UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHANE FOWLER, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 20-3854 (APM)
JESSICA HOPMAN, et al.,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and (2) of the Federal Rules of Civil Procedure, defendants move for dismissal of plaintiffs' Complaint for Declaratory Judgment (ECF No. 1). In this action, plaintiffs seek declaratory relief to establish a federal defense to state law claims pending in an earlier-filed action in California. This Court, however, lacks personal jurisdiction over defendants because plaintiffs do not allege that defendants have any contacts whatsoever with the District of Columbia. This Court also lacks subject matter jurisdiction because a federal defense does not give rise to federal-question jurisdiction. Finally, even if this Court had jurisdiction, it should exercise its discretion to decline to decide the declaratory judgment action because the same issues are being litigated in an earlier-filed case in California.

Dated: March 12, 2021

Respectfully submitted

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 2

A. Statutory and regulatory background 2

B. Factual background 5

C. Procedural history and related proceedings 7

LEGAL STANDARD 8

ARGUMENT 10

I. The Court should dismiss this case for lack of subject matter jurisdiction. 10

II. The Court should dismiss this case for lack of personal jurisdiction. 14

III. The Court should decline to exercise its discretionary declaratory judgment jurisdiction in this case. 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page(s)**

Aetna Health Inc. v. Davila,
542 U.S. 200 (2004) 11

Air Brake System, Inc. v. Mineta,
357 F.3d 632 (6th Cir. 2004) 4

Ali v. Rumsfeld,
649 F.3d 762 (D.C. Cir. 2011) 10

Berkley v. Dowds,
152 Cal. App. 4th 518 (2007) 16

Brillhart v. Excess Insurance Co. of America,
316 U.S. 491 (1942) 17

Caterpillar, Inc. v. Williams,
482 U.S. 386 (1987) 11

Crane v. New York Zoological Society,
894 F.2d 454 (D.C. Cir. 1990) 9, 14

Doe v. United States Youth Soccer Association, Inc.,
8 Cal. App. 5th 1118 (2017) 16

Dupervil v. Alliance Health Operations, LCC,
2021 WL 355137 (E.D.N.Y. Feb. 2, 2021) 12

Eaton v. Big Blue Healthcare, Inc.,
480 F. Supp. 3d 1184 (D. Kan. Aug. 19, 2020) 12

Edmond v. U.S. Postal Service General Counsel,
949 F.2d 415 (D.C. Cir. 1991) 9

Estate of Jones v. St. Jude Operating Co., LLC,
2021 WL 900672 (D. Or. Feb. 16, 2021) 12

Estate of McCalebb v. AG Lynwood, LLC,
2021 WL 911951 (C.D. Cal. Mar. 1, 2021) 12, 13

Estate of Smith v. Bristol at Tampa,
2021 WL 100376 (M.D. Fla. Jan. 12, 2021) 12

Franchise Tax Board v. Construction Laborers Vacation Trust,
463 U.S. 1 (1983)....................10, 11

Fuentes v. Azar,
468 F. Supp. 3d 83 (D.D.C. 2020)....................17

Garcia v. Welltower OpCo Group,
2021 WL 492581 (C.D. Cal. Feb. 10, 2021)....................12, 13

Goldblatt v. HCP Prairie Village KS OPCO LLC,
2021 WL 308158 (D. Kan. Jan. 29, 2021)....................11, 12

Goodyear Dunlop Tires Operations, S.A. v. Brown,
564 U.S. 915 (2011)....................14

Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,
545 U.S. 308 (2005)....................4

GTE New Media Services, Inc. v. BellSouth Corp.,
199 F.3d 1343 (D.C. Cir. 2000)....................14

Gully v. First National Bank,
299 U.S. 109 (1936)....................11

Gunter v. CCRC Opco-Freedom Square, LLC,
2020 WL 8461513 (M.D. Fla. Oct. 29, 2020)....................12

Handy v. Shaw, Bransford, Veilleux & Roth,
325 F.3d 346 (D.C. Cir. 2003)....................17

Haro v. Kaiser Foundation Hospitals,
2020 WL 5291014 (C.D. Cal. Sept. 3, 2020)....................12

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408 (1984)....................14

Jerdine v. FDIC,
730 F. Supp. 2d 218 (D.D.C. 2010)....................8

Kokkonen v. Guardian Life Insurance Co. of America,
511 U.S. 375 (1994)....................9

Lawrence v. D.C. Court of Appeals,
629 F. Supp. 579 (D.D.C. 1986)....................11

Lyons v. Cucumber Holdings, LLC,
2021 WL 364640 (C.D. Cal. Feb. 3, 2021)....................12

Martin v. Serrano Post Acute LLC,
2020 WL 5422949 (C.D. Cal. Sept. 10, 2020) 12

Moore v. Pflug Packaging & Fulfillment, Inc.,
2018 WL 2430903 (N.D. Cal. May 30, 2018)....................16

Mwani v. bin Laden,
414 F.3d 1 (D.C. Cir. 2005)....................15

NetCoalition v. SEC,
715 F.3d 342 (D.C. Cir. 2013)....................13

Parker v. St. Jude Operating Co., LLC,
2020 WL 8362407 (D. Or. Dec. 28, 2020) 12

Perisic v. Kim,
2020 WL 5459048 (D.D.C. Oct. 24, 2019) 12

Public Service Commission of Utah v. Wycoff Co.,
344 U.S. 237 (1952)....................10

Robertson v. Big Blue Healthcare, Inc.,
2021 WL 764566 (D. Kan. Feb. 26, 2021)....................12

Robinson v. Ashcroft,
357 F. Supp. 2d 146 (D.D.C. 2004)....................9

Saldana v. Glenhaven Healthcare LLC,
2020 WL 6713995 (C.D. Cal. Oct. 14, 2020)....................12

Saunders v. Big Blue Healthcare, Inc.,
2021 WL 764567 (D. Kan. Feb. 26, 2021) 16

Second Amendment Foundation v. U.S. Conference of Mayors,
274 F.3d 521 (D.C. Cir. 1991)....................9

Settles v. U.S. Parole Commission,
429 F.3d 1098 (D.C. Cir. 2005)....................9

Sherod v. Comprehensive Healthcare Management Services, LLC,
2020 WL 6140474 (W.D. Penn. Oct. 16, 2020) 12

Sickle v. Torres Advanced Enterprise Solutions, LLC,
884 F.3d 338 (D.C. Cir. 2018) 11

Simpson v. Federal Bureau of Prisons,
496 F. Supp. 2d 187 (D.D.C. 2007) 14

Skelly Oil Co. v. Phillips Petroleum Co.,
339 U.S. 667 (1950) 10

Speelman v. United States,
461 F. Supp. 2d 71 (D.D.C. 2006) 9

UnitedHealthCare Insurance Co. v. Price,
255 F. Supp. 3d 208 (D.D.C. 2017) 17

US Airways Master Executive Council v. American West Master Executive Council,
525 F. Supp. 2d 127 (D.D.C. 2007) 12

UtahAmerican Energy, Inc. v. Department of Labor,
685 F.3d 1118 (D.C. Cir. 2012) 17–18

Warth v. Seldin,
422 U.S. 490 (1975) 8

Wilton v. Seven Falls Co.,
515 U.S. 277 (1995) 9, 17

WMATA v. Ragonese,
617 F.2d 828 (D.C. Cir. 1980) 17

World-Wide Volkswagen Corp. v. Woodson,
444 U.S. 286 (1980) 15

Statutes

District of Columbia Code § 13–423(a) 14–15

Public Readiness and Emergency Preparedness Act
42 U.S.C. § 247d-6d 1
42 U.S.C. § 247d-6d(a)(1) 2
42 U.S.C. § 247d-6d(a)(2)(B) 3
42 U.S.C. § 247d-6d (a)(3) 3
42 U.S.C. § 247d-6d(b)(1) 2
42 U.S.C. § 247d-6d(d) 15
42 U.S.C. § 247d-6d(d)(1) 3
42 U.S.C. § 247d-6d(e) 3

42 U.S.C. § 247d-6d(i)(1)(A)-(C) 2

Declaratory Judgment Act
28 U.S.C. § 2201–02....................10
28 U.S.C. § 2201(a) 9, 16

Pub. L. 116-127 § 6005, 134 Stat. 178 (2020)....................2

Pub. L. 116-136 § 3103, 134 Stat. 281 (2020), *codified at* 42 U.S.C. § 247d-6d(i)(1)(D)....................2

Rules

Fed. R. Civ. P. 12(b)(1)....................8

Fed. R. Civ. P. 12(b)(2)....................9

Fed. R. Civ. P 57....................10

Regulations

85 Fed. Reg. 15,198 (Mar. 17, 2020) 3

85 Fed. Reg. 21,012 (Apr. 15, 2020) 3

85 Fed. Reg. 35,100 (June 4, 2020) 3

85 Fed. Reg. 52,136 (Aug. 24, 2020) 3

85 Fed. Reg. 54,581 (Sept. 2, 2020) 4

85 Fed. Reg. 79,190 (Dec. 9, 2020) 3

Other Authorities

Kevin J. Hickey, Congressional Research Service, *The PREP Act and COVID-19: Limiting Liability for Medical Countermeasures* (Dec. 21, 2020) 2

10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2767 (4th ed.)....................10, 11

Health and Human Services, Office of General Counsel,
Advisory Opinion 20-01 (Apr. 17, 2020), *as modified* May 19, 2020 ....3, 4
Advisory Opinion 20-02 (May 19, 2019) 4
Advisory Opinion 20-03 (Oct. 22, 2020), *as modified* Oct. 23, 2020 4
Advisory Opinion 20-04 (Oct. 22, 2020), *as modified* Oct. 23, 2020 4
Advisory Opinion 21-01 (Jan. 8, 2021) 4, 13

Statement of Rep. Gregory Walden,166 Congressional Record House 1675-09, March 13, 2020 13

Statement of Rep. Nathan Deal, 151 Congressional Record House 12244, Dec. 18, 2005 13

INTRODUCTION

Plaintiffs in this declaratory judgment action are a nursing home company, Sunrise Villa Culver City, and its executive director Shane Fowler (collectively, Fowler). In July 2020, after Gerald Hopman died of complications stemming from COVID-19 while in Fowler's care, Jessica Hopman, individually and as successor-in-interest for Gerald Hopman, filed suit against Fowler in California state court. Hopman asserted only state-law claims based on Fowler's negligence in moving Gerald from a single-person apartment to a shared room in another part of the facility where Fowler was not taking adequate safety precautions to protect residents against COVID-19, and for failing to ensure that he received appropriate care and treatment after he contracted COVID-19. In its defense, Fowler argued that these claims are subject to defenses set forth in the Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C. § 247d-6d, which apply to certain claims relating to the "use" or "administration" of certain "covered countermeasures." After six months of litigation in California, including two attempts by Fowler to remove that case to federal court and an unsuccessful state-court motion for judgment on the pleadings asserting PREP Act defenses, Fowler filed this declaratory judgment action in this Court in an attempted end-run around the case pending in California.

The Court should dismiss this case because the Court lacks both personal and subject matter jurisdiction. In the alternative, the Court should exercise its discretion to decline to decide this case because there are ongoing parallel proceedings in an earlier-filed case that will resolve the issues Fowler raises here.

BACKGROUND

A. Statutory and regulatory background

"To encourage the expeditious development and deployment of medical countermeasures during a public health emergency, the [PREP Act] authorizes the Secretary of Health and Human Services (HHS) to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines." Kevin J. Hickey, LSB10443, Cong. Res. Serv., *The PREP Act and COVID-19: Limiting Liability for Medical Countermeasures* 1 (Dec. 21, 2020). The PREP Act liability provisions are triggered only when the HHS Secretary formally declares a public-health emergency or threat of such an emergency and "recommend[s]" the "manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures." 42 U.S.C. § 247d-6d(b)(1). "Covered countermeasures" may include certain drugs, biological products, and medical devices authorized for emergency use, *id.* § 247d-6d(i)(1)(A)–(C), including, in limited circumstances, protective devices approved by the National Institute of Occupational Safety and Health (NIOSH), *see* Families First Coronavirus Response Act, Pub. L. 116-127 § 6005, 134 Stat. 178, 207 (2020); Pub. L. 116-136 § 3103, 134 Stat. 281, 361 (2020) (codified at 42 U.S.C. § 247d-6d(i)(1)(D)).

Specifically, the PREP Act liability provision states that "a covered person" is "immune from suit and liability under Federal and State law" for "claims for loss caused by, arising out of, relating to, or resulting from the administration to or use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a)(1). The immunity applies to claims with a "causal relationship [to] the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure," subject to certain

conditions. *Id.* § 247d-6d(a)(2)(B), (a)(3). Nonetheless, covered persons *may* be sued "for death or serious physical injury proximately caused by willful misconduct." *Id.* § 247d-6d(d)(1). For these claims, the statute creates an "exclusive Federal cause of action," *id.*, provides special procedures for their adjudication, and specifies exclusive jurisdiction in this Court, *id.* § 247d-6d(e).

On March 17, 2020, the Secretary invoked the PREP Act by issuing a Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID–19. *See* 85 Fed. Reg. 15,198 (Mar. 17, 2020). The Secretary has made six amendments to the initial Declaration, all but one of which post-date the actions and inactions giving rise to this case. In the First Amendment, based on the CARES Act and purportedly retroactive to the date of that law's passage, the Secretary expanded covered countermeasures to include respiratory protective equipment. *See* 85 Fed. Reg. 21,012, 21,013–14 (Apr. 15, 2020). Two subsequent amendments clarified that covered countermeasures include drugs, biological products, and medical devices that "limit[ed] the harm COVID–19 might otherwise cause" and added routine childhood vaccines to the list of covered countermeasures. 85 Fed. Reg. 35,100, 35,101 (June 4, 2020); 85 Fed. Reg. 52,136, 52,137–38 (Aug. 24, 2020).

Well after the events at issue in this lawsuit, the Secretary's Fourth Amendment extended the Declaration to apply to claims based on the failure to administer a covered countermeasure if that countermeasure was in short supply—for example, in the case of tiered vaccine distribution based on patients' vulnerability. *See* 85 Fed. Reg. 79,190, 79,197 (Dec. 9, 2020). The Fourth Amendment stated that the "Declaration must be construed in accordance with" four "Advisory Opinions" previously issued by the HHS Office of General Counsel (OGC), each of which it incorporated by reference. *Id.* at 79,191 & n.5. Each of those four opinions stated that it did "not have the force or effect of law." *See* OGC, Advisory Opinion 20-01 (Apr. 17, 2020), *as modified*

May 19, 2020, at 1; Advisory Opinion 20-02 (May 19, 2019), at 2; Advisory Opinion 20-03 (Oct. 22, 2020), *as modified* Oct. 23, 2020, at 4; Advisory Opinion 20-04 (Oct. 22, 2020), *as modified* Oct. 23, 2020, at 7.[1] Rather, they solely "set[] forth the current views of" OGC and did not "bind HHS or the federal courts." OGC, Advisory Opinion 20-01 at 1.

Later, in the waning days of the last administration, the HHS OGC issued a fifth advisory opinion. OGC, Advisory Opinion 21-01 (Jan. 8, 2021). Like the others, that opinion stated that it "sets forth the current views" of OGC, was "not a final agency action or a final order," and "does not have the force or effect of law." *Id.* at 5. The opinion stated OGC's view that: (1) the PREP Act is a complete preemption statute; (2) the PREP Act's immunity provision applies to situations where a covered person makes a decision regarding allocation of covered countermeasures "which results in non-use by some individuals," but not where "nonfeasance" results in non-use; and (3) that the *Grable* doctrine of federal-court jurisdiction applies to any cases where there is a question as to whether the PREP Act applies. *Id.* at 2–5 (citing *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg*., 545 U.S. 308 (2005)). The OGC cited as authority for its opinion the generic federal housekeeping statute, 5 U.S.C. § 301, the general organizing authority and delegation for the OGC, *see* Statement of Organization, Functions, and Delegations of Authority, 85 Fed. Reg. 54,581, 54,583 (Sept. 2, 2020), and *Air Brake Systems, Inc. v. Mineta*, 357 F.3d 632, 647–48 (6th Cir. 2004), a Sixth Circuit decision holding that the Chief Counsel of the National Highway Traffic Safety Administration had delegated authority to issue advisory opinions, but that such opinions "have no claim to deference of any sort." Advisory Opinion 21-01 at 5 n.3.

[1] The OGC Advisory Opinions are available at: https://www.hhs.gov/about/agencies/ogc/advisory-opinions/index.html.

B. Factual background[2]

Gerald Hopman moved into Fowler's facility in Culver City, California, in September 2018. The facility had two types of residential units: assisted living units comprised of single apartments or studios for independent residents, and commingled units with shared rooms located in the Terrace Club. Hopman was initially placed into a one-bedroom apartment. Under the parties' residency agreement, Fowler was required to provide Hopman's family with 30-day written notice prior to Hopman being relocated to a different unit within the facility.

In January 2020, Fowler recommended that Hopman move to the Terrace Club where he would share a room with another resident. Hopman had no desire to relocate there because of the shared rooms, but Fowler insisted that Hopman be transferred so he could mingle with other residents. After an attempt to relocate Hopman to the Terrace Club was unsuccessful, Fowler and Hopman agreed that Hopman would move into a studio apartment, which he did.

Shortly thereafter, the COVID-19 pandemic hit the area around the facility. Fowler sent a letter to the residents and their families assuring them that Fowler was taking precautions to prevent the spread of COVID-19 at the facility. Fowler stated that the facility was locked down with access restricted to essential visitors only, and that residents were isolated in their apartments and rooms with in-room meals only.

On March 30, 2020, Jessica Hopman contacted Fowler because she had heard that some residents had contracted the virus. Fowler assured her there were no cases of infected residents, that her father was fine, and the residents were isolated in their rooms. On April 3, 2020, Fowler

[2] The facts stated herein are based on the complaint in *Hopman v. Sunrise Villa Culver City*, No. 20STCV25558 (Super. Ct. Cal. filed July 7, 2020), attached to the Complaint in this case as Exhibit A, ECF No. 1-1.

assured Jessica Hopman that all residents would remain in their rooms at all times, and the staff was making a plan to care for isolated residents in their rooms.

On April 16, 2020, Jessica Hopman learned that, without her consent, Fowler had removed her father from his studio unit at the apartments and placed him in a shared room at the Terrace Club, and had done so without notifying her or providing 30-days' prior notice. Fowler moved Gerald's residence in violation of the residency agreement. Jessica Hopman immediately told Fowler her father did not want to reside at the Terrace Club because of the higher risk of contracting COVID-19 in a congregate setting.

On April 18, 2020, Jessica Hopman was permitted to visit her father inside Terrace Club, where she noticed residents wandering freely in the common areas and hallways without masks and without practicing social distancing. Residents' room doors were left wide open, and, during her visit with her father, another resident randomly walked into her father's room to carry on a conversation.

On April 24, 2020, Jessica Hopman learned that a resident at Terrace Club was infected with COVID-19. That same day, Fowler sent a letter to residents' families stating the facility would test residents for the virus but making no mention of the infected resident. On April 30, 2020, Hopman and other residents at the Terrace Club were tested for the COVID-19. Over the next few days, Hopman's condition deteriorated rapidly—he stopped eating, suffered gastrointestinal issues, lost weight, struggled to speak, and developed a cough. Despite the noticeable change in his condition, Fowler's staff did not notify Hopman's physician and did not transfer him to an acute health care facility for care and medical treatment.

On May 4, 2020, Hopman's family was informed that he had tested positive for COVID-19, along with his roommate, six other residents, and nine caregivers, all who lived or worked at

the Terrace Club. As Hopman's condition continued to deteriorate, the facility remained understaffed, but Fowler prohibited outside caregivers from entering the facility to care for Hopman. Fowler's staff also failed to communicate with his family about his health status.

Hopman died, alone in his room, on May 12, 2020, due to complications stemming from COVID-19. Around the same time, three other residents at the Terrace Club also died from illnesses related to COVID-19.

C. Procedural history and related proceedings

On July 7, 2020, Jessica Hopman, a California resident, filed a complaint in Superior Court of the State of California, County of Los Angeles, on behalf of her father as his successor-in-interest, and on her own behalf individually, against Fowler alleging state claims for elder abuse, negligence, breach of contract, willful misconduct, and wrongful death. On August 7, 2020, Fowler removed the case to federal court, asserting federal question jurisdiction based on a claimed defense under the PREP Act. Notice of Removal at 3, *Hopman v. Sunrise Villa Culver City*, No. 20-cv-07141-RGK-JEM (C.D. Cal. Aug. 7, 2020), ECF No. 1.

On August 25, 2020, the district court *sua sponte* remanded the case to state court, finding that Hopman "raise[d] no federal question," that her complaint did "not allege any facts that implicate the PREP Act," and that "Defendants cannot confer jurisdiction upon the Court by attempting to attach a federal question to their Notice of Removal or asserting an affirmative defense under federal law." Order, *Hopman v. Sunrise Villa Culver City*, No. 20-cv-07141-RGK-JEM (C.D. Cal. Aug. 25, 2020), ECF No. 14, at 1–2.

After the case returned to state court, on October 21, 2020, Fowler filed a motion for judgment on the pleadings, arguing that the PREP Act immunizes Fowler from liability. The state court issued a decision on January 5, 2021, denying Fowler's motion in its entirety. The court held

that Hopman's allegations, "taken on their face, do not absolutely implicate the PREP Act and/or absolutely immunize" Fowler. Mem. Op. at 3, *Hopman v. Sunrise Villa Culver City*, No. 20STCV25558 (Super. Ct. Cal. Jan. 5, 2021). The court explained that Hopman does not allege that Fowler is a covered person under the PREP Act or that her claims implicate the PREP Act by alleging an injury arising out of the use of a covered countermeasure, and held that Hopman's claims arise from Fowler's inaction. *See id.*

On February 4, 2021, Fowler filed a second notice of removal, this time asserting that the HHS OGC's January 8, 2021 opinion (Advisory Opinion 21-01) constituted an intervening change in the law that entitled it to file a second notice of removal. *See* Notice of Removal at 3, *Hopman v. Sunrise Villa Culver City*, No. 21-cv-1054-RGK-JEM (C.D. Cal. Feb. 4, 2021), ECF No. 1. Fowler then filed a motion to transfer Hopman's case from the Central District of California to this Court, *see* Motion to Transfer, *Hopman v. Sunrise Villa Culver City*, No. 21-cv-1054-RGK-JEM (C.D. Cal. Mar. 1, 2021), ECF No. 14, and Hopman has filed a motion to remand the case to state court again, *see* Motion to Remand, *Hopman v. Sunrise Villa Culver City*, No. 21-cv-1054-RGK-JEM (C.D. Cal. Mar. 4, 2021), ECF No. 19. Both motions are set for hearing on April 5, 2021.

LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to move to dismiss a complaint for lack of subject-matter jurisdiction. "In ruling on a motion under Rule 12(b)(1), the Court 'must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Jerdine v. FDIC*, 730 F. Supp. 2d 218, 222–23 (D.D.C. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). The Court, however, "need not accept factual inferences" unsupported by facts alleged in the complaint, nor must the court accept legal

conclusions couched as factual allegations. *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.D.C. 2006). The Court may consider materials outside the pleadings when ruling on a Rule 12(b)(1) motion. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005). Because federal courts are courts of limited jurisdiction, "[i]t is to be presumed that a cause lies outside this limited jurisdiction and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citations omitted).

Federal Rule of Civil Procedure 12(b)(2) allows a defendant to move to dismiss a complaint for lack of personal jurisdiction. On a motion to dismiss under Rule 12(b)(2), the plaintiff bears the burden of establishing a factual basis for personal jurisdiction by coming forward with specific and pertinent facts that connect the defendant to the forum. *Crane v. N.Y. Zoological Soc'y*, 894 F.2d 454, 456 (D.C. Cir. 1990). The plaintiff may not rest on conclusory statements or bare allegations to show personal jurisdiction, but rather "must allege specific acts connecting the defendant to the forum." *Second Amendment Found. v. U.S. Conference of Mayors*, 274 F.3d 521, 524 (D.C. Cir. 2001). A plaintiff can survive a motion to dismiss if she makes a "prima facie showing" of personal jurisdiction. *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 424 (D.C. Cir. 1991). When making a personal jurisdiction determination under Rule 12(b)(2), the Court need not treat all of the plaintiff's allegations as true, *see Robinson v. Ashcroft*, 357 F. Supp. 2d 146, 148 (D.D.C. 2004), but it should resolve factual discrepancies in the record in favor of the plaintiff, *see Crane*, 894 F.2d at 456.

Even where a court has subject-matter and personal jurisdiction, it has the discretion to decline to hear a declaratory judgment suit. *See* 28 U.S.C. § 2201(a); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995).

ARGUMENT

I. The Court should dismiss this case for lack subject matter jurisdiction.

In a typical civil action, plaintiffs seek damages or injunctive relief to remedy an injury. Declaratory judgment actions are an exception, permitting a litigant to seek a court judgment that defines the parties' rights before an injury occurs and in anticipation of threatened future litigation. Here, Fowler seeks a declaratory judgment to establish that the PREP Act provides Fowler a defense in an earlier-filed action still pending in California that asserts five claims, each arising wholly under state law. *See* Complaint, Exhibit A, ECF No. 1-1 (Complaint, *Hopman v. Sunrise Villa Culver City*, No. 20STCV25558 (Super. Ct. Cal. filed July 7, 2020)). The Court should dismiss this case because it lacks subject matter jurisdiction.

Fowler's complaint rests on the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, and Rule 57 of the Federal Rules of Civil Procedure, *see* Complaint ¶ 1—both of which are procedural, not jurisdictional. Neither the Declaratory Judgment Act nor Rule 57 confer subject-matter jurisdiction or create any substantive rights. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 15–16 (1983) (citing *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671–72 (1950)); *Ali v. Rumsfeld,* 649 F.3d 762, 778 (D.C. Cir. 2011).

Fowler asserts that this Court has subject-matter jurisdiction based on federal-question jurisdiction. Complaint ¶ 16 (citing 28 U.S.C. § 1331). The Declaratory Judgment Act, however, provides federal-question jurisdiction only where a "federal issue would inhere in the claim on the face of the complaint that would have been presented in a traditional damage or coercive action." 10B Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure* § 2767 (4th ed.); *see also Pub. Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 248 (1952). Here, the traditional damages action was already filed by Hopman, and the face of that complaint

does not contain a claim under any federal law. Under the "well-pleaded complaint rule," "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citing *Gully v. First Nat'l Bank,* 299 U.S. 109, 112–13 (1936)). Hopman is the master of her claims, and "she may avoid federal jurisdiction by exclusive reliance on state law." *Id.*

Fowler apparently bases his assertion of federal question jurisdiction on the PREP Act *defense* he has raised in the pending California case. A federal defense, however, does not give rise to federal-question jurisdiction—even when "the *only* question for decision is raised by a federal preemption defense." *Franchise Tax Bd.*, 463 U.S. at 12 (emphasis added). "If, but for the availability of the declaratory-judgment procedure, the federal claim would arise only as a defense to a state-created action, jurisdiction is lacking." Wright, Miller, & Kane, *supra*, § 2767 (collecting cases); *see also Lawrence v. D.C. Ct. of Appeals*, 629 F. Supp. 579, 580 (D.D.C. 1986) ("[I]t is well established … that defenses to a claim do not create federal jurisdiction where none otherwise exists."); *cf. Sickle v. Torres Adv. Enterpr. Solutions, LLC*, 884 F.3d 338, 346 n.3 (D.C. Cir. 2018) (noting that ordinary preemption is a merits issue, not a jurisdictional one). That is precisely the situation here. *See*, *e.g.*, *Goldblatt v. HCP Prairie Village KS OPCO LLC*, 2021 WL 308158, *12 (D. Kan. Jan. 29, 2021) (holding that the court lacked subject matter jurisdiction over defendants' counterclaim for declaratory relief because defendant sought to raise a PREP Act issue only as a defense to plaintiff's claims under state law).

To the extent Fowler claims complete preemption as an exception to the well-pleaded complaint rule, the exception does not apply here. A case may be removed from state to federal court based on complete preemption when a federal statute wholly displaces the state-law cause of action. *See Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004). Complete preemption is

exceedingly rare. The Supreme Court has only recognized only three statutes—section 301 of the Labor Management Relations Act, § 502(a) of the Employee Retirement Income Security Act (ERISA), and §§ 85 and 86 of the National Bank Act—that "have the requisite extraordinary preemptive force to support complete preemption." *Perisic v. Kim*, 2019 WL 5459048, *7 n.6 (D.D.C. Oct. 24, 2019) (citing *U.S. Airways Master Exec. Council v. Am. W. Master Exec. Council*, 525 F. Supp. 2d 127, 133–34 (D.D.C. 2007)).

As nearly every district court to have considered the issue has concluded, the PREP Act does not provide for complete preemption over claims like Hopman's; rather, whether or not the PREP Act immunizes defendants from liability under state law is a question directed to state courts. *See*, *e.g.*, *Estate of McCalebb v. AG Lynwood, LLC*, 2021 WL 911951 (C.D. Cal. Mar. 1, 2021); *Robertson v. Big Blue Healthcare, Inc.*, 2021 WL 764566 (D. Kan. Feb. 26, 2021); *Estate of Jones v. St. Jude Operating Co., LLC*, 2021 WL 900672 (D. Or. Feb. 16, 2021); *Lyons v. Cucumber Holdings, LLC*, 2021 WL 364640 (C.D. Cal. Feb. 3, 2021); *Dupervil v. All. Health Ops., LCC*, 2021 WL 355137 (E.D.N.Y. Feb. 2, 2021); *Goldblatt*, 2021 WL 308158; *Estate of Smith v. Bristol at Tampa*, 2021 WL 100376 (M.D. Fla. Jan. 12, 2021); *Parker v. St. Jude Operating Co., LLC*, 2020 WL 8362407 (D. Or. Dec. 28, 2020); *Gunter v. CCRC Opco-Freedom Square, LLC*, 2020 WL 8461513 (M.D. Fla. Oct. 29, 2020); *Sherod v. Comprehensive Healthcare Management Services, LLC*, 2020 WL 6140474 (W.D. Penn. Oct. 16, 2020); *Saldana v. Glenhaven Healthcare LLC*, 2020 WL 6713995 (C.D. Cal. Oct. 14, 2020); *Martin v. Serrano Post Acute LLC*, 2020 WL 5422949 (C.D. Cal. Sept. 10, 2020); *Haro v. Kaiser Found. Hosps.*, 2020 WL 5291014 (C.D. Cal. Sept. 3, 2020); *Eaton v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1184 (D. Kan. Aug. 19, 2020).

The sole contrary decision, *Garcia v. Welltower OpCo Group*, 2021 WL 492581 (C.D. Cal. Feb. 10, 2021), reached its conclusion solely by deferring to Advisory Opinion 21-01, without

independent assessment of the requirements for complete preemption. *Id.* at *6–*7. But federal courts owe "no deference to the executive branch in construing [their] jurisdiction." *NetCoalition v. SEC*, 715 F.3d 342, 348 (D.C. Cir. 2013). Moreover, the Advisory Opinion's discussion of complete preemption erroneously conflated the question of whether the subsection (a)(1) defense applies with the question of whether claims are completely preempted. *See* Advisory Op. 21-01 at 2–4. The document thus lacks any persuasive value. *See McCalebb*, 2021 WL 911951, at *4 n.5 (rejecting OGC opinion as "conclusory" and contrary to precedent).

Further, regardless of whether willful misconduct claims subject to subsection (d) are completely preempted by the PREP Act, Hopman's willful misconduct claim does not fall under subsection (d) because it does not rest on the administration or use of any covered countermeasures to which the PREP Act applies. The simple mention of masks or other personal protective equipment in the state-court complaint does not transform Hopman's claims into one about "a purposeful allocation of scarce resources carried out in accordance with federal guidelines." *McCalebb*, 2021 WL 911951, at *5. Rather, the gravamen of the complaint is that Mr. Hopman died as a result of "overall inattention rather than conscious decision-making about covered countermeasures while delivering care." *Id.* The text of the PREP Act in no way suggests that it applies in such situations, and such an application is divorced from the statutory purpose of encouraging the manufacture and distribution of vaccines and other covered countermeasures. *See, e.g.*, 166 Cong. Rec. H1675-09 (daily ed. Mar. 13, 2020) (statement of Rep. Gregory Walden) (stating that PREP Act amendment was designed to "boost the availability and supply of critically needed respirator [masks]"); 151 Cong. Rec. H12244 (daily ed. Dec. 18, 2005) (statement by Rep. Nathan Deal, noting PREP Act was designed to ensure that a pandemic flu "vaccine gets developed and to make sure doctors are willing to give it when the time comes").

II. The Court should dismiss this case for lack of personal jurisdiction.

"The plaintiff has the burden of establishing a factual basis for the exercise of personal jurisdiction over the defendant." *Crane*, 894 F.2d at 456. Personal jurisdiction may take two forms: (1) "general or all-purpose jurisdiction," or (2) "specific or case-linked jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). This Court may exercise general personal jurisdiction over those who are domiciled in or maintain a principal place of business in the District of Columbia. *See Simpson v. Fed. Bureau of Prisons*, 496 F. Supp. 2d 187, 191 (D.D.C. 2007) (citing D.C. Code § 13–422 (2001)). Here, Fowler does not allege that Hopman has any contacts whatsoever with the District of Columbia. Thus, the Court does not have general personal jurisdiction.

This Court also lacks specific personal jurisdiction over Hopman. "In contrast to general, all-purpose jurisdiction, specific jurisdiction is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear*, 564 U.S. at 919 (quotation marks omitted). Stated differently, specific jurisdiction exists if a claim is related to or arises out of the non-resident defendant's contacts with the forum. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). A plaintiff seeking to establish specific jurisdiction over a non-resident defendant must show that specific jurisdiction comports with the forum's long-arm statute, and that it does not violate due process. *See GTE New Media Servs., Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1347 (D.C. Cir. 2000). The District of Columbia's long-arm statute provides that specific jurisdiction exists if the claim against the non-resident defendant arises from the defendant's:

(1) transacting any business in the District of Columbia;

(2) contracting to supply services in the District of Columbia;

> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if the defendant regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed, or services rendered, in the District of Columbia; [or]
>
> (5) having an interest in, using, or possessing real property in the District of Columbia[.]

D.C. Code § 13–423(a)(1)–(5) (1981).

In this case, Fowler has not alleged any facts that would satisfy the long-arm statute. And Fowler has not otherwise alleged "a constitutionally sufficient relationship between the defendant and the forum" sufficient to satisfy due process. *Mwani v. bin Laden*, 414 F.3d 1, 9 (D.C. Cir. 2005). Indeed, all the relevant facts alleged in Hopman's complaint took place in California. Fowler has not alleged that Hopman has *any* contacts with the District of Columbia, much less any contacts so significant that she "should reasonably anticipate being hailed into court" here, as is required to meet the constitutional minimum of due process. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Fowler's sole argument for personal jurisdiction rests on the novel theory that Hopman "effectively consent[ed] to personal jurisdiction" in this Court by "alleging and bringing claims expressly alleging willful misconduct against Covered Persons and otherwise invoking the PREP Act" in the complaint Hopman filed in California state court. Complaint ¶ 17. Fowler argues that the California complaint subjects Hopman to personal jurisdiction here because the PREP Act's "willful misconduct" exception to immunity for covered persons makes this Court the "'exclusive federal jurisdiction' for willful misconduct claims brought pursuant to 42 U.S.C. § 247d-6d(d)." *Id.* That argument is fanciful. The California state-court complaint was not brought pursuant to 42 U.S.C. § 247d-6d(d); it was brought under the California state tort of "willful misconduct." *See*,

e.g., *Doe v. U.S. Youth Soccer Ass'n., Inc.*, 8 Cal. App. 5th 1118, 1140 (2017) (discussing the tort of willful misconduct); *Berkley v. Dowds*, 152 Cal. App. 4th 518, 526 (2007) (same); *Moore v. Pflug Packaging & Fulfillment, Inc.*, 2018 WL 2430903, at *6 (N.D. Cal. May 30, 2018) (same).

Fowler also suggests that allegations in the *Hopman* complaint, such as allegations that Fowler "committed neglect," acted "with conscious disregard" to adequate training, and "unnecessarily expos[ed] [Mr. Hopman]" to COVID-19 implicate willful misconduct. Complaint ¶ 51. But the state tort suit alleges these acts and omissions because they are relevant to the state tort claims—not to invoke the PREP Act, which the *Hopman* complaint never references. Further, the PREP Act is inapplicable to the *Hopman* state-court suit because Hopman's claims are "premised on a failure to take preventive measures to stop the spread of COVID-19," and the "decedent's death was not caused by the administration or use of covered countermeasures" to which the PREP Act applies. *Saunders v. Big Blue Healthcare, Inc.*, 2021 WL 764567, *7 (D. Kan. Feb. 26, 2021).

Finally, even if Fowler's (non-meritorious) PREP Act defense applied to the *Hopman* suit, it would not establish personal jurisdiction over Hopman in this Court. Rather, it would provide a basis to dismiss the California action, leaving Hopman to decide whether to begin again by bringing a case in this Court.

III. The Court should decline to exercise its discretionary declaratory judgment jurisdiction in this case.

Even if Fowler could establish the jurisdictional prerequisites for declaratory relief, the Court should decline to consider this case. By its express terms, the Declaratory Judgment Act gives a district court the discretion to decline to hear a declaratory judgment suit: It states that, upon a proper application, the district court "may" declare the party's rights. 28 U.S.C. § 2201(a). The Supreme Court has explained that this language as discretionary:

> By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants. Consistent with the nonobligatory nature of the remedy, a district court is authorized, in the sound exercise of its discretion, to stay or to dismiss an action seeking a declaratory judgment before trial or after all arguments have drawn to a close. In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.

Wilton, 515 U.S. at 288 (footnote omitted); *see also Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494–95 (1942) (setting the standard for discretion where parallel state proceedings are pending). Here, this Court should exercise its discretion to decline to hear this case.

There are ongoing proceedings in the earlier-filed case in California that will resolve the issues Fowler raises here. To allow this "duplicative litigation" would "waste judicial resources, muddy legal waters with conflicting rulings, and strain the capabilities of litigants." *UnitedHealthCare Ins. Co. v. Price*, 255 F. Supp. 3d 208, 210 (D.D.C. 2017) (citations omitted); *see also Fuentes v. Azar*, 468 F. Supp. 3d 83, 93 (D.D.C. 2020) (declining to exercise jurisdiction in a mandamus action presenting the same issues as a pending lawsuit between the parties). As the D.C. Circuit has explained, "considerations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously." *Id.* (quoting *WMATA v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980)). "Sound judicial administration counsels against separate proceedings, and the wasteful expenditure of energy and money incidental to separate litigation of identical issues should be avoided." *Id.* (quoting *Handy v. Shaw, Bransford, Veilleux & Roth*, 325 F.3d 346, 349 (D.C. Cir. 2003)).

Here, the California case, which involves the same issues and the same parties, was filed in July 2020. Under the "first-to-file" doctrine, the case that was commenced first should be allowed to proceed to its conclusion first. *UtahAmerican Energy, Inc. v. Dep't of Labor*, 685 F.3d 1118, 1124 (D.C. Cir. 2012) (citations omitted). Fowler can pursue his PREP Act theories in the

case pending in California, which is where all the parties are located and a more convenient forum. This Court should abstain from allowing Fowler to pursue a declaratory judgment claim to deprive Hopman of her choice of forum.

CONCLUSION

The Court should dismiss plaintiffs' Complaint for Declaratory Judgment.

Dated: March 12, 2021

Respectfully submitted

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHANE FOWLER, et al., Plaintiffs, v. JESSICA HOPMAN, et al., Defendants.	)	Civil Action No. 20-3854 (APM)

[PROPOSED] ORDER

Having considered defendants' motion to dismiss and the entire record, it is ORDERED that defendants' motion is GRANTED, and this case is DISMISSED.

Dated: ____________________

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Amit P. Mehta
United States District Judge