

**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.)	

**REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

Each of the arguments of plaintiffs Fowler and Sunrise Senior Living Management (collectively, Fowler) in opposition to defendant Jessica Hopman's motion to dismiss rests on a fundamental misunderstanding of the nature of the claims brought by Hopman against Fowler in an earlier-filed case in California. Fowler insists that Hopman's complaint in the California case alleges willful misconduct in the use or administration of covered countermeasures within the meaning of the PREP Act. Hopman has brought no such claim. Fowler's misunderstanding of Hopman's claims has already been rejected both by the U.S. District Court for the Central District of California, which remanded Hopman's case to state court, and by the state court that denied Fowler's motion for judgment on the pleadings. This Court should likewise reject Fowler's mischaracterization of Hopman's California lawsuit. This declaratory judgment action should be dismissed.

ARGUMENT

I. The Court lacks subject-matter jurisdiction over this case.

A. This Court lacks jurisdiction to issue the advisory opinion that Fowler seeks.

Fowler does not dispute that, on its face, the complaint filed by Hopman in California raises only state-law claims and that Fowler's PREP Act defenses to the state-law claims cannot confer federal question jurisdiction. Fowler argues, though, that it does not "seek[] a declaratory judgment to establish that the PREP Act provides Fowler a defense' in the California Action." Opp'n Mem. 7 (quoting Def. Mem. 10). Instead, Fowler describes the relief it seeks as "a declaratory judgment that '[t]he PREP Act applies to the claims by the Hopman Litigants in California, and provides the exclusive remedy and forum for the willful misconduct claims in the

Hopman complaint.” *Id.* (quoting Complaint, ECF No. 1). Fowler’s statement of the relief it seeks highlights that this Court lacks jurisdiction.

As Fowler makes clear, it is not asking the Court to rule on the merits of Hopman’s claims, but only to offer an advisory opinion on how and where Hopman’s claims should be brought. This Court therefore lacks subject-matter jurisdiction, because “the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions.” *Pub. Emps. for Env’t Resp., v. Nat’l Park Serv.*, 2021 WL 1198047, at *11 (D.D.C. Mar. 30, 2021) (quoting *Pub. Serv. Elec. & Gas Co. v. FERC*, 783 F.3d 1270, 1274 (D.C. Cir. 2015)); see *Larsen v. U.S. Navy*, 525 F.3d 1, 4 (D.C. Cir. 2008) (holding that the court lacks subject-matter jurisdiction where a court order “would accomplish nothing—amounting to exactly the type of advisory opinion Article III prohibits”); *DC Soccer, LLC v. Capx Off. Sols., LLC.*, 2021 WL 1061206, at *6 (D.D.C. Mar. 18, 2021) (declining to “issue an advisory opinion on the existence of subject-matter jurisdiction over a hypothetical, future lawsuit”).

B. Fowler’s theory that the PREP Act completely preempts claims asserted in the California case does not provide subject-matter jurisdiction here.

Putting aside that it seeks only an advisory opinion, Fowler asserts that this Court has subject-matter jurisdiction over this case based on the complete-preemption exception to the well-pleaded complaint rule, as applied to the complaint filed by Hopman in the California litigation. Opp’n Mem. 9–10, 14. Specifically, Fowler argues that “the PREP Act is a complete preemption statute which confers federal question jurisdiction over the Hopman Litigants’ willful misconduct claim,” *id.* at 7, and, therefore, that Hopman’s claims may be pursued only under subsection (d) of the PREP Act, *id.* at 9–10. To begin with, the appropriate mechanism for contesting the California court’s jurisdiction over an action pending in California is a motion filed in California. Indeed, Fowler has already filed such a motion, which remains pending.

In any event, Fowler’s argument glosses over the key issue: Where a statutory provision has complete preemptive effect, only claims “within the scope” of that provision are “in reality based on federal law,” thus providing a basis for federal-court jurisdiction. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Thus here, it is not enough that the PREP Act may completely preempt *some* “willful misconduct” claims. Rather, Fowler must show that Hopman’s claim pending in California is a “willful misconduct” claim *relating to the administration or use of covered countermeasures*, within the meaning of the PREP Act. As nearly every court to address the issue has held, the type of claim advanced by Hopman is not such a claim.¹

i. The willful misconduct claim alleged in the pending California case does not relate to the administration or use of covered countermeasures.

Both the ordinary defense created by subsection (a)(1) of the PREP Act and the exclusive federal cause of action for “willful misconduct” created by subsection (d) of the PREP Act apply only where four requirements are met: The plaintiff’s claim must be (1) against a “covered person,” (2) “for loss,” (3) “arising out of, relating to, or resulting from the administration to or the use by an individual,” (4) of a covered countermeasure subject to a declaration of the HHS Secretary. 42 U.S.C. § 247d-6d(a)(1), (d). Covered countermeasures are drugs, biological products, or medical devices authorized for emergency use by the Food and Drug Administration (FDA), or respiratory protective devices approved by the National Institute for Occupational Safety and Health

¹ In addition to the fourteen opinions cited in Hopman’s opening memorandum, at 12 (collecting cases), at least eight additional district court decisions reject PREP Act arguments similar to those raised by Fowler. *See Maltbia v. Big Blue Healthcare, Inc.*, 2021 WL 1196445 (D. Kan. Mar. 30, 2021); *Gibbs v. Southeast SNF LLC*, 2021 WL 1186626 (W.D. Tex. Mar. 30, 2021); *Wright v. Encompass Health Rehab. Hosp. of Columbia, Inc.*, 2021 WL 1177440 (D.S.C. Mar. 29, 2021); *Stone v. Long Beach Healthcare Ctr., LLC*, 2021 WL 1163572 (C.D. Cal. Mar. 26, 2021); *Ivey v. Serrano Post Acute, LLC*, 2021 WL 1139741 (C.D. Cal. Mar. 25, 2021); *Martin v. Serrano Post Acute, LLC*, 2021 WL 1146380 (C.D. Cal. Mar. 25, 2021); *Lopez v. Life Care Ctrs. of Am., Inc.*, 2021 WL 1121034 (D.N.M. Mar. 24, 2021); *Smith v. Colonial Care Ctr., Inc.*, 2021 WL 1087284 (C.D. Cal. Mar. 19, 2021).

(NIOSH). 42 U.S.C. § 247d-6d(i)(1), (7). Accordingly, only those masks and other PPE that have been authorized for emergency use or approved by NIOSH are covered countermeasures; other masks and other PPE are not. And contrary to Fowler’s suggestion, Opp’n Mem. 17, “precautions”—including social distancing, visitor screening, temperature checks, and isolation of exposed patients or workers—are *not* covered countermeasures under the PREP Act.

Hopman’s claims in the pending California litigation do not satisfy the third and fourth elements of a “willful misconduct” claim under subsection (d) because her claims do not relate to “covered countermeasures”—either their use *or* non-use. Hopman’s “claims facially rest on an alleged duty arising from or related to proper standards of general medical and nursing care, not the administration or use of certain drugs, biological products, or devices.” *Dupervil v. All. Health Operations, LCC*, 2021 WL 355137, at *13 (E.D.N.Y. Feb. 2, 2021). Her willful misconduct claim is based on Fowler’s failure to “provide care, supervision, and services” that met Mr. Hopman’s needs and to observe, report, and respond to changes in Mr. Hopman’s health status *after* he contracted COVID-19. Complaint, Exhibit A (ECF No. 1-1 (Complaint, *Hopman v. Sunrise Villa Culver City*, No. 20STCV25558 (Super. Ct. Cal. filed July 7, 2020), ¶¶ 108–09)). Such claims do not have a “causal relationship” with the administration or use of “covered countermeasures.”² 42 U.S.C. § 247d-6d(1); *see Smith*, 2021 WL 1087284, at *4 (finding that allegations similar to Hopman’s “refer to policies and a failure to protect, not to any covered countermeasure, *i.e.*, drug, product, or device,” and “[t]hus, the square peg of Plaintiffs’ allegations does not fit into the round

² Fowler dismisses the cases cited in Hopman’s opening memorandum as irrelevant because they did not address willful misconduct claims. Opp’n Mem. 11. But willful misconduct claims addressed in subsection (d) are a subset of claims covered by subsection (a). *See* 42 U.S.C. § 247d-6d(1) (creating an “exception to the immunity from suit and liability of covered persons set forth in subsection (a)”). The threshold requirement of a “causal relationship” with the administration or use of “covered countermeasures” applies to both subsections.

hole of the PREP Act’s definition of a covered countermeasure”); *see also Gibbs*, 2021 WL 1186626, at *3 (“Failures to maintain hygiene, adequate staffing levels, or follow facility policy are not covered countermeasures.”).

Moreover, Hopman’s claims are based on inaction. Thus, to the extent that they can be construed to relate to covered countermeasures, they would relate to *non*-use of such countermeasures. Such claims would not be subject to the PREP Act. Based on its plain language, the statute applies only to claims with a causal connection to affirmative acts: “the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of [a covered] countermeasure.” 42 U.S.C. § 247d-6d(2)(B). The list does not include a failure to act, as nearly every federal court to consider the issue has found. *See, e.g., Stone*, 2021 WL 1163572, at *4; *Lopez*, 2021 WL 1121034, at *9–*14; *Robertson v. Big Blue Healthcare, Inc.*, 2021 WL 764566 (D. Kan. Feb. 26, 2021); *Sherod v. Comprehensive Healthcare Mgmt. Servs., LLC*, 2020 WL 6140474, at *7 (W.D. Pa. Oct. 16, 2020); *Estate of Maglioli v. Andover Subacute Rehab. Center I*, 478 F. Supp. 3d 518, 531 (D.N.J. 2020); *Eaton v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1184, 1192–93 (D. Kan. 2020).

ii. Fowler misstates the significance and content of administrative authority.

Attempting to counter the overwhelming weight of judicial authority, Fowler asserts that statements by the Department of Health and Human Services (HHS) that the PREP Act is a “complete preemption statute” are “controlling and must be followed” by this Court. Opp’n Mem. 8–9 (citing *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843–44 (1984); Advisory Opinion 21-01; Fifth Amendment to the Declaration, 86 Fed. Reg. 7872; and Preemption of State and Local Requirements Under a PREP Act Declaration, 2021 WL 298368 (O.L.C. Jan. 19, 2021)). Fowler

is wrong. Under binding circuit precedent, neither *Chevron* nor any other level of deference applies to federal agencies' views on federal-court jurisdiction. In any event, the cited materials say nothing about whether the PREP Act provides for complete preemption of the type of claims pending in Hopman's case in California.

As explained in Hopman's opening memorandum (at 13), 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). Rather, courts have an independent "obligation to examine the source of their own power," and "neither the parties to a private action nor an administrative agency may dictate the scope of an Article III court's jurisdiction." *Murphy Expl. & Prod. Co. v. U.S. Dep't of the Interior*, 252 F.3d 473, 479–80 (D.C. Cir. 2001). "HHS has not been delegated authority over the interpretation of judge-created federal jurisdiction doctrines such as complete preemption and is due no deference for its musings on such matters." *Ivey*, 2021 WL 1139741, at *2 (citing *Smith v. Berryhill*, 139 S. Ct. 1765, 1778–79 (2019)); see also *Murphy Expl.*, 252 F.3d at 479 (stating that "[i]t goes without saying that the jurisdiction of the federal courts is outside agencies' expertise").

Moreover, the administrative authority cited by Fowler does not support Fowler's theory of complete preemption of Hopman's claims. The Office of Legal Counsel opinion does not address complete preemption at all. It states that the PREP "Act expressly preempts state and local requirements to the extent that they would effectively prohibit qualifying pharmacists from ordering and administering COVID-19 tests and vaccines authorized by the Secretary's declaration," under an ordinary preemption provision of the PREP Act that is not at issue in this case. 2021 WL 298368, at *2 (citing 42 U.S.C. § 247d-6d(b)(8)). Similarly, although HHS's Fifth Amendment to its Declaration under the PREP Act uses the phrase "complete preemption," it too is referring only to ordinary preemption under that same provision. See 86 Fed. Reg. at 7874

(stating that any state law that would prohibit certain nurses and physicians with lapsed licenses “from administering a covered countermeasure” is preempted).

Finally, HHS Advisory Opinion 21-01 states that claims relating to the non-use of a covered countermeasure resulting from a “[p]rioritization or purposeful allocation of a Covered Countermeasure,” “can fall within the PREP Act,” while “nonfeasance ... that also results in non-use” does not. AO 21-01 at 3, 4. That statement does not help Fowler here: Hopman alleges that Fowler committed willful misconduct in failing to provide adequate care, supervision, and services to meet Mr. Hopman’s needs, and failing to observe and report any changes in his medical condition after he contracted COVID-19. Those allegations do not relate to the prioritization or purposeful allocation of a covered countermeasure. *See Estate of McCaleb v. AG Lynwood, LLC*, 2021 WL 911951, at *5 (C.D. Cal. Mar. 1, 2021) (holding that “cases of general neglect [must] fall outside the protection of the PREP Act. Otherwise, the [Opinion’s] limiting language and illustration would be superfluous, if not confounding.”); *Lopez*, 2021 WL 1121034 at *11 (finding no conflict with AO 21-01 and concluding that the PREP Act does not apply to claims based on “failure to use and the failure to administer masks,” as opposed to “a prioritization plan to administer masks to some residents and not others”); *see also Wright*, 2021 WL 1177440, at *4 (explaining why AO 21-01 is not owed deference under *Chevron* or any other doctrine).

C. The *Grable* doctrine does not apply.

Fowler also asserts that the PREP Act confers jurisdiction over this case under the doctrine of *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005). Opp’n Mem. 15. The *Grable* doctrine applies to the “‘special and small category’ of cases in which arising under jurisdiction still lies” despite the absence of a federal-law claim. *Gunn v. Minton*, 568 U.S. 251, 258 (2013) (citing *Empire Healthchoice Assurance, Inc. v. McVeigh* 547

U.S. 677, 699 (2006)) A complaint falls under *Grable* only where a federal issue is “(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*, 586 U.S. at 258. In determining whether these requirements are met, the well-pleaded complaint rule applies. *Bender v. Jordan*, 623 F.3d 1128, 1130 (D.C. Cir. 2010) (citing *Empire*, 547 U.S. at 690). As is true with regard to other questions of federal-court jurisdiction, federal agencies’ views are owed no deference. *See NetCoalition*, 715 F.3d at 348.

This case does not fall into “the ‘slim category’ of cases” that permit federal-question jurisdiction where a cause of action is predicated on state law. *D.C. Ass’n of Chartered Pub. Schs. v. District of Columbia*, 930 F.3d 487, 491 (D.C. Cir. 2019) (citing *Gunn*, 568 U.S. at 258). Fowler’s complaint raises no state-law claim at all, and Hopman’s complaint does not “necessarily raise” any federal issue. Rather, as the U.S. District Court for the Central District of California held in remanding Hopman’s case to state court, Hopman’s complaint “raise[s] no federal question” and “does not allege any facts that implicate the PREP Act.” Order, *Hopman v. Sunrise Villa Culver City*, No. 20-cv-07141-RGK-JEM (C.D. Cal. Aug. 25, 2020), ECF No. 14, at 1. Likewise, the state court presiding over her case after remand agreed that Hopman’s complaint does not implicate the PREP Act by alleging an injury arising out of the administration or use of a covered countermeasure. *See* Mem. Op. at 3, *Hopman v. Sunrise Villa Culver City*, No. 20STCV25558 (Super. Ct. Cal. Jan. 5, 2021). An “anticipated federal defense” does not give rise to jurisdiction under *Grable*. *D.C. Ass’n of Chartered Pub. Schs.*, 930 F.3d at 491.

Furthermore, in enacting the PREP Act, Congress paid particular attention to judicial review and chose to provide for a narrow category of claims relating to pandemic response to be heard by three-judge courts in this district: claims brought by plaintiffs alleging willful misconduct

arising out of the use or administration of covered countermeasures. As discussed above, *see supra* at I.B., Hopman has not brought such a claim. Congress did not provide for federal-court jurisdiction for other state-law claims or for a defendant who wants to assert an ordinary PREP Act defense to establish federal jurisdiction. For the Court to assert jurisdiction over this *additional* category of state-law cases—as urged by Fowler—would not be “consistent with congressional judgment about the sound division of labor between state and federal courts.” *Grable*, 545 U.S. at 313. Indeed, every court to consider the application of *Grable* in the circumstances urged by Fowler has rejected it. *See, e.g., Maltbia*, 2021 WL 1196445, at *12 n.12; *Martin*, 2021 WL 1146380, at *1; *Ivey*, 2021 WL 1139741, at *3; *McCalebb*, 2021 WL 911951, at *3; *Robertson*, 2021 WL 764566, at *11 & n.19; *Estate of Jones v. St. Jude Operating Co., LLC*, 2021 WL 900672, at *7, n.8 (D. Or. Feb. 16, 2021); *Lyons v. Cucumber Holdings, LLC*, 2021 WL 364640, at *6 (C.D. Cal. Feb. 3, 2021); *Dupervil*, 2021 WL 355137, at *14–*15); *Goldblatt v. HCP Prairie Vill. KS OPCO LLC*, 2021 WL 308158, at *11 & n.7 (D. Kan. Jan. 29. 2021); *Martin v. Serrano Post Acute LLC*, 2020 WL 5422949, at *2 (C.D. Cal. Sept. 10, 2020).

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

Fowler concedes that this Court lacks general or specific personal jurisdiction over Hopman based on minimum-contacts principles. Fowler asserts, however, that this Court may exercise personal jurisdiction over Hopman because this district is the exclusive venue for cases brought pursuant to subsection (d) of the PREP Act. Opp’n Mem. 20–21. According to Fowler, the exclusive venue provision for subsection (d) claims impliedly authorizes nationwide service of process for such cases, and if the *defendant* in a case under subsection (d) can be haled into this Court even absent minimum contacts, this Court can likewise assert personal jurisdiction over a subsection (d) plaintiff named as a defendant in a declaratory judgment action.

Fowler's argument fails because, as explained above, Hopman has not asserted a claim of willful misconduct related to the administration or use of covered countermeasures within the meaning of subsection (d) of the PREP Act. Thus, Fowler's theory, even if correct, would not establish jurisdiction over Hopman in this case.

Moreover, this case was brought pursuant to the Declaratory Judgment Act, not subsection (d) of the PREP Act, and the Declaratory Judgment Act does not provide for nationwide service of process. *See* 28 U.S.C. § 2201–02. Thus, this Court can exercise personal jurisdiction over Hopman only if doing so comports with D.C.'s long-arm statute and does not violate due process. *See Sharp Corp. v. Hisense USA Corp.*, 292 F. Supp. 3d 157, 169–74 (D.D.C. 2017) (applying minimum-contacts principles in declaratory judgment action and holding that court lacked personal jurisdiction over defendants); *Brunson v. Kalil & Co., Inc.*, 404 F. Supp. 2d 221, 226–27 (D.D.C. 2005) (dismissing declaratory judgment action for lack of personal jurisdiction after applying long-arm statute and considering requirements of due process). The distinction between a case brought under subsection (d) of the PREP Act and a case brought under the Declaratory Judgment Act is important because Fowler's case is not a mirror image of a subsection (d) case: It does not seek to resolve Hopman's claims; it has not been assigned to a three-judge panel; and it is not subject to the subsection (d) prerequisites and special procedures.

To the extent that plaintiffs in subsection (d) cases may rely on an implied authorization of nationwide service of process to establish that this Court can exercise personal jurisdiction over a defendant in such a case, there is no basis to impute the same to a plaintiff in a declaratory judgment action. The PREP Act benefits covered persons by providing immunity from most claims arising from the use of covered countermeasures, with an exception for willful misconduct claims that are themselves subject to a variety of restrictions and special procedures. Thus, while it may not offend

traditional notions of fairness to hale into court in the District of Columbia a covered person sued as a defendant in a subsection (d) case because the PREP Act provides significant benefits to such defendants, the same cannot be said for forcing a potential (or in this case, real) out-of-state plaintiff to litigate as a defendant in this jurisdiction. *See also Cherdak v. Am. Arb. Ass'n Inc.*, 443 F. Supp. 3d 134, 149 (D.D.C. 2020) (in a declaratory relief action, stating that “[m]ere speculation as to [future] claims will not establish personal jurisdiction over the defendant” (citation omitted)).

Fowler’s suggestion that a decision by the Central District of California to transfer Hopman’s case to this Court “could moot the personal jurisdiction questions,” Opp’n Mem. 22 n.9, illustrates the distinction. If Hopman’s case were transferred to this Court, Hopman would be the plaintiff and have the option of litigating in this district or dismissing the complaint without prejudice. In contrast, as a defendant in this declaratory judgment action, Hopman has no choice but to litigate this case in this district if it is not dismissed. *Cf. Phillips Petroleum v. Shutts*, 472 U.S. 797, 814 (1985) (holding that jurisdiction may be asserted over out-of-state plaintiffs where they receive notice and have an opportunity to opt out).

In short, Hopman lacks minimum contacts with this jurisdiction, and she has not filed a PREP Act claim in this court (or elsewhere). That the District Court for the District of Columbia would be the appropriate forum for litigation if Hopman chose to file a subsection (d) claim does not confer personal jurisdiction over her in this case.

III. The Court should decline to consider this case because the same issues are pending in an earlier-filed case.

Fowler concedes that this Court has the discretion to decline to hear this case and that, in general, where two cases involve the same parties and issues, the case that was commenced first should be allowed to proceed to its conclusion first. Opp’n Mem. 22. Nevertheless, Fowler urges this Court to exercise its discretion to entertain this case, for two reasons. Neither has merit.

First, Fowler repeats its mischaracterization of the claims that Hopman has asserted in the California case. As explained above, Hopman has not brought a PREP Act claim or asserted willful misconduct related to the administration or use of covered countermeasures. Thus, Fowler’s observation that this District is the exclusive venue for litigating such claims, and Fowler’s argument that such claims are completely preempted, are irrelevant. Moreover, although Hopman expressly disclaims any intent to assert a claim of willful misconduct related to the administration or use of covered countermeasures, Fowler is able to argue otherwise in the California case and to pursue all of the arguments that it seeks to pursue here—indeed, it is doing so. Disputes over the content of the state-law claims alleged in a California case are best considered by the court presiding over that case.

Second, Fowler argues that this case and the California action are “not duplicative” because Hopman seeks money damages and Fowler seeks a declaration that Hopman has brought a case alleging willful misconduct in the use or administration of covered countermeasures. Opp’n Mem. 23. Fowler is wrong. Although the two cases seek different relief, this case is entirely duplicative of the California case because it turns on resolution of the same issues raised in the pending motions in that case (Fowler’s motion to transfer and Hopman’s motion to remand): whether Hopman’s state-law claims are claims of willful misconduct related to the administration or use of covered countermeasures that can only be brought under subsection (d) of the PREP Act.

CONCLUSION

The Court should dismiss plaintiffs’ Complaint for Declaratory Judgment.

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Respectfully submitted

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