

NOT FOR PUBLICATION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

JAMES GAVERT, by and through his
successor in interest; GERALDINE
GAVERT, an individual; RHONDA
GAVERT, an individual; RACHELLE
GAVERT GRAHAM, an individual,

Plaintiffs-Appellees,

v.

CF MODESTO, LLC, DBA Modesto Post
Acute Center,

Defendant-Appellant,

and

MICHAEL LEE BRODIE, M.D., an
individual; ANDREH SARALOU, M.D., an
individual,

Defendants.

No. 22-15516

D.C. No.

1:21-cv-01719-AWI-SKO

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Submitted June 20, 2023**

* 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

Before: WALLACE, O’SANNLAIN, and SILVERMAN, Circuit Judges.

CF Modesto, LLC (doing business as Modesto Post Acute Center) (“Modesto”) appeals the district court’s order remanding this case to state court for lack of federal subject matter jurisdiction. Modesto 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 Modesto’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 Modesto 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.

without oral argument. *See* Fed. R. App. P. 34(a)(2).

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 Modesto’s challenges are controlled by *Saldana*. Modesto 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*.¹

AFFIRMED.

¹ Modesto's motion for judicial notice, Docket No. 16, is **GRANTED**.