No. 22-2757

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ZANE CAGLE, Individually and in a Representative Capacity for All Persons Identified by RSMo 537.080,

Plaintiff-Appellee,

v.

NHC HEALTHCARE-MARYLAND HEIGHTS, LLC, NHC/OP, LP, NHC/DELAWARE, INC., NATIONAL HEALTHCARE CORPORATION, DELAWARE,

Defendants-Appellants,

SUSAN MORLEY-TAYLOR, JEFFREY LORAINE, ANGELA SANFORD, M.D., GERALD MAHON, M.D., CHERYL BENE, LPN, COURTNEY NANCE, LPN, ERICA D. PARHAM, LPN, RACHEL N. MCKINLEY, LPN, JANNA M. RAUH, LD, LAURA N. LETIZIA, BSN-RN, MARIA MCALLISTER, SW DIR., SHERRY TERRY, OT, JOHN AND JANE DOES,

Defendants.

On Appeal from the United States District Court
for the Eastern District of Missouri
No. 4:21-cv-1431, The Honorable Ronnie L. White

BRIEF OF DRI CENTER FOR LAW & PUBLIC POLICY AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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November 4, 2022

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae DRI Center for Law and Public Policy is the public policy and advocacy voice of DRI, Inc. DRI, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTEREST OF THE AMICUS CURIAE[1]

The DRI Center for Law and Public Policy is the public policy and advocacy voice of DRI, an international organization of approximately 13,000 attorneys who represent businesses and defend parties in civil litigation. The Center addresses issues that are germane to defense attorneys and their clients. The Center participates as an *amicus curiae* in the Supreme Court, the federal courts of appeals, and state appellate courts, in an ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

The COVID-19 pandemic has sparked considerable litigation concerning the standard of care and the protective measures used to combat the disease. Because of the exigent circumstances related to fighting pandemic disease, Congress presciently provided immunity to various healthcare providers and others. The relevant federal statutes, and federal administrative action pursuant to delegated authority, should receive a consistent interpretation in federal court. The Center and DRI have a significant interest in ensuring that such claims are heard in federal court to the full extent provided by federal law.

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

Here, the District Court refused to accept removal jurisdiction under the Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. § 247d-6d, and, separately, the federal-officer removal statute, 28 U.S.C. § 1442(a)(1)—a problem that has recurred nationwide. The Center respectfully contends that the District Court erred and that cases like this can be removed to federal court.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the beginning of the pandemic, most Americans were asked to fight COVID-19 by following a few public-health guidelines: wear a mask, stand six feet apart, wash your hands, and stay at home. Nursing homes, in contrast, had to follow a much longer list of infection-control measures, in large part because they served a vulnerable population. And for the vast majority of these operators, the measures were not a choice or a recommendation, but a requirement the federal government imposed on them. The federal government is able to command compliance not just because it wields regulatory authority, but also because of the outsized federal role in arranging care for the elderly and others who require assistance in their day-to-day lives.

The District Court had jurisdiction of this case under the federal-question statute because of complete preemption under the PREP Act.[2] But instead of

[2] The district court also addressed federal-officer removal and diversity jurisdiction. Although the Center also disagrees with the district court's federal-

exercising jurisdiction, the District Court remanded the case back to state court. That decision was incorrect:

The PREP Act confers federal jurisdiction and provides that the only permissible civil action against certain "covered persons" about "covered countermeasures," as designated by the Secretary of Health and Human Services (HHS), is a federal one. 42 U.S.C. § 247d-6d. The lawsuit here concerns how Defendants deployed such countermeasures on a programmatic level—a type of suit that the Secretary has expressly stated should be barred by the PREP Act. Yet the District Court incorrectly reasoned that the PREP Act did not provide for complete preemption because the Act "exclude[s] inaction from its coverage." Add. 17; R. Doc. 50 at 17.

The District Court's decision disregards the thoughtful, comprehensive scheme that Congress created for injuries caused by covered countermeasures. The PREP Act creates what it expressly labels an "exclusive Federal cause of action" for a narrow subset of claims involving willful misconduct, and it funnels all interlocutory appeals of decisions denying PREP Act immunity to a single federal court of appeals. 42 U.S.C. § 247d-6d(d)(1), (e). The availability of compensation through a federal administrative regime in no way undermines the PREP Act's focus

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officer decision and its interpretation of the removal statute in diversity cases, this brief focuses on the federal-question ground for removal.

on ensuring that any *suit* proceeds in federal court. If left to stand, the decision will undermine the uniformity that Congress intended when it enacted the PREP Act, force healthcare providers to commit valuable resources to litigation defense that are better committed to combatting the pandemic, and complicate COVID-19-related risk assessment by creating a complex patchwork of state-court decisions.

The District Court's remand order should therefore be reversed.

ARGUMENT

I. The PREP Act completely preempts Plaintiff's claims because it demonstrates Congress's intent that the Act be interpreted in a centralized, consistent way by federal courts alone.

A. The PREP Act gives the Secretary of HHS the authority to immunize those responding to public health emergencies (including pandemics) from federal and state-law claims, thereby completely preempting those claims.

Congress enacted the relevant provision of the PREP Act, 42 U.S.C. § 247d-6d, in 2005, to give the Secretary of HHS the authority to "declare limited liability protection" when facing a public health emergency, such as "the threat of pandemic flu." 151 Cong. Rec. 30,409 (2005) (statement of Rep. Nathan Deal, chairman of the Health Subcommittee). Congress anticipated that such protection would be needed, for example, "to make sure doctors are willing to give [a vaccine] when the time comes." *Id.*

Persons covered by the PREP Act are "immune from suit and liability under Federal and State law" for any claim relating to a "covered countermeasure," except

for an "exclusive Federal cause of action" for the most serious injuries caused by the most serious misconduct. 42 U.S.C. § 247d-6d(a)(1), (d)(1). That federal cause of action may be heard only in a specific federal court. *Id.* § 247d-6d(e). As an alternative to suing the private parties responsible for administering pandemic countermeasures, some claimants may receive compensation from a federal fund through a federal administrative process. The overall effect of this structure is to federalize litigation and, to the extent a claim exceeds the federal statutory limits on cases that may come to court, to require the federal district court to dismiss it.

The immunity extends to any claim of loss "caused by, arising out of, relating to, or resulting from" the "manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures." 42 U.S.C. § 247d-6d(a)(1), (b)(1). The listed "covered countermeasure[s]" include "a qualified pandemic or epidemic product," such as "a product manufactured, used, designed, developed, modified, licensed, or procured" to "diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic," and a "respiratory protective device that is approved by the National Institute for Occupational Safety and Health" that "the Secretary determines to be a priority for use during a public health emergency." *Id.* § 247d-6d(i)(1)(A), (i)(1)(D), (i)(7)(A). A "covered person" includes, among others, a "qualified person who prescribed, administered, or dispensed such countermeasure" and a "program planner" who "supervised or administered a

program with respect to the administration, dispensing, distribution, provision, or use" of a countermeasure. *Id.* § 247d-6d(i)(2)(B)(iii), (i)(2)(B)(iv), (i)(6).

The immunity resulting from the Secretary's declaration, however, does not leave injured people without recourse. The PREP Act's other operative provision creates a federal "Covered Countermeasure Process Fund," which provides compensation for individuals who suffer "serious physical injury or death" that is "directly caused by the administration or use of a covered countermeasure." *Id.* § 247d-6e(a), (b)(1), (e)(3). An individual with an eligible injury may file an administrative claim for recovery from the Fund. *See* 42 C.F.R. pt. 110.

The Act states that "the sole exception to the immunity from suit and liability of covered persons … shall be for an exclusive Federal cause of action against a covered person for death or serious physical injury *proximately caused by willful misconduct*." 42 U.S.C. § 247d-6d(d)(1) (emphasis added); *see id.* § 247d-6d(c)(1)(A) (defining "willful misconduct"). These actions must be filed in the District Court for the District of Columbia, to be heard initially by a three-judge panel. *Id.* § 247d-6d(e)(1), (5). And before filing suit, any potential plaintiff must first seek recovery from the Fund. *Id.* § 247d-6e(d)(1).

The PREP Act also specifies that the D.C. Circuit "shall have jurisdiction of an interlocutory appeal by a covered person" from a denial of a motion to dismiss or

motion for summary judgment "based on an assertion of the immunity from suit." *Id.* § 247d-6d(e)(10).

B. In response to the COVID-19 pandemic, HHS declares that COVID countermeasures are "covered" by the PREP Act, with an understanding that the declaration will completely preempt state-law claims.

On January 21, 2020, the CDC confirmed that the first case of COVID-19 had been detected in the United States. CDC, *First Travel-related Case of 2019 Novel Coronavirus Detected in United States* (Jan. 21, 2020), https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html. Ten days later, HHS declared that COVID-19 posed a public health emergency in the United States. U.S. Dep't of Health & Hum. Servs., Office of the Assistant Sec'y for Preparedness & Response, *Determination that a Public Health Emergency Exists* (Jan. 31, 2020), https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.

On March 17, 2020, the Secretary issued a COVID-19-related PREP Act declaration, defining the universe of "covered countermeasures" as "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate COVID-19." Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15,198, 15,202 (Mar. 17, 2020). HHS provided for immunity to apply broadly; the initial March 17, 2020 declaration stated that a covered "administration" of a countermeasure includes "*decisions* directly relating

to public and private delivery, distribution, and dispensing of the countermeasures to recipients," and that the declaration "precludes a liability claim relating to the management and operation of a countermeasure distribution program." *Id.* at 15,200 (emphasis added). And in advisory guidance accompanying the various declarations made under the PREP Act, HHS's General Counsel stated plainly that "[u]nder the PREP Act, immunity is broad." U.S. Dep't of Health & Hum. Servs., Office of the Sec'y, Gen. Couns., *Advisory Opinion on the Public Readiness and Emergency Preparedness Act and the March 10, 2020 Declaration Under the Act April 17, 2020, as Modified on May 19, 2020*, at 7 (May 19, 2020), https://www.hhs.gov/sites/default/files/prep-act-advisory-opinion-hhs-ogc.pdf.

HHS amended the Declaration ten times, issued seven guidance documents, and provided six advisory opinions on how to apply the Declaration, with each development tracking the progress of COVID-19 and the nation's response to it. *See* U.S. Dep't of Health & Hum. Servs., *Public Readiness and Emergency Preparedness (PREP) Act*, https://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx.

HHS recognized in the early stages of the pandemic that covered persons had to make difficult decisions about how to administer medical care and should not be exposed to suit or liability for that decisionmaking. It declared that immunity relating to "covered countermeasures" included immunity from suits about the

alleged failure to provide covered countermeasures, or particular ones, when resources were scarce. Fourth Amendment to the Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 and Republication of the Declaration, 85 Fed. Reg. 79,190, 79,197 (Dec. 9, 2020) ("Fourth Amendment") (explaining that the scope of the declaration includes decisions to "not administer[] a Covered Countermeasure to one individual in order to administer it to another individual" (emphasis omitted)).

In a subsequent Advisory Opinion ("Advisory Opinion 21-01"), HHS reaffirmed that "[p]rioritization or purposeful allocation of a Covered Countermeasure" and "decision-making that leads to the non-use of covered countermeasures by certain individuals" are "expressly covered by [the] PREP Act." U.S. Dep't of Health & Hum. Servs., Office of the Sec'y, Gen. Couns., *Advisory Opinion 21-01 on the Public Readiness and Emergency Preparedness Act Scope of Preemption Provision* 3-4 (Jan. 8, 2021), https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/2101081078-jo-advisory-opinion-prep-act-complete-preemption-01-08-2021-final-hhs-web.pdf. In the agency's view, "program planning," which includes the "administration, dispensing, distribution, provision, or use of … a qualified pandemic or epidemic product," "inherently involves the allocation of resources" such that "some individuals are going to be denied access to them." *Id.* at 4. These circumstances, according to HHS, were subject to the

PREP Act's immunity. *Id.* at 3. HHS anticipated that the only instance where the PREP Act might not apply is when the defendant fails "to make any decisions whatsoever." *Id.* at 4.

Advisory Opinion 21-01 also firmly states HHS's position that any suit "related to the use or non-use of covered countermeasures against COVID-19, including PPE," is completely preempted. *Id.* at 1, 3-4. HHS has taken the view that the "PREP Act is a '[c]omplete [p]reemption' statute," *id.* at 2, and a federal district court should not be stymied by a plaintiff's well-pleaded complaint alleging only violations of state law to conclude that the claims are completely preempted by the PREP Act, *id.* at 4-5.

II. The District Court's ruling misapplies complete-preemption doctrine and incorrectly authorizes a patchwork of state-court decisions on immunity.

Both in words and in substance, the PREP Act does exactly what a federal statute should do when Congress seeks to replicate the effect of other completely preemptive statutes. Complete preemption occurs when federal law "provide[s] the exclusive cause of action" for the type of claim being asserted. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003); *accord, e.g.*, *Thomas v. U.S. Bank Nat'l Ass'n*, 575 F.3d 794, 797 (8th Cir. 2009). That is exactly what the PREP Act says, in those same words: it creates "an exclusive Federal cause of action," which must be heard in a specific federal forum guaranteeing uniformity, and it provides that the

exclusive Federal cause of action shall be "the sole exception to the immunity from suit and liability of covered persons." 42 U.S.C. § 247d-6d(d)(1).

A. Complete preemption means that the only viable causes of action are federal—even if not every plaintiff will have a viable federal cause of action.

When a federal statute gives rise to complete preemption, it disallows any cause of action other than the federal one. But some plaintiffs seeking to sue in state court under state law will not qualify for a federal cause of action. As the Supreme Court has repeatedly said, those claims are completely preempted too, even though they are subject to dismissal on the merits.

When the "preemptive force" of a federal statute "is so powerful as to displace entirely any state cause of action"—*i.e.*, where there is complete preemption—a federal court may exercise jurisdiction over a case, despite the lack of a federal claim expressly alleged in the well-pleaded complaint because the only available remedy is a federal one. *Metro. Life Ins. v. Taylor*, 481 U.S. 58, 64 (1987) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 23 (1983)); *see Aetna Health Inc. v. Davila*, 542 U.S. 200, 207 (2004) ("When a federal statute wholly displaces the state-law cause of action through complete pre-emption, the state claim can be removed." (quoting *Beneficial*, 539 U.S. at 8) (internal alteration and quotation marks omitted)); *Griffioen v. Cedar Rapids Ry.*, 785 F.3d 1182, 1188-89 (8th Cir. 2015) ("[W]hen a federal statute completely preempts a state-law cause

of action, the state-law claim is properly recharacterized as a complaint arising under federal law." (quoting *Hull v. Fallon*, 188 F.3d 939, 942 (8th Cir. 1999)) (internal quotation marks omitted)). In other words, "some statutes have such 'extraordinary pre-emptive power' that state claims turn into federal claims, even if none actually appear in the complaint," *Krakowski v. Allied Pilots Ass'n*, 973 F.3d 833, 836 (8th Cir. 2020) (quoting *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 543 (8th Cir. 1996)).

In both *Davila* and *Beneficial*, the court of appeals had held that the plaintiffs' claim (under ERISA or the National Bank Act) was not completely preempted because it did not match the available federal cause of action. Thus, for instance, Davila wanted to sue his health plan for medical malpractice under a state statute. ERISA does not provide a cause of action for medical negligence, but only one for collecting benefits; so, the Fifth Circuit reasoned, the state cause of action was not completely preempted. *Roark v. Humana, Inc.*, 307 F.3d 298, 309-11 (5th Cir. 2002). The Supreme Court reversed, squarely rejecting the view "that only strictly duplicative state causes of action are pre-empted." *Davila*, 542 U.S. at 216; *accord Beneficial*, 539 U.S. at 11 ("[T]here is, in short, no such thing as a state-law claim of usury against a national bank."); *Phipps v. FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005) ("The NBA preempts actions challenging the lawfulness of the interest charged by a national bank.").

B. Exclusive federal jurisdiction is critical for fulfilling Congress's intent in enacting the PREP Act.

1. Here, the PREP Act is a federal statute that is "so powerful as to displace entirely any state cause of action." *Beneficial*, 539 U.S. at 7 (quoting *Franchise Tax Bd.*, 463 U.S. at 23). It provides a broad immunity *from suit and liability*, with a single, "exclusive[ly] Federal" exception. And the "exclusive Federal cause of action" comes with an even more exclusive federal forum designed to promote consistent decisionmaking. That text and structure refute any notion that Congress intended to allow hundreds of different state courts to reach their own conclusions about the meaning and scope of the PREP Act.

First, the immunity is markedly broad. The Act immunizes covered persons "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." 42 U.S.C. § 247d-6d(a)(1) (emphasis added). The words "relating to" have a "broad" meaning—"to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *United States v. Stults*, 575 F.3d 834, 845 (8th Cir. 2009) (quoting *United States v. Weis*, 487 F.3d 1148, 1152 (8th Cir. 2007)). Properly applied to the Secretary's COVID-19 declaration and amendments, "relating to" should encompass any claim that in any way involves a decision regarding how,

when, or whether to use a covered countermeasure, including personal protective equipment ("PPE").

The District Court thus erred in holding that, because the state-court complaint on its face "d[id] not relate to Defendants' use of countermeasures," the PREP Act was not "implicate[d]." Add. 16; R. Doc. 50 at 16. The court's conclusion rested on the flawed premise that "inaction rather than action caused the death." Add. 16; R. Doc. 50 at 16 (quoting *Jackson v. Big Blue Healthcare, Inc.*, No. 2:20-cv-2259, 2020 WL 4815099, at *6 (D. Kan. Aug. 19, 2020)). But Plaintiff alleges that Defendants' decisions regarding, among other things, quarantining residents, following infection-control protocols, and using PPE were improper. *See* App. 53; R. Doc. 1-1, at 12. These decisions necessarily implicate the "administration[] or use of one or more covered countermeasures." 42 U.S.C. § 247d-6d(a)(1), (b)(1). And immunity extends to a covered provider's decisions on how to allocate covered countermeasures (including decisions *not* to use covered countermeasures), especially in light of the severe shortages of, for instance, PPE and COVID-19 testing kits these providers faced. *See* Fourth Amendment, 85 Fed. Reg. at 79,197 (noting that declaration covers decisions to "not administer[] a Covered Countermeasure to one individual in order to administer it to another individual" (emphasis omitted)); Advisory Opinion 21-01 at 3-4; Rob Stein, *A Rush on Coronavirus Testing Strains Laboratories, Drives Supply Shortages*, NPR (Nov. 17,

2020), https://www.npr.org/sections/health-shots/2020/11/17/935809271/a-rush-on-coronavirus-testing-strains-laboratories-drives-supply-shortages ("Testing shortages have hobbled the nation's ability to fight the pandemic since it began."); Jennifer Cohen & Yana van der Meulen Rodgers, *Contributing factors to personal protective equipment shortages during the COVID-19 pandemic*, Preventive Medicine 141, at 1 (Oct. 2, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7531934/pdf/main.pdf ("Since early 2020[,] the US has experienced a severe shortage of [PPE] needed by healthcare workers fighting the COVID-19 pandemic."). Instead of creating a loophole in the PREP Act, the District Court should have instead considered whether the cause of action the PREP Act *does* provide is exclusive of any other cause of action, federal or state, and whether Congress has set forth procedures governing recovery. The answer must be yes.

And, notably, the statute expressly provides an immunity "*from suit*"; the appellate decision that the Supreme Court reversed in *Beneficial* had refused to apply complete preemption because it did not think the National Bank Act provided such an immunity "from facing suit in state court." *Anderson v. H&R Block, Inc.*, 287 F.3d 1038, 1045 (11th Cir. 2002). The PREP Act contains no such ambiguity.

Second, as "the sole exception" to its decision to displace both federal and state causes of action, Congress allowed only a limited, "exclusive Federal cause of action." 42 U.S.C. § 247d-6d(d)(1). No other cause of action is permissible; rather,

the alternative is a comprehensive compensation scheme for those who are seriously injured or killed by the use of a covered countermeasure. That federal exclusivity exactly fits what the Supreme Court and this Court had both said, shortly before the PREP Act's enactment, is the key to complete preemption. *Beneficial*, 539 U.S. at 8 (complete preemption exists where "the federal statutes at issue provide[] the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action"); *Neumann v. AT&T Commc'ns, Inc.*, 376 F.3d 773, 779-80 (8th Cir. 2004) (noting that "the action is subject to removal" when "the exclusive cause of action is under federal law").

Some courts of appeals, however, have reached the opposite conclusion by interpreting "exclusive Federal cause of action" as simultaneously permitting state-law claims that are not for willful misconduct—*e.g.*, for negligence. *E.g.*, *Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 410 (3d Cir. 2021) ("Just because the PREP Act creates an exclusive federal cause of action does not mean it completely preempts the [plaintiffs'] state-law claims."). But this conclusion ignores how the "exclusive[ly] Federal" willful misconduct claim is the "sole exception" to immunity, and how Congress chose to create a compensation fund to serve as the exclusive remedy for claims not involving willful misconduct. 42 U.S.C. § 247d-6e(b)(1), (e)(3). This federal compensation mechanism preserves the liability shield for covered persons while also providing some additional

compensation for plaintiffs whose claims are preempted. It is no reason to allow plaintiffs to pursue different recoveries in *state* court for the same types of conduct the compensation fund addresses.

Third, Congress provided that a single federal district court would have jurisdiction over any suits in this area. And that district court would proceed, up through summary judgment, as a three-judge panel—an unusual measure designed to promote uniformity on pretrial legal rulings within even that single district. 42 U.S.C. § 247d-6d(e)(1), (5).

Fourth, Congress provided without limitation that any interlocutory appeal construing PREP Act immunity will go to the D.C. Circuit. Specifically, any "interlocutory appeal by a covered person … of an order denying a motion to dismiss or a motion for summary judgment based on an assertion of the immunity from suit conferred by [§ 247d-6d(a)]" falls into the appellate jurisdiction of the "United States Court of Appeals for the District of Columbia Circuit." *Id.* § 247d-6d(e)(10).

Fifth, confirming the point, the PREP Act also expressly prohibits a state from enforcing "any provision of [state] law or [state] legal requirement" that "is different from, or is in conflict with," any provision of the PREP Act that "relates to … the prescribing, dispensing, or administration by qualified persons of [any] covered countermeasure." *Id.* § 247d-6d(b)(8). A cause of action that supplements what the PREP Act allows is squarely "in conflict" with the PREP Act's decision to make its

cause of action "exclusively Federal." *Cf. Davila*, 542 U.S. at 216 (explaining that "Congress'[s] intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted").

2. Allowing Plaintiff's claims to proceed in state court despite Congress's clear and complete preemption of any state-court claims would disrupt the uniformity expected by the PREP Act. As the Secretary stressed in the Fourth Amendment, "there are substantial federal legal and policy issues" and thus, a substantial federal interest "in having a uniform interpretation of the PREP Act." 85 Fed. Reg. at 79,194. Uniformity and consistency in legal liability relating to the administration of COVID-19 countermeasures is essential, in the Secretary's view, to the "whole-of-nation response" to the persisting pandemic. *Id.*

The Secretary's desire for uniformity and consistency is well-founded in the statute's text. Congress intended to achieve uniformity in decisionmaking about PREP Act liability by funneling all appeals about immunity to a single *federal* court of appeals. That uniformity would be frustrated if artfully-pleaded state-law claims that should be displaced by the PREP Act's comprehensive remedial scheme were to remain in state court. State court decisions cannot be reviewed by a federal court of appeals, and state appellate courts may reach disparate decisions about immunity on a similar set of facts.

Moreover, the exercise of federal jurisdiction is particularly appropriate where there is a need to "resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005); *e.g.*, *Husmann v. Trans World Airlines, Inc.*, 169 F.3d 1151, 1153 (8th Cir. 1999) (federal jurisdiction by way of complete preemption to advance the goals of "uniformity and certainty in the laws governing international air carrier liability" because "[p]ermitting a state court action would undermine [this] 'uniformity' and 'certainty'"); *see also Treiber & Straub, Inc. v. UPS, Inc.*, 474 F.3d 379, 383-84 (7th Cir. 2007) (federal jurisdiction by way of federal common law where there is "a need for uniformity in interstate shipping and commerce"). Allowing state-law claims implicating covered countermeasures and covered persons to proceed in state court would wreak considerable uncertainty upon health care providers, particularly those who operate in multiple jurisdictions. A provider operating in New York and Connecticut, for example, might find that it is subject to liability for a certain kind of treatment decision in New York but not in Connecticut. *Compare Mills v. Hartford Health Care Corp.*, No. HHDCV206134761S, 2021 WL 4895676, at *4 (Conn. Super. Ct. Sept. 27, 2021) (PREP Act immunity applies to claims based on a health-care provider's decision to withhold medical transfer until after COVID-19 test results were returned), *with Whitehead v. Pine Haven Operating LLC*, 75 Misc. 3d 985, 992 (N.Y. Sup. Ct. 2022)

(opining that PREP Act immunity is "meant to protect pharmaceutical companies who rapidly developed the COVID-19 vaccine, and now cannot be read to afford a free pass to residential nursing homes").

3. The PREP Act's immunity from suit *and* liability clearly reflects Congress's judgment that covered persons should devote their resources to fighting the pandemic, not toward litigation that second-guesses decisions made as part of a whole-of-nation public-health response. Remanding this case (and others like it) to state court would thwart that intent. Failing to honor the uniformity plainly evident in the statutory scheme means that the state courts might choose not to apply the PREP Act's immunity provisions even if the D.C. Circuit has squarely held that immunity from suit should apply under identical circumstances. The provider would then be forced to keep litigating until it can obtain review by the U.S. Supreme Court to vindicate the immunity that should have extinguished the suit at the outset. A covered provider operating in multiple jurisdictions would have to spend considerable resources defending the same policy judgment in different state courts, whereas a single decision from the D.C. Circuit can provide certainty about whether particular conduct is immune. But immunity from suit is pointless if covered persons are required to go to such lengths to enforce a clear statutory protection. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (immunity from suit "is effectively lost if a case is erroneously permitted to go to trial"). Indeed, that is precisely the outcome

that Congress sought to avoid when it routed all appeals regarding "an assertion of the immunity from suit" to the D.C. Circuit, and all original actions concerning willful misconduct to the three-judge panel of the D.C. district court. 42 U.S.C. § 247d-6d(e)(5), (10).

* * * * *

The PREP Act was intended to alleviate covered providers' liability fears when operating under the stresses of a global pandemic. A single federal court would authoritatively interpret the boundaries of the only cause of action available. The District Court's decision incorrectly strips providers of that certainty by forcing adjudication of state-law claims in state court—thereby inviting a patchwork of state-court decisions on the scope of immunity.

CONCLUSION

This Court should reverse the District Court's remand order.

Dated: November 4, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4) and Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that the foregoing Brief of DRI Center for Law & Public Policy as *Amicus Curiae* in Support of Appellants and Reversal complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5). According to the word count feature of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 4,777 words.

I further certify that the foregoing brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: November 4, 2022

/s/ William M. Jay
William M. Jay

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2022, I electronically filed the foregoing document with the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

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/s/ William M. Jay
William M. Jay

CERTIFICATE OF COMPLIANCE WITH 8th Cir. R. 28A(h)(2)

The undersigned, on behalf of the party filing and serving this brief, certifies that the brief has been scanned for viruses and that the brief is virus-free.

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/s/ William M. Jay
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