Appellee,

v.

HEIGHTS OF SUMMERLIN, LLC;
SUMMIT CARE, LLC; GENESIS
HEALTHCARE, INC.; LATOYA DAVIS;
ANDREW REESE,

Defendants-Appellants.

No. 22-15413

D.C. No.

2:21-cv-00954-GMN-DJA

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada

Gloria M. Navarro, District Judge, Presiding

Submitted June 20, 2023**

Before: WALLACE, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

Heights of Summerlin, LLC, Summit Care, LLC, Genesis Healthcare, Inc.,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

Latoya Davis, and Andrew Reese (collectively, “Summerlin”) appeal from the district court’s order remanding this case to state court for lack of federal subject matter jurisdiction. Summerlin argues that the district court had three independent grounds for such jurisdiction: federal officer removal, complete preemption, and the presence of an embedded federal question.

I

The district court did not have federal subject matter jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), because Summerlin’s actions were not “taken pursuant to a federal officer’s directions.” *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 684 (9th Cir. 2022) (cleaned up). While Summerlin has demonstrated that, like the defendants in *Saldana*, it was subject to federal laws and regulations throughout the COVID-19 pandemic, “simply complying with a law or regulation is not enough to bring a private person within the scope of the [federal officer removal] statute.” *Id.* (cleaned up). Similarly, recommendations, advice, and encouragement from federal entities do not amount to the type of control required for removal under the statute. *See id.* at 685.

II

The district court did not have federal subject matter jurisdiction under the doctrine of complete preemption because the Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. §§ 247d-6d, 247d-6e, is not a complete

preemption statute—that is, it is not one of those “rare” statutes “where a federal statutory scheme is so comprehensive that it entirely supplants state law causes of action.” *Saldana*, 27 F.4th at 686 (cleaned up). While the PREP Act may preempt some state-law claims, any such conflict preemption would be an affirmative defense, and would not create federal subject matter jurisdiction. See *id.* at 688.

III

The district court did not have embedded federal question jurisdiction because the state-law causes of action in the complaint do not “necessarily” raise “substantial” federal issues that are “actually disputed” and “capable of resolution in federal court without disrupting the federal-state balance approved by Congress.” *Id.* at 688 (cleaned up). Although a federal defense may be available under the PREP Act, “a federal defense is not a sufficient basis to find embedded federal question jurisdiction.” *Id.*

IV

In short, all of Summerlin’s challenges are controlled by *Saldana*. Summerlin argues that *Saldana* was wrongly decided, but cites no “clearly irreconcilable” intervening authority permitting us to overrule it. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Accordingly, we apply *Saldana*.

AFFIRMED.