2024 WL 3627443 (N.C.) (Appellate Brief)
Supreme Court of North Carolina,
Twenty-Fourth District.

Emily HAPPEL, individually, Tanner Smith, a minor, and Emily Happen, on behalf of Tanner Smith, as his mother,

v.

GUILFORD COUNTY BOARD OF EDUCATION, and Old North State Medical Society, Inc.

No. 86PA24.
July 30, 2024.

From N.C. Court of Appeals 23-487 From Guilford 22CVS7024

Brief of Amicus Curiae Children's Health Defense (CHD) in Support of Appellants Emily Happel and Tanner Smith

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*1 *NATURE OF CHD'S INTEREST IN THE CASE* [1]

Children's Health Defense (CHD) is a national non-profit 501(c)(3) organization. CHD's mission is to end the epidemic of children's chronic health conditions by working to eliminate harmful exposures to environmental toxins, obtain justice for those already injured, and promote protective safeguards. CHD is involved in other litigation regarding COVID-19 vaccines, the PREP Act, parental rights, and informed consent. CHD is interested in questions this case raises about federal nullification of state laws protecting informed consent, bodily autonomy, and parental rights.

ISSUES ADDRESSED

Whether the lower court erred in determining that the PREP Act provides immunity against and pre-empts plaintiffs' state law claims.

INTRODUCTION

This case raises the question of whether there are any meaningful limits on the Federal Government's power to nullify state law. Through the Public Readiness and Emergency Preparedness Act of 2005, Pub. L. No. 109-148, 42 U.S.C.§§ 247d-6d, 247d-6e ("PREP"), the Federal Government regulates non-economic *intra*state activities, by using liability shields and express preemption to nullify the effects of the state laws that would otherwise govern those activities. According to the complaint in this case, a worker at a school-based COVID-19 testing and vaccination clinic injected a child with an emergency-use-only product, over the child's express objection and without his parents' consent. The lower courts wrongly interpreted PREP as nullifying the North Carolina common, statutory, and constitutional law that would otherwise ***2** govern those activities and provide a basis for relief to the Plaintiffs, including laws concerning battery, parental rights, bodily autonomy, and informed consent. *See* Order Granting Defendants' Motions to Dismiss, *Happel v. Guilford County Board of Education*, Guilford County Superior Court Division, No. 22-CVS-7024 (Feb. 27, 2023), ¶¶ 23, 24, 33, 34; Opinion of the North Carolina Court of Appeals in *Happel v. Guildford County Board of Education*, No. COA23-487 (March 5, 2024), pp. 4-13.

Contrary to what is suggested by the lower courts' application of PREP, federal law reigns supreme *only* where the Constitution empowers the Federal Government to act, and Congress can permissibly nullify state law *only* through statutes enacted pursuant to an enumerated power. Of relevance to this case, the Commerce Clause, coupled with the Necessary and Proper Clause, *does* empower Congress to regulate intrastate economic activities that have substantial effects on interstate commerce. However, the Commerce Clause does *not* empower Congress to nullify in one fell swoop a host of state laws governing non-economic intrastate activities that have, at most, a highly attenuated effect on interstate commerce.

PREP potentially regulates activities of every conceivable sort, some with no bearing whatsoever on interstate commerce, and thus appears to exceed constitutional limits on the exercise of federal power. By applying PREP to nullify the state laws underlying every one of the plaintiffs' claims, thus depriving the plaintiffs of any remedy for violations of those laws, the lower courts ignored these constitutional limits, and endorsed instead a federal undermining of state sovereignty that threatens the very foundation of liberty. To avoid the Constitutional issues created by the lower courts' application of PREP, we ask this Court to read PREP more narrowly, and reverse.

***3** *ARGUMENT*

I. This Court Should Reverse the Court of Appeals, Because PREP, as Applied to Dismiss Plaintiffs' Claims, Exceeds Congress's Enumerated Powers, Intrudes on State Sovereignty, and Undermines the State-Federal Balance of Power at the Foundation of Liberty

A) PREP Regulates Intrastate Activities by Nullifying the State Laws that Would Otherwise Govern Those Activities

The PREP Act regulates intrastate activities through liability shields and preemption provisions, which - for the duration of a PREP Declaration issued by the Secretary of Health and Human Services - nullify the state laws that would otherwise govern activities involving a "covered countermeasure." *See* 42 U.S.C. § 247d-6d(a) (immunizing "covered persons" from all suits for losses caused by, relating to, arising out of, or resulting from use or administration of a covered countermeasure) and 42 U.S.C. § 247d-6d(b)(8) (preempting any state law that differs from or conflicts with PREP and relates to any one of myriad activities

involving a covered countermeasure). In the absence of a PREP Declaration, these state laws would define standards of conduct for the activities at issue, including sanctions for violations and recourse for those injured by violations.

The scope of PREP's regulatory impact is indeterminate, in part because PREP delegates to the Secretary unreviewable authority to designate and amend, in each PREP Declaration, the core aspects of PREP's coverage for that Declaration, [2] *see* § 247d-6d(b)(7), including which "countermeasures" are covered (§ 247d-6d(b)(1)), for which categories of disease, health condition, or threat, (§ 247d-6d(b)(2)(A)), for what time period (§ 247d-6d(b)(2)(B) and (3)), and in what geographic territory (§ 247d-6d(b)(2)(D)); which persons are immunized from ***4** liability (§ 247d-6d(i)(2) and (i)(8)(B)); and which populations of potential plaintiffs are precluded from suing (§ 247d-6d(a)(1) and § 247d-6d(b)(2)(C)). This much is clear, however: the impacts of PREP's nullification provisions are not confined to a particular type of intrastate activity, and the provisions potentially reach activities of every conceivable sort. Indeed, in this case, the lower courts read PREP to regulate - among other things - battery; informed consent for medical treatment; parental oversight of their children's care; and the assertion of bodily autonomy.

B) The United States Constitution Does Not Empower the Federal Government to Regulate Non-Commercial, Non-Economic Intrastate Activities When Those Activities Have Virtually No Effect on Interstate Commerce.

The United States Constitution creates a system of dual sovereignty, in which "the National Government possesses only limited powers; the States and the people retain the remainder." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533 (2012). Protection of this system is a key goal of the Constitution; indeed, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (cleaned up). The limits of federal power and the state-federal power balance are reinforced by the Ninth and Tenth Amendments. S*ee* U.S. Const. Amends. IX & X; *see also New York v. United States*, 505 U.S. 144, 156, 159 (1992) (discussing Tenth Amendment and limits on Federal power).

Importantly, "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted." *Sebelius*, 567 U.S. at 535; *cf. Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) ("Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the ***5** United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence."). Additionally, even when Congress acts pursuant to an enumerated power, any law it enacts must be both "necessary" *and* "proper" (*see* Art. I, § 8, cl. 18); laws that "undermine the structure of government established by the Constitution" or that "compromise essential attributes" of state sovereignty, "are not *proper* for carrying into execution Congress's enumerated powers. Rather, they are, in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Sebelius*, 567 U.S. at 559 (cleaned up) (emphasis in original).

Among Congress's enumerated powers is the power to regulate interstate commerce, *see* Art. I, § 8, cl. 3. [3] Of significance to this case, the United States Supreme Court reads the Commerce Clause as allowing Congress to regulate wholly *intra*state activities only if, in the aggregate, the activities "substantially affect" interstate commerce. *United States v. Lopez*, 514 U.S. 549, 558 (1995). The Court cautions that the scope of this enumerated power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *United States v. Morrison*, 529 U.S. 598, 608 (2000) (cleaned up). Indeed, "Congress's interstate power must be read carefully to avoid creating a general federal authority akin to the police power." *United States v. Hill*, 927 F.3d 188, 196 (4th Cir. 2019) (cleaned up).

***6** To determine whether a statute that regulates *intra*state activity (such as PREP) is a valid exercise of the Commerce Clause power, the United States Supreme Court considers four factors: "(1) Is the regulated activity inherently economic?; (2) Are there

legislative findings that reveal why something that does not appear to substantially affect interstate commerce actually does so?; (3) Does the statute contain a jurisdictional element that limits the statute's reach to acts that "have an explicit connection with or effect on interstate commerce"?; and (4) Is the link between the regulated activity and interstate commerce attenuated?" *Hill*, 927 F.3d at 211 (Agee, C.J., dissenting) (citing *Lopez*, 514 U.S. at 559-63, and *Morrison*, 529 U.S. at 610-17); *see also United States v. Roof*, 10 F.4th 314, 383 (4th Cir. 2021).

When a regulated intrastate activity is *not* inherently commercial or economic, courts have found that the statute in question exceeds Congress's Commerce Clause power *unless* at least one of two factors is met: either (1) the statute contains a jurisdictional element that limits the statute's reach to instances when the activity *in fact* affects interstate commerce; or (2) legislative findings demonstrate that, despite appearances to the contrary, the regulated activity *in fact* has a substantial effect on interstate commerce. Moreover, if the purported link between the regulated activity and interstate commerce is too attenuated, courts find that the Commerce Clause power has been exceeded. *Cf. Hobby Distillers Association v. Alcohol & Tobacco Tax and Trade Bureau*, 4:23-cv-01221, p. 24, (N.D. Tex. Jul. 10, 2024) (where regulation of purely local activity does not serve broader, overarching statutory scheme, Commerce Clause does not empower Congress to regulate).

For example, in *United States v. Morrison*, holding that Congress lacked authority to enact a statute providing a civil remedy for victims of gender-related violence, the United States Supreme Court noted that gender-motivated crimes of violence are not inherently economic; the ***7** statute contained no jurisdictional element tying it to interstate commerce; and Congress's purported findings that gender-based violence substantially affected interstate commerce were too attenuated. *See* 529 U.S. at 613-16. Similarly, in *United States v. Lopez*, the Court found that a statute prohibiting possession of firearm in a school zone exceeded Congress's Commerce Clause powers, where the prohibited activity was not commercial; the statute lacked a jurisdictional element to ensure the prohibited activity in fact affected interstate commerce; Congress made no findings regarding the prohibited activity's effects on interstate commerce; and the effects on interstate commerce claimed by the Government were too attenuated. 514 U.S. at 551, 561-63.

In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court affirmed Congress's authority to prohibit intrastate manufacture and possession of marijuana for medical purposes, despite a state law allowing such activities. However, the Court noted that the prohibition at issue was part of a larger regulatory scheme set forth in the Controlled Substances Act, which aimed to regulate "quintessentially economic" activities connected with drug trafficking, 545 U.S. at 25, and which included express findings explaining why Congress included local activities in its coverage. *Id.* at 20. Moreover, the Court also noted that production of drugs for home consumption *in fact* has substantial effects on supply and demand in the national market for that drug. *Id.* at 19, 30-32. *Cf.*, *Roof*, 10 F.4th at 383-84 (rejecting challenge to religious-obstruction statute, where although the activities criminalized by the statute were not inherently commercial or economic, statute contains jurisdictional element requiring government to show nexus between alleged crime and interstate commerce, and legislative history explicitly discusses nexus to interstate commerce); *Hill*, 927 F.3d at 204-205, 207 (rejecting challenge to Hate Crimes Act by defendant convicted of assaulting a warehouse worker preparing packages for interstate sale and shipment, where ***8** although hate crimes are not inherently economic, the Act contains express jurisdictional element allowing prosecution only when defendant's conduct interferes with commercial or economic activity engaged in by victim at time of defendant's conduct). The upshot of these cases is crystal clear: the Constitution does not allow the Federal Government to regulate the intrastate activities that underly the claims in this case.

C) PREP Violates the United States Constitution When Applied to Regulate Non-Commercial, Non-Economic Intrastate Activities Having Virtually No Effect on Interstate Commerce

Similar to the statutes in *Morrison* and *Lopez*, PREP can be interpreted to regulate activities that are not inherently commercial or economic. Indeed, PREP's nullification provisions potentially reach non-commercial, non-economic activities of every conceivable sort, including battery, informed consent for medical treatment, childrearing, and the assertion of bodily autonomy.

Also, as in the statutes at issue in *Morrison* and *Lopez*, PREP contains no express jurisdictional limitations that constrain its reach to circumstances where the activities it regulates in *fact* affect interstate commerce. Indeed, PREP seems written to do just the opposite. Its liability shield encompasses "*all* claims" for "*any* type of loss" "*relating* to" administration or use of covered countermeasures by covered persons (*see* 42 U.S.C.S. § 247d-6d(a) (emphasis added)). Its preemption of state law encompasses "*any* provision of law or legal requirement" that varies from PREP and "*relates to*" any one of myriad aspects of, or activities involving, a "covered countermeasure." *See id.* at § 247d-6d(b)(8) (emphasis added).

PREP's reach is limited to situations involving a "covered countermeasure" (which may have traveled in interstate commerce), but this requirement provides no limitation at all, without a genuine link between the regulated activity and interstate commerce. If the Commerce Clause ***9** empowered Congress to regulate a non-economic intrastate activity simply because the activity involves use of a product that travels in interstate commerce, then the Federal Government would possess the general police power the Supreme Court has cautioned against; indeed, to encourage production of any widget under the sun, Congress could nullify and even replace the state laws that would otherwise apply to non-economic, intrastate activities that happen to involve the widget.

PREP lacks any express legislative findings that the non-economic intrastate activities it potentially regulates *in fact* have any effects on interstate commerce, despite all appearances to the contrary. Similarly, PREP's sparse legislative history includes no such findings; rather, it suggests that Congress did not even recognize the breadth of non-economic intrastate activities that PREP could affect. During a brief discussion before PREP was passed as part of the Department of Defense Appropriations Act of 2006,[4] Senator Orrin Hatch noted that PREP was intended to encourage private-sector development and production of vaccines and other "countermeasures." *See* Cong. Record Vol. 151, No. 167 (daily ed. Dec. 22, 2005), *https://www.congress.gov/congressional-record/volume-151/issue-167/senate-section/article/S14233-1*, pp. S14237-38, Remarks of Sen. Hatch. A few members of Congress expressed concerns about the "staggering" breadth of immunity the Act bestowed on manufacturers for an equally broad range of products, and about a lack of an adequate compensation program for injuries caused by those products; concerns were also expressed that PREP violates core constitutional principles, including federalism, the separation of powers, ***10** judicial review, the nondelegation doctrine, the *Erie* doctrine, due process, the right to seek redress for injuries, and the First and Fifth Amendments. *See id.*, pp. S14234-37 (remarks of Sen. Kennedy); *see also* Cong. Record Vol. 151, No. 167 (daily ed., Dec. 21, 2005), *https://www.congress.gov/congressional-record/volume-151/issue-167/senate-section/article/S14241-1*, pp. S14242-43 (remarks of Sens. Biden, Byrd, and Clinton) and S12426-7 (remarks of Sen. Leahy); Conference Report on H.R. 2863, Department of Defense Appropriations Act, 2006 (Extensions of Remarks, Dec. 22, 2005) *https://www.congress.gov/congressional-record/volume-151/issue-168/extensions-of-remarks-section/article/E2649-2*, pp. E2649-50, (remarks of Rep. Conyers). However, there was no consideration of the myriad, non-economic intrastate activities potentially affected by PREP.

On its face, then, PREP arguably exceeds the Commerce Clause power and violates the Ninth and Tenth Amendments. These violations are compounded when PREP is applied to dismiss the complaint in this case. According to the complaint, at a school-based COVID-19 testing and vaccination clinic, a worker injected a child with an emergency-use-only product, over his own objection and without his parents' consent, violating a state law expressly prohibiting such activity, and other state common law and constitutional requirements. Obviously, these activities are not inherently economic; indeed, they are decidedly non-commercial and non-economic. Moreover, the effects of these intrastate activities on interstate commerce are - *in fact* - non-existent, or at most, highly attenuated. If simply due to involvement of "covered countermeasures," PREP is allowed to reach

these activities, then we all will be "hard pressed to posit any activity by an individual that Congress is without power to regulate." *See Lopez*, 514 U.S. at 564. Fortunately, however, the United States Constitution does not allow this result.

*11 D) This Court Should Remand with Instructions to Apply PREP in a Manner that Respects Constitutional Limits on Federal Power and Protects State Sovereignty

The United States Supreme Court noted in *Jones v. United States*, 529 U.S. 848 (2000), that "constitutionally doubtful constructions should be avoided where possible," *id.* at 852, and "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Id.* at 857 (cleaned up). In *Jones*, the Court avoided a Commerce Clause problem by interpreting a federal arson statute as not reaching arson of owner-occupied private residence that was not used for any commercial purpose. *Id.* at 851-52. The Court observed that if it were to adopt the Government's "expansive interpretation" of the arson statute, "hardly a building in the land would fall outside the federal statute's domain," *id.* at 857; according to the Court, the statute would not be "soundly read to make virtually every arson in the country a federal offense." *Id.* at 859.

Here, as in *Jones*, the constitutional problems caused by the lower courts' broad reading of a federal statute can and should be avoided. Rather than accepting the defendant's "expansive interpretation" of PREP, under which "hardly [any activity] in the land would fall outside the federal statute's domain," *see id.* at 857, this Court should instruct the lower courts to adopt a narrower reading of PREP's liability shields and preemption provisions, a reading that enforces constitutional limits on the exercise of federal power.

Importantly for this and future cases involving PREP nullification, "State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Sebelius*, 567 U.S. at 536. Indeed, a "healthy balance of power" between the States and the Federal Government serves to reduce "the risk of tyranny and abuse *12 from either front." *Ashcroft*, 501 U.S. at 458 (cleaned up); *see also Bond v. United States*, 564 U.S. 211, 222 (2011) (federalism denies "any one government complete jurisdiction over all the concerns of public life," and thus "protects the liberty of the individual from arbitrary power"). However, the state and federal governments "will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty." *Ashcroft*, 501 U.S. at 459.

CONCLUSION

For the foregoing reasons, CHD respectfully requests that this Honorable Court reverse the judgment of the Court of Appeals and remand to the trial court for further proceedings consistent with the Court's opinion.

Respectfully Submitted this 30th day of July, 2024, by

<<signature>>

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Footnotes

1 No person or entity other than the named amicus authored in whole or in part or provided any funding for this brief.

2 This broad delegation of authority was one reason for constitutional concerns raised by members of Congress prior to PREP's passage. *See* pages 9-10, below.

3 Coupled with the necessary and proper clause, this is the power on which Congress relied when it enacted PREP.

4 Senator Joseph Biden characterized the questionable procedures surrounding PREP's insertion into the Appropriations Act as follows: “No hearings were held on this language; no Committee vote was taken; no bill passed the House or the Senate. Not even the House and Senate conferees had a chance to give input on this provision. Indeed, I'm told it was inserted in the dead of night, after conferees had already signed the conference report!” *Id.* p. 14242.

2024 WL 3627447 (N.C.) (Appellate Brief)
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Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and, Emily Happel on behalf of Tanner Smith as his mother, Plaintiffs-Appellants,

v.

GUILFORD COUNTY BOARD OF EDUCATION and Old North State Medical Society, Inc., Defendants-Appellees.

No. 86PA24.
July 30, 2024.

From Guilford County No. COA23-487
File No. 22CVS7024

Brief of Amici Curiae Rep. Neal Jackson et al. (Members of the North Carolina General Assembly) in Support of Plaintiffs-Appellants and Reversal

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† No person or entity other than Amici Curiae, their members, or their counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

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***2 TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:**

Amici Curiae, individual members of the North Carolina General Assembly, hereby respectfully submit this brief urging reversal of the decision of the Court of Appeals in this case, filed March 5, 2024: [1]

NATURE OF THE INTEREST OF THE AMICI CURIAE

Amici Curiae are individual members of the North Carolina General Assembly. They have a special interest in protecting the fundamental rights of the parents they represent and for whom the General Assembly enacted legislation in 2021 on the very subject embraced by this appeal. As members of the General Assembly, they have a unique role in ensuring that local governmental bodies, particularly those charged with public education, or who otherwise regularly interact with children, abide by and are governed according to North Carolina state law. In this same vein, they further have a strong interest in ensuring that the enactments of the General Assembly are upheld against erroneous findings of federal preemption. Certain of these *Amici* ***3** also possess experience as elected members of local governmental bodies, prior to serving in the General Assembly.

Amici are specifically the following members of the North Carolina General Assembly:

Name	*Counties*	*Years of Service*
Rep. Neal Jackson	Moore, Randolph	2023-Present
Rep. Brian Biggs	Randolph	2023-Present
Rep. Mark Brody	Anson, Union	2011-Present
Rep. Keith Kidwell	Beaufort, Dare, Hyde, Pamlico	2017-Present
Rep. Donnie Loftis	Gaston	2021-Present
Rep. Joseph Pike	Harnett	2023-Present
Rep. Frank Sossamon	Granville, Vance	2023-Present
Rep. Jeff Zinger	Forsyth	2021-Present

ISSUE TO BE ADDRESSED

Amici Curiae members of the North Carolina General Assembly here address the following issue:

> (1) Whether the trial court and the Court of Appeals erred when they determined that the PREP Act provided immunity to the ***4** defendants for constitutional violations and preempted all state law claims?

Amici respectfully urge this Court to rule that the Court of Appeals and Superior Court both erred when they held that the PREP Act preempted Plaintiffs-Appellants' state law claims.

SUMMARY OF ARGUMENT

In this case, state constitutionally protected parental and individual rights are alleged to have been violated in a most alarming manner. According to the complaint, which must be taken as true for purposes of a Rule 12(b)(6) motion to dismiss, Defendants-Appellees (hereinafter collectively known as "Defendants") worked in conjunction to give a COVID-19 vaccination to a 14-year-old child without any parental consent, written or otherwise. *Happel v. Guilford Cnty. Bd. of Educ.*, No. COA23-487, 899 S.E.2d 387, 2024 WL 925471 (2024). The Plaintiffs here are the minor child and his mother. The minor was only present at the COVID-19 vaccination site (located at Northwest Guilford High School, a public school operated by Defendant Guilford County School Board) because it doubled as a COVID testing location, and the Guilford County Schools had notified the child's parents that he could not ***5** return to participation in school athletics unless he was ***tested*** (not vaccinated) for COVID-19. *Id.* When clinic site workers were unable to reach his mother for consent to administer a vaccine, "one of the [site] workers instructed … [another] worker to 'give it to him anyway.'" *Id.* at 390. Though the child protested that he did not want the vaccination, and he was only expecting a COVID *test* when he came to the site, the worker injected him with a Pfizer COVID-19 vaccine - over his objection and without any parental consent. *Id.* Plaintiffs' complaint describes this vaccination site as being "operated jointly" by the Defendant School Board and Defendant Old North State Medical Society, Inc. ("ONSMS"). (R p 10).

The Court of Appeals affirmed the Superior Court's dismissal, but disposed of the matter by finding that all claims were preempted by the federal PREP Act, 42 U.S.C. § 247d–6d, without addressing other issues presented by the appeal. The Court of Appeals, however, should have addressed these other issues ***prior to*** deciding the federal constitutional issue of PREP Act preemption since these other issues might have supplied narrower grounds on which to decide the present case.

***6** As to the merits of whether the PREP Act preempts Plaintiffs' claims, the Court of Appeals erred in finding preemption because it did not consider the presumption against federal preemption of state law and because state constitutional law claims fall outside of the text of the PREP Act, as confirmed by the law's legislative history. Furthermore, reading the PREP Act to preempt state constitutional law claims results in a commandeering of state entities in violation of the Tenth Amendment. While some other courts may have found PREP Act preemption of state law claims, those cases presented different legal arguments and factual scenarios, making them readily distinguishable from the present case.

Finally, in the event this Court addresses PREP Act preemption, these *Amici* respectfully ask that the Court reaffirm the legal validity of N.C. Gen. Stat. § 90-21.5(a1), which was enacted in August 2021 to ensure parental consent to covered vaccinations.

***7** *ARGUMENT*

I. THE COURT OF APPEALS ERRED BY ADDRESSING THE FEDERAL CONSTITUTIONAL QUESTION OF PREP ACT PREEMPTION WITHOUT FIRST RULING ON OTHER NARROWER, AND POTENTIALLY CASE DISPOSITIVE, ISSUES.

A. Preemption Presents A Federal Constitutional Issue And Should Only Be Addressed By A Court When Necessary To Resolve The Case At Bar.

Because federal preemption is based on the Supremacy Clause of the United States Constitution, whether state law is preempted by a federal statute presents a federal constitutional issue. *See Bell Atl. Md., Inc. v. Prince George's Cnty.*, 212 F.3d 863, 865

(4th Cir. 2000) ("[D]etermining whether a federal statute preempts a state statute is a constitutional question.") (citing *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (citation omitted)); *see also* U.S. Const., art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof … shall be the supreme Law of the Land."); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) ("A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, ***8** by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question[.]") (internal citations omitted). [2]

According to well established precedent, both federal and North Carolina courts are to decline speaking to issues of federal constitutional law when a case may be decided on alternative, non-constitutional grounds. As the Fourth Circuit has explained, "'[C]ourts should avoid deciding constitutional questions ***unless they are essential*** to the disposition of a case.'" *MediaOne Group, Inc. v. Cnty. of Henrico, Va.*, 257 F.3d 356, 361 (4th Cir. 2001) (emphasis added) (quoting *Bell Atl. Md.*, 212 F.3d at 865); *see Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 452 n.1 (1974) (Powell, J., concurring) ("[T]he appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief."). Therefore, "[w]hen a court is faced with a constitutional question of federal preemption and a question of state law, the court should 'decide only' the state law question if it provides an independent 'ground upon ***9** which the case may be disposed of.'" *MediaOne Group*, 257 F.3d at 361 (4th Cir. 2001) (quoting *Bell Atl. Md.*, 212 F.3d 863, 866 (citation omitted)).

The federal courts are not alone in this directive. This Court has similarly said that "the courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds." *Anderson v. Assimos,* 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2022) (citing *State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975), and *Rice v. Rigsby*, 259 N.C. 506, 512, 131 S.E.2d 469, 473 (1963)); *see State v. Lambert*, 146 N.C. App. 360, 368, 553 S.E.2d 71, 77 (2001) ("[W]hen a case can be disposed of on appeal without reaching the constitutional issue, it is to be first disposed of on non-constitutional grounds.") (citing *Burwell v. Griffin*, 67 N.C. App. 198, 209, 312 S.E.2d 917, 924 (1984)).

B. The Court Of Appeals Improperly Addressed Preemption Prior To Deciding Other Appellate Issues.

The Court of Appeals here, however, decided this case based ***solely*** on the federal constitutional question of whether the federal PREP Act, 42 U.S.C. § 247d–6d, preempts all of Plaintiffs' claims, including their claims under the North Carolina constitution. ***10** *Happel*, 899 S.E.2d at 390-94. Proceeding directly to this significant federal constitutional question was improper. Though presented in five causes of action, Plaintiffs' complaint alleged only three theories for their claims against Defendants: (1) common law battery; (2) violation of Emily Happel's and her son's state constitutional rights; and (3) violation of Emily Happel's and her son's federal constitutional rights. (R pp 12-16). Plaintiffs abandoned their federal constitutional claims on appeal, leaving just two state law theories of recovery, and the Superior Court's Order dismissing these state law claims relied on other bases in addition to PREP Act preemption for its decision. (R pp 51-59).

Unlike the Superior Court, the Court of Appeals pretermitted analysis of the non-constitutional issues that could have been case dispositive. This was error. Regarding Plaintiffs' common law battery claim, the Superior Court held that the complaint failed to adequately allege sufficient facts to hold the Defendant School Board liable as a principal for the alleged intentional torts of the "workers" who administered the vaccination to the minor child. (R pp 54-55). While the Superior Court's Order did not make the same ruling as to ONSMS specifically, the logic of the ruling for the School Board applies equally to ***11** ONSMS, and ONSMS adopted the Board's defenses both in its answer and motion to dismiss filed in Superior Court and in its brief filed in the Court of Appeals (*see* R p 48; ONSMS Appellee's Resp. Br. at pp 19-20).

The Superior Court also held that the complaint failed to allege sufficient facts to indicate that ONSMS was a state actor. (R p 57-58). This is a critical issue that required resolution before reaching the far weightier federal constitutional question of

preemption since ONSMS could not be liable under the state constitution, absent a finding that the complaint contained adequate allegations that it was a state actor. For its part, the School Board argued, and the Superior Court agreed, that Plaintiffs' state law battery claim and the Board's waiver of sovereign immunity rendered unavailable a claim under *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992).[3] In addition to ***12** addressing this threshold question, the Court of Appeals did not decide, but should have, whether Plaintiffs' complaint alleged sufficient facts for the Board - as well as ONSMS, if it were found to be a state actor - to be held liable under the state constitution for the onetime actions of two unidentified "workers" in the absence of a formal policy or custom of the Board or ONSMS.[4] *Cf. Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.") (concerning liability for a municipal defendant under 42 U.S.C. § 1983). Indeed, according to Plaintiffs' complaint, the actions of two individuals (identified only as "workers" in the pleadings) were ***contrary to*** the ***13** stated policy of the School Board, which was to secure parental consent prior to administration of a vaccination. (R pp 11, 19).

Thus, before the federal constitutional question of preemption under the PREP Act could be considered, the Court of Appeals needed to decide whether Plaintiffs had alleged sufficient facts for liability of a principal on a claim of battery by its agent. Similarly, the Court of Appeals should have considered whether the complaint alleged sufficient predicate facts for a *Corum* claim - specifically, (1) whether "'established claims or remedies' [were] inadequate," *see Askew v. City of Kinston*, No. 55A23, 902 S.E.2d 722, 735 (2024); *e.g., Olvera v. Edmundson*, 151 F. Supp. 2d 700, 705 (W.D.N.C. 2001) (dismissing *Corum* claim because wrongful death action would compensate plaintiff); and (2) whether either Defendant could be held constitutionally liable for the actions of the site workers, who acted in contravention of the Defendant Board's alleged policies.

Though these questions themselves may be said to relate to state constitutional issues, they are nevertheless narrower and more fact ***14** bound.[5] The Court of Appeals might then have never needed to issue a decision as to PREP Act preemption, and in so doing open the door to sweeping precedential consequences far beyond the case *sub judice* by holding state law to be in conflict with, and therefore preempted by, federal law. Potentially avoiding this collision between a federal statute and North Carolina common and constitutional law is the approach dictated by this Court's and federal jurisprudence. Accordingly, the Court of Appeals erred when it relied on PREP Act preemption to the exclusion of the narrower, and possibly case dispositive, issues before it.

II. THE LOWER COURTS FAILED TO CORRECTLY ANALYZE THE QUESTION OF FEDERAL PREEMPTION.

Assuming this Court reaches the issue of PREP Act preemption, it should reverse the lower courts' erroneously overbroad reading as to the scope of preemption required by that Act. In light of the text and legislative history of the PREP Act, Plaintiffs' state constitutional law claims fall outside of its preemptive limits, especially given the ***15** presumption against preemption of state law and the commandeering of state agents that would result, in violation of the Tenth Amendment.

A. Plaintiffs' Claims Fall Outside The Ambit Of PREP Act Preemption.

1. The Presumption Against Federal Preemption Of State Law Precludes Finding That Plaintiffs' Claims Are Preempted.

The North Carolina Constitution provides a private right of action for citizens whose state constitutional rights are violated. "[W]hen [a] plaintiff has a cognizable state constitutional claim and cannot access the courts to obtain any form of relief," then she may bring an action under the state constitution. *Washington v. Cline*, 385 N.C. 824, 830, 898 S.E.2d 667, 671 (2024)

(citations omitted). Nevertheless, by finding federal preemption under the PREP Act, the decision of the Court of Appeals precludes *any* suit under the state constitution for redress of the constitutional rights alleged to have been violated by these Defendants.

Like the United States Constitution, the North Carolina Constitution vigorously protects the fundamental rights of parents to direct the care, custody, control, and nurture of their children. Basing its reasoning on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the Ninth Amendment, the U.S. ***16** Supreme Court held decades ago in *Stanley v. Illinois* that "the right to raise one's children is … '***essential***,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and ***one of the 'basic civil rights of man,'*** *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) [.]" 405 U.S. 645, 651 (1972) (internal citations cleaned up and emphasis added). Thus, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (italics in original removed). As these are "[r]ights far more precious … than property rights," they *exceed* a person's right to property in legal esteem and constitutional protection. *Id.* (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)).

While acknowledging the importance of these federal principles, this Court has explained that "North Carolina's recognition of the paramount right of parents to [the] custody, care, and nurture of their children ***antedates*** the [U.S.] constitutional protections set forth in *Stanley*." *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994) (emphasis added); *see Price v. Howard*, 346 N.C. 68, 75, 484 S.E.2d 528 (1997) ("North Carolina law traditionally has protected the interests ***17** of natural parents in the companionship, custody, care, and control of their children[.]"); *see also* N.C. Const., art. I, §§ 1, 13 & 19. Indisputably then, under both federal and state constitutional law, parental rights are "a '***fundamental liberty interest which warrants due process protection***.'" *In re E.B.*, 375 N.C. 310, 316, 847 S.E.2d 666, 671 (2020) (quoting *In re Montgomery*, 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984)) (internal quotations and citations omitted) (emphasis added); *see also In re Murphy*, 105 N.C. App. 651, 657, 414 S.E.2d 396, 400 (1992) (observing that the North Carolina constitution provides procedural due process protections to parents). "This parental liberty interest 'is perhaps the ***oldest of the fundamental liberty interests*** [.]'" *Owenby v. Young*, 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)) (emphasis added).

Besides involving the parental interest in the custody, care, control, and nurture of their children, the allegations in this case also implicate an individual's right to be free of unwanted medical interventions. *See, e.g., Schmerber v. Calif.*, 384 U.S. 757, 772, (1966) ("The integrity of an individual's person is a cherished value of our society."); *United States v. Charters*, 829 F.2d 479 (4th Cir. 1987) ("The right to refuse medical ***18** treatment has been specifically recognized as a subject of constitutional protection.") (citations omitted); *In the Matter of Sophia Renee Truesdell*, 63 N.C. App. 258, 268, 304 S.E.2d 793, 800 (1983) (concerning involuntary sterilization by government), *modified and affirmed by*, 313 N.C. 421, 329 S.E.2d 630 (1985).

But nothing in the text of the PREP Act ***specifically and expressly*** speaks to a violation of a state's constitution, especially the deprivation of a parent's right to determine the care, custody, control, and nurture of her minor child or, for that matter, an individual's right to be free of unwanted medical treatment. So, Defendants-Appellees rest on the notion that PREP Act immunity flows from the language stating that a covered entity is immune from "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 vaccine. 42 U.S.C. § 247d-6d(a)(1) (emphasis added). If allowed to stand, however, the decision of the Court of Appeals would permit *any* constitutional violation and immunize all manner of "egregious" conduct so long as it is done in connection with the provision of a COVID-19 vaccine. Such a breathtakingly broad immunity ***19** is inconsistent with U.S. Supreme Court jurisprudence and should not be allowed to stand, especially if the issue need not have been reached at all.

This kind of broad federal preemption of state law is highly disfavored. [6] As the U.S. Supreme Court has emphasized, "[W]e have ***never assumed lightly*** that Congress has derogated state regulation, but instead have addressed claims of pre-emption

with the **starting presumption *that Congress does* not *intend to supplant state law***." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers, Ins.*, 514 U.S. 645, 654 (1995) (citations omitted) (emphasis added). Thus, "[i]f a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). In determining whether a state law is preempted, courts "wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Calif. Div. of Labor Stnds. Enforce. v.* ***20** *Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 325, (1997) (internal quotation marks and citation omitted); *see Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (cleaned up and citations omitted).

The Court of Appeals, though, did not begin with (or even reference) this presumption against federal preemption in areas of traditional state concern. Protections of the familial relationship and parental rights could hardly be more historically and traditionally within the realm of state law. *Cf., e.g., Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (explaining that "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States"). Unsurprisingly then, the U.S. Supreme Court has "consistently recognized that ***the whole subject*** of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Rose v. Rose*, 481 U.S. 619, 625 (1987) (cleaned up, citations omitted, and emphasis added). Therefore, "[b]efore a state law governing domestic ***21** relations will be overridden, it must do ***major damage*** to clear and substantial federal interests." *Id.* (cleaned up, citations omitted, and emphasis added); *see Row v. Row*, 185 N.C. App. 450, 456, 650 S.E.2d 1, 4 (2007) (quoting *Rose v. Rose*).

Rather than read the PREP Act to avoid friction between this federal statute and the longstanding protection of fundamental liberties by a state - as the U.S. Supreme Court has ***repeatedly*** instructed - the Court of Appeals here brought state and federal law into direct conflict and resolved that dispute against the most important of constitutionally protected liberty interests. This error should be corrected by reversing the decisions of the lower courts.

2. Textually, the PREP Act Does Not Cover State Constitutional Law Claims.

The text of the PREP Act itself reveals no apparent intent to reach constitutional liberty interests. To the contrary, it grants immunity against "all claims for loss," and "loss" is - as shown by the plain language of the statutory text - contemplated by Congress to mean the traditional tort claims that might arise from a dangerous or defective product or medical malpractice. 42 U.S.C. § 247d-6d(a)(2)(A). As such, it defines "loss" inclusively as "(i) ***death***; (ii) physical, mental, or emotional ***injury***, ***22** ***illness***, ***disability, or condition***; (iii) ***fear*** of physical, mental, or emotional injury, illness, disability, or condition, including any need for ***medical monitoring***; and (iv) loss of or ***damage to property***, including business interruption loss." *Id.* (emphasis added); *see* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS195 (2012) ("When … any words … are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar … [A] listing is not prerequisite. An 'association' is all that is required."). [7] Particularly given the presumption against finding preemption of historic state powers, it is more than a reach to say these clearly defined categories of "loss" also include the violation of fundamental constitutionally protected rights, rather than the general tort losses associated with a medical negligence or product liability claim.

This reading accords with the stated intent of the PREP Act's sponsors at the time of its enactment. When Congress passed the PREP ***23** Act, then-Representative Nathan Deal of Georgia, a chief proponent of the bill, explained that the point of the legislation was to incentivize pharmaceutical companies and doctors to take on the added risk of tort liability inherent in producing and administering an experimental vaccine. 151 CONG. REC. 164, H12264 (Dec. 18, 2005) (statement of Rep. Deal of Georgia) (discussing H.R.2863: Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes

in the Gulf of Mexico, and Pandemic Influenza Act of 2006 (enacted December 30, 2005)). He stated on the floor of the U.S. House that "there is no ***business model*** that would have vaccine ***manufacturers*** take on the tremendous liability risks to produce such a[n experimental] vaccine … [and the Act would insure] the vaccine gets developed and … make sure ***doctors*** are willing to give it when the time comes." *Id.* (emphasis added). While a government actor *might* (depending on state law) take on a risk of tort liability in deciding to administer an experimental vaccine, the government's duty to respect citizens' fundamental constitutional rights is not a liability risk that is increased or otherwise affected by the experimental status of any vaccine the government might administer. *See Corum*, 330 N.C. at 783 413 S.E.2d at 290 ("The very purpose of the ***24** Declaration of Rights is to ensure that the violation of these rights is ***never permitted*** by anyone who might be invested under the Constitution with the powers of the State.") (citing *State v. Manuel*, 20 N.C. 144 (1838)) (emphasis added). The government's duty to, for example, respect parental rights regarding their children's care, is the same regardless of the status of a vaccine a government helps make available and regardless of the existence of the PREP Act. State governmental entities have duties that are dictated by their individual constitutions and laws, not the "business models" of vaccine manufacturers. And, if a state wishes to shield itself or others from liability under its own laws and constitution, the people and the legislatures of the individual states may do so using their reserved powers without any help from Congress. *Cf., e.g., Rural Empowerment Ass'n for Cmty. Help v. State*, 281 N.C. App. 52, 62, 2021-NCCOA-693, ¶¶ 19-22, 868 S.E.2d 645, 653 (2021), *appeal dismissed and disc. rev. denied*, 880 S.E.2d 678 (Mem.) (2022).

Limiting the PREP Act's language to exclude preemption of constitutional liberty interests accords with the instructions of the U.S. Supreme Court, which has directed against reading an express ***25** preemption provision "to the furthest stretch of its indeterminacy," since such an expansive approach "would be to read Congress's words of limitation as [a] mere sham [] and to read the presumption against preemption out of the law whenever Congress speaks to the matter with generality." *Travelers, Inc.*, 514 U.S. at 655; *see Dillingham Constr.*, 519 U.S. at 335 ("[A]s many a curbstone philosopher has observed, everything is related to everything else.") (Scalia, J., concurring). Unfortunately, the trial court and Court of Appeals both engaged in just such a "stretch to indeterminacy." To reach the correct result here, as the U.S. Supreme Court has stated, requires a different approach: "[G]o beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to ***the objectives*** of the [] statute as a guide to the scope of the state law that Congress understood would survive." *Travelers, Ins.*, 514 U.S. at 656. Understood in this way, the PREP Act's grant of immunity from state medical malpractice and product liability law claims in no way compels immunity from liability that would arise when ***a State's own public school system (and its agents)*** disregard the ***separate and distinct*** state constitutional restrictions long placed on a public school to honor parents' fundamental liberties regarding the ***26** rearing of their children or even to respect an individual's own medical decisions.

B. Reading The PREP Act To Preclude Plaintiffs' Claims Results In An Unconstitutional Commandeering Of State Agents In Violation Of The Tenth Amendment.

In our federal system, the United States and the State of North Carolina are dual sovereigns. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (describing "dual sovereignty"). While the federal government possesses *only* those powers expressly enumerated in the Constitution, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X. "As James Madison wrote, 'the powers delegated by the … Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist No.* 45, pp. 292-293 (C. Rossiter ed. 1961)). This division between the powers of the federal and State governments is not a trifling technicality, but rather "was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State* ***27** *Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

Because "the Framers rejected the concept of a central government that would act upon and through the States," *Printz v. United States*, 521 U.S. 898, 920 (1997), the Constitution prohibits using the states as mere instrumentalities of the federal government. *See New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."); *cf. Medellín v. Texas*, 552 U.S. 491, 532 (2008) (the President's foreign affairs powers could not support "a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws"). More specifically, this means that the federal government may not give a "command to the States to promulgate and enforce laws and regulations," *FERC v. Mississippi*, 456 U.S. 742, 761-62 (1982), nor may it "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory ***28** program," *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981).

The U.S. Supreme Court has invalidated laws that had the effect of commandeering the states to do the work of the federal government. For example, in *New York v. United States*, the Supreme Court held that Congress could not compel states to make "a 'choice' of either accepting ownership of [radioactive] waste [sites] or regulating [them] according to the instructions of Congress." 505 U.S. at 175. Neither option was something Congress could compel a state to accept, and thus forcing a state to "choose" between them amounted to an unconstitutional "'commandeer[ing]' of state governments into the service of federal regulatory purposes[.]" *Id.* The program failed constitutional scrutiny because "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; ***it may not conscript state governments as its agents***." *Id.* at 178 (emphasis added).

Several years later, in *Printz v. United States*, the U.S. Supreme Court again struck down a law for commandeering the states into federal service. In that case, the Court invalidated a provision of federal law that required state law enforcement officers to conduct firearms background ***29** checks for gun purchases. 521 U.S. at 922-25. Writing for the majority, Justice Scalia reaffirmed that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs," *id.* at 925, because "it is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority," *id.* at 928 (citation omitted).

Yet, contrary to the teachings of *Printz*, the interpretation given to the PREP Act's preemption by the Court of Appeals rends the connection between a state government and its local governmental entities by limiting the state in the ways it may regulate localities' conduct. Federalism dictates that, if a state so desires, it can make a local government amenable to civil suit when it violates *state* constitutional rights. The PREP Act, however, has here been read such that the State of North Carolina cannot "remain independent and autonomous within [its] proper sphere of authority" over local governments, including its schools, *see Printz*, 521 U.S. at 928.

The North Carolina General Assembly has unmistakably and unambiguously addressed the issue of consent for minors to receive a ***30** COVID-19 vaccine that is granted emergency use authorization but not yet fully approved by the United States Food and Drug Administration by prohibiting COVID-19 vaccinations of minors without written parental consent. Section 90-21.5(a1), enacted in 2021, affirms the fundamental right of parents to determine the care, custody, control, and nurture of their minor children, and the exercise thereof with regard to each parent's decision about the COVID-19 vaccine while under emergency use authorization. The Court of Appeals therefore erred in its limited focus on the "administration" of the COVID-19 vaccine. Instead, it should have centered its analysis on the parent who was deprived of her fundamental right to make decisions for her minor child about the COVID-19 vaccine, as that is the relevant right abridged by the alleged conduct of Defendants-Appellants.

The Court of Appeals itself correctly acknowledged that the General Assembly legislated with the purpose of avoiding just what transpired in this case: "[The] intent [of newly added subsection (a1)] is to prevent the egregious conduct alleged in the case before us, and to safeguard the constitutional rights at issue - [the parent's] parental right to the care and control of her child, and [the minor's] right to individual liberty." ***31** *Happel*, 899 S.E.2d at 393. Nevertheless, the force of this provision is now

suspect since the lower courts held that a state lacks the power to entertain a cause of action for the unconsented to vaccination of a minor if the vaccine is covered by the PREP Act. Why? Because (per the lower courts here) the *federal* government, under the auspices of the PREP Act, has seized from the states even their public school boards so as to achieve *federal* policy objectives and has by *federal* statute freed those school boards from the consequences of failing to abide by the constitutional safeguards established by the very states that created those public schools. This is a form of federal commandeering far more invasive than requiring local law enforcement to conduct background checks for firearms purchases. *Cf. Printz*, 521 U.S. at 931-32.

Precedent firmly admonishes courts against liberally embracing the idea that broadly written federal statutes earnestly capture within their reach the vital organs by which a state sovereign discharges its *own* constitutional powers and prerogatives. When a reading of federal powers "would result in a significant impingement of the States' traditional and primary power[s]," courts must "read the statute as written to avoid the significant constitutional and federalism questions ***32** raised[.]" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173-74 (2001) (holding that, under the Commerce Clause, permitting the federal government to apply the Clean Water Act to a "municipal landfill" would raise federalism concerns); *see Bond v. United States*, 572 U.S. 844, 859-60 (2014) (when confronted with "an improbably broad reach" of a federal statute, it is appropriate to seek recourse to principles of federalism, including a presumption against "interpreting the statute's expansive language in a way that intrudes on the police power of the States" to reach purely local matters) (internal citations omitted).

Regrettably, the lower courts in this case took a far different course. They vitiated our constitutional protections for fundamental rights *and* gave judicial imprimatur to federal commandeering of local school boards to engage in conduct expressly prohibited by state law. The Court of Appeals should have read the PREP Act to avoid preempting state constitutional law claims and thereby avoided the conflict between the PREP Act and the protections afforded to the State by the Tenth Amendment to govern its own state entities according to its own state constitution. *See, e.g., In re* ***33** *Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977) ("Where one of two reasonable constructions will raise a serious constitutional question, the construction which avoids this question should be adopted.").

C. Other Courts Have Failed To Properly Analyze The PREP Act.

The Court of Appeals was clear that there was no governing law from North Carolina courts, the Fourth Circuit, or North Carolina's federal district courts squarely addressing the PREP Act preemption issue it confronted. *See Happel*, 899 S.E.2d at 392-93. It therefore looked for guidance from other courts, and though there was some, the utility of the cases it examined is limited due to those decisions being from jurisdictions outside of North Carolina and the Fourth Circuit; one case, from New York, even pre-dated COVID. *Id.*

The cases cited in the *Happel* opinion are readily distinguishable. The pre-COVID case discussed by the Court of Appeals, *Parker v. St. Lawrence County Public Health Department*, involved only common law claims for negligence and battery, not state constitutional law claims. 102 A.D.3d 140, 142, 954 N.Y.S.2d 259, 261 (2012). The two other cases discussed by the Court below, *Cowen v. Walgreen Co.*, No. 22-CV-157-TCK-JFJ, 2022 WL 17640208, at *2 (N.D. Okla. Dec. 13, 2022), an ***34** unpublished federal district court opinion, and *M.T. v. Walmart Stores, Inc.*, 63 Kan. App. 2d 401, 402, 528 P.3d 1067, 1070 (2023), a decision of Kansas' intermediate appellate court, likewise involved no state constitutional law claims against the defendants.

A Vermont trial court relied on PREP Act immunity to preclude liability for a local school district that inadvertently vaccinated a student without parental consent, but in that case, too, the plaintiffs first asserted only tort claims and later attempted to add claims under the Vermont Constitution; the trial court dismissed all claims. *Politella v. Windham S.E. Sch. Dist.*, Case No. 22-CV-01707, 2022 WL 18143866 (Vt. Super. Dec. 28, 2022). The Vermont Supreme Court recently affirmed this dismissal, relying in part on the Court of Appeals opinion in *Happel*. _____ A.3d _____, 2024 WL 3545717 (Vt. July 26, 2024). The

Vermont Supreme Court's relatively brief opinion, like the *Happel* opinion, fails to disclose any consideration by that court of the presumption against finding federal preemption of state law, the textual distinction to be drawn between a general "loss" (which is likely covered by the PREP Act) and the violation of a constitutional right, the uniqueness of bringing state constitutional law claims against a state actor, and the Tenth ***35** Amendment concerns of federal law being employed to prevent the bringing of a cause of action under state law against a state-created entity, like a school board. In other words, it overlooks all of the issues this brief identifies as significant concerns in the present case.

Finally, *Bird v. State of Wyoming*, 537 P.3d 332 (Wyo. 2023), "involve[d] a contract health care provider negligently injecting [plaintiff prison inmates] with an emergency use authorized COVID-19 vaccine not expressly mentioned on their consent form[s]." *Id.* at 336. That court did not discuss claims under the Wyoming constitution, nor did it address the issues raised by this appeal regarding the presumption against preemption and the impropriety of commandeering state entities for federal purposes.

In short, the present case presents a unique set of facts and involves the assertion of claims under a state constitution, both which distinguish it from the overwhelming number of other cases decided involving the PREP Act.

***36 III. IF THIS COURT TAKES UP THE ISSUE OF PREP ACT PREEMPTION INSTEAD OF DECIDING THE CASE ON OTHER GROUNDS, IT SHOULD REMOVE ANY DOUBT ABOUT THE LEGAL FORCE OF N.C. GEN. STAT. § 90-21.5(A1).**

As Justice Gorsuch wrote last summer about our nationwide experience with COVID-19, "Since March 2020, we may have experienced ***the greatest intrusions on civil liberties in the peacetime history of this country***." *Ariz. v. Mayorkas*, 143 S. Ct. 1312, 1314 (2023) (Gorsuch, J., dissenting) (emphasis added). Lest this statement seem hyperbolic, he reminded us of what governments did in the name of "public health:"

> Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their ***37** color-coded schemes when defeat in court seemed imminent.

Id. at 1314-15 (citations omitted).

Attuned to these threats to individual liberties, including the threat of vaccination of a minor without parental consent, the North Carolina General Assembly acted. In 2021, amid the COVID-19 pandemic, the General Assembly made legal provision for the alleged facts of the present case and enshrined into law statutory protections for longstanding parental rights:

> Notwithstanding any other provision of law to the contrary, a health care provider ***shall obtain written consent from a parent or legal guardian*** prior to administering any vaccine that has been granted

> emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age.

N.C. Gen. Stat. § 90-21.5(a1) (emphasis added). What happened in this case shows the Legislature's fears were well-founded.

But, ***if*** this Court rules the PREP Act can be legitimately interpreted to prevent *a state* from using its own *state laws* that allow suits that would hold accountable the local boards of educations it has ***38** created[8] by *state law* for violations of the *state constitution*, then the logical foundations of N.C. Gen. Stat. § 90-21.5(a1) are undermined. This is because the preemption section of the PREP Act, subsection (b)(8), prevents a state from enforcing "any provision of law or legal requirement that … (A) is different from, or is in conflict with, any requirement applicable under this section; and (B) relates to the … the prescribing, dispensing, or administration" of a vaccine covered by the PREP Act." 42 U.S.C. 247d-6d(b)(8)(A) & (B). This language, if given the breadth seemingly urged by Defendants, would appear to prevent state regulation of healthcare providers and others, including schools, even in ia context (like this one) where a local school acts as a healthcare provider in administering a vaccine.

***39** Such a curtailment of state powers would represent a massive assault on state autonomy and principles of federalism. *See, e.g., Printz*, 521 U.S. at 925 ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."). States must remain free to protect minors by regulating the local municipal entities that they create according to state law unburdened by federal interference, and such means of regulation should include both the right of an aggrieved person to bring a civil suit and a state statutory directive to those entities and healthcare providers.

Therefore, if the Court does not dispose of this case on alternative bases, *see* Section I *supra*, and instead proceeds to consider the effect of the PREP Act on Plaintiffs' claims, these *Amici* respectfully ask that this Court reaffirm (and remove any doubt concerning) the continued legal enforceability of N.C. Gen. Stat. § 90-21.5(a1).

CONCLUSION

For the foregoing reasons, these *Amici* respectfully pray that this Court hold that the Court of Appeals erred when it ruled that Plaintiffs-Appellants' state law claims were preempted by the PREP Act.

***40** Respectfully submitted, this the *30th* day of July, 2024.

Electronically submitted

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Appendix not available.

Footnotes

1 No person or entity other than *Amici Curiae*, their members, or their counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

2 Most courts, however, have not found that the PREP Act provides for "complete preemption" warranting removal to federal court. *See, e.g., Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 857-58 (6th Cir. 2023).

3 Defendants' argument that Plaintiffs' assertion of a common law battery claim precludes a *Corum* claim, though, impermissibly attempts to have Plaintiffs both coming and going since Defendants argue that the battery claim, too, fundamentally fails. If there is no battery claim available, whether due to PREP Act preemption or immunity, then Plaintiffs may pursue a *Corum* claim. *See, e.g., Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 340-41, 678 S.E.2d 351, 356 (2009) (holding that, if an alternative remedy is precluded by immunity, then a *Corum* claim may lie since there is no adequate alternative remedy); *cf.* N.C. Gen. Stat. § 1A-1, Rule 8(e)(2) ("A party may also state as many separate claims or defenses as he has regardless of consistency[.]").

4 Though this court has not expressly endorsed the federal framework of *Monell*, it has also not held a governmental entity strictly liable under *Corum* for the intentional torts of its employees or agents. *See, e.g., Deminski on behalf of C.E.D. v. State Bd. of Ed.*, 377 N.C. 406, 414, 2021-NCSC-58, ¶ 20, 858 S.E.2d 788, 784 (2021) (allowing *Corum* claim based on deliberate indifference because "[d]eliberate indifference indicates that the government entity knew about the circumstances infringing plaintiff-students' constitutional right and failed to take adequate action to address those circumstances"); *see generally* Justice Trey Allen, LOCAL GOVERNMENT IMMUNITY TO LAWSUITS IN NORTH CAROLINA119-22 (2018).

5 This Court's Order of 23 May 2024 granting discretionary review, of course, accepted this case for one discrete question and declined Plaintiffs' petition for review of these other issues; as such, they are not currently before the Court.

6 The preemption decision at issue in this case is premised on a theory of express preemption. Therefore, this brief does not address other theories of preemption, including implied preemption.

7 The Court of Appeals similarly divorced the word "administration" from its context. *See Happel*, 899 S.E.2d at 391; *see also* 42 U.S.C. § 247d-6d(a)(2)(B).

8 "[T]he General Assembly has long enjoyed plenary power to create political subdivisions of local government, establish their jurisdictional boundaries, and invest them with certain powers, which 'may be enlarged, abridged or modified at the will of the legislature[.]'" *Town of Boone v. State*, 369 N.C. 126, 131, 794 S.E.2d 710, 714 (2016) (quoting *Quality Built Homes Inc. v. Town of Carthage*, 369 N.C. 15, 18, 789 S.E.2d 454, 457 (2016) (quoting *White v. Comm'rs of Chowan Cnty.*, 90 N.C. 437, 438 (1884)); *see* N.C. Const., art. VII, § 1 (Legislature's power to create units of local government); *id.*, art. IX, §§ 2 & 3 (Legislature's power to create system of public schools).

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2024 WL 3595432 (N.C.) (Appellate Brief)
Supreme Court of North Carolina,
Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and Emily Happel on behalf of Tanner Smith as his mother, Plaintiffs.,

v.

GUILFORD COUNTY BOARD OF EDUCATION and Old North State Medical Society, Inc., Defendants.

No. 86PA24.
July 25, 2024.

From Guilford County No. 22CVS7024 No. COA23-487

Amicus Curiae Brief in Support of Petitioners-Appellants Under N.C. R. App. P. 28(i)

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*2 BRIEF OF *AMICUS CURIAE* [1]

NC Values Institute, as *amicus curiae*, respectfully submits that the decision of the North Carolina Court of Appeals should be reversed.

INTEREST OF *AMICUS CURIAE*

NC Values Institute ("NCVI"), formerly known as The Institute for Faith and Family, is a North Carolina nonprofit organization that exists to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith, and the fundamental right of parents to control the education and upbringing of their children. See https://ncvi.org. NCVI has submitted many amicus briefs to the U.S. Supreme

Court and other appellate courts around the country. As *amicus curiae* in this case, NCVI writes to emphasize the paramount importance of the parental rights at stake.

ISSUE ADDRESSED IN THE BRIEF

Amicus curiae seeks to address the issue of the fundamental right of parents to direct the care, custody, and control of their children, based ***3** on provisions in both the North Carolina and United States Constitutions and long recognized by federal and state courts as natural, inalienable human rights that may not be infringed.

INTRODUCTION AND SUMMARY

Parental rights to the care, custody, and control of their children are not created by statute or by any federal or state constitution but are natural, inalienable rights uniformly recognized by federal and state courts throughout American history. This case is not about the state's right to mandate vaccines or the personal right to refuse vaccination. Nor is it primarily about federal preemption of state law. Instead, it concerns the time-honored fundamental right of parents to make decisions for the welfare of their children, including medical care and treatment. Indeed, the U.S. Supreme Court has characterized parental rights as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Even in dissenting from the analysis of the other justices in *Troxel*, Justice Scalia vigorously affirmed that the "right of parents to direct the upbringing of their children is among the unalienable Rights' with which the Declaration of Independence proclaims all Men … are endowed by their Creator." ***4** *Id.*, at 91 (Scalia, J., dissenting) (internal quotation marks omitted). Decisions of the North Carolina Supreme Court are consistent in upholding these fundamental parental rights, and the language of N.C. Const. art. I, § 1 ("endowed by their Creator with certain inalienable rights") echoes the words of the Declaration of Independence cited by Justice Scalia.

The statute at the center of this case, N.C. Gen. Stat. § 90-21.5, requiring parental consent for vaccines, is one that should be used to safeguard the fundamental rights of parents to make medical decisions for their children. These critical rights impact the health, safety, and life of children in the State of North Carolina. In addition to the statute, parental rights are rooted in both state and federal constitutional law. But in *Happel v. Guilford Cnty. Bd. of Educ.*, 899 S.E.2d 387 (N.C. App. 2024), the North Carolina Court of Appeals failed to consider the constitutional violations and ruled against a family whose rights were infringed by the coerced vaccination of a minor in violation of N.C. Gen. Stat. § 90-21.5, based solely on a federal statute that allegedly preempts the state law. Public Readiness and Emergency Preparedness Act (PREP Act), 42 U.S.C.S. § 247d-6d. The Court of Appeals should have considered ***5** the fundamental nature of the parental rights at stake and subjected these important claims to strict scrutiny.

ARGUMENT

I. PARENTAL RIGHTS ARE INALIENABLE AND FUNDAMENTAL, AS CONSISTENTLY AFFIRMED BY DECADES OF UNITED STATES SUPREME COURT PRECEDENT.

There is such "extensive precedent" on point that it cannot possibly be doubted that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. Due process rights to life, liberty, and property encompass "not merely freedom from bodily restraint but also the right of the individual to … marry, establish a home and bring up children, to worship God...." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These rights to establish a family have been characterized as "essential." *Ibid.*; *see Troxel*, at 65. As noted in the context of a child custody dispute, a parent's "right to the care, custody, management and companionship"

of his or her children is a "right[] more precious … than property rights" - even more important than financial support from a former spouse. *May v. Anderson*, 345 U.S. 528, 533 (1953).

***6** Parental rights fit comfortably within judicial definitions of "fundamental" rights. "Marriage and procreation are fundamental to the *very existence and survival* of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (emphasis added). In *Skinner*, the Court struck down a sterilization requirement, stressing the potentially "far-reaching and devastating effects" of depriving the individual of "a basic liberty." *Ibid.* The often repeated language used to recognize fundamental rights is easily applied to the rights of parents - "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). *See Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1977) (discussing the criteria to recognize fundamental rights beyond those enumerated in the Bill of Rights).

Even in upholding a child labor law, explaining that "the family itself is not beyond regulation in the public interest," the U.S. Supreme Court affirmed the paramount importance of parental rights: "It is ***7** cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

II. PARENTAL RIGHTS TO THE "CARE AND CONTROL" OF THEIR CHILDREN SWEEP BROADLY.

Parental rights extend to a wide spectrum of public and private life - medical care, education, religion, custody, associations. Judicial precedent touches all of these topics.

A. The right to make medical decisions for minor children is one of the most vital rights of parents.

It is difficult to imagine a more critical application of parental rights than basic medical decisions necessary to preserve the life and health of a child. "The law's concept of the family rests on the presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham v. J. R.*, 442 U.S. 584, 602 (1979). Historically, American jurisprudence "reflects Western civilization concepts of the family as a unit with broad parental authority over minor children" and "cases have consistently followed that course." *Ibid.* In *Parham*, the U.S. ***8** Supreme Court upheld Georgia's statutory procedure for parents to voluntarily commit a minor to a hospital for mental health treatment, reversing the state court's conclusion that the law was unconstitutional. A child "lacks the "maturity, experience, and capacity for judgment" required in "making life's difficult decisions" (*ibid.*), including whether to receive a novel vaccine authorized only on an emergency basis. "Since parents have a fundamental right to make medical decisions for their children, parents therefore have a right to decline vaccinations on behalf of their children." Abigail Wenger, *Vaccinations - Informed Consent or Blind Faith? Pennsylvania Requires Statutory Reform on Vaccination Exemptions*, 91 PA Bar Assn. Quarterly 68, 73 (April 2020).

Medical treatment falls well within the rights and duties of a fit parent. Common law has long recognized that "the only party capable of authorizing medical treatment for a minor in normal circumstances is usually his parent or guardian." *Newmark v. Williams*, 588 A.2d 1108, 1115-1116 (Del. 1990) (child's parents declined chemotherapy); *see* W. Posser & W. Keeton, The Law of Torts § 118 at 114-115 (5th ed. 1984). Parental autonomy under these circumstances is not absolute, but "the State has the burden of proving by clear and convincing evidence that ***9** intervening in the parent-child relationship is necessary to ensure the safety or health of the child, or to protect the public at large." *Newmark*, 588 A.2d at 1108. The state may intervene where a child is subject to life threatening conditions. *Id.*, at 1116, citing *In re Application of L. I. Jewish Med. Ctr.*, 147 Misc. 2d 724, 729, 557 N.Y.S.2d 239, 243 (N.Y. Sup. Ct. 1990). [2]

The *Happel* case presents no extraordinary circumstances. There is no medical emergency, life threatening or otherwise. There is no mandatory vaccination policy, either for a fully approved or emergency use vaccine. Indeed, 14-year-old Tanner and his mother, Emily, anticipated only the COVID-19 test required for him to return to football practice - not a coerced vaccination. Tanner and his mother both objected to him taking the vaccine. *Happel*, 899 S.E.2d at 389-390. The ordinary and *fundamental* parental right to make medical decisions is the correct legal standard under these circumstances. Federal statutes may trump *state* law, but they do not trump long recognized fundamental rights that courts have recognized throughout American history.

***10 B. Parental rights to the "care and control" of their children extend broadly to many other areas of life.**

Religion and education are key areas of life within the sphere of parental rights. The "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). Reasoning that a child is "not the mere creature of the state," the U.S. Supreme Court explained that "those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 534-535. Accordingly, *Pierce* upheld the right of parents to place their children in private school rather than "forcing them to accept instruction from public teachers only," a practice designed to "standardize" them. *Id.* at 535.

Parental rights to control the upbringing of their children, including education generally and religious training specifically, were addressed at length in the landmark *Wisconsin v. Yoder* ruling. "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." 406 U.S. 205, 232 (1972). ***11** The government's "interest in universal education," important as it may be, "is not totally free from a balancing process when it impinges on fundamental rights" such as the "traditional interest of parents with respect to the religious upbringing of their children." *Id.* at 214. *Yoder*'s rationale applies here. Here, the government's interest in disease control must similarly be weighed against the paramount interest of parents in making important decisions about their children's medical care. This is *especially* true in the absence of a vaccine mandate and *especially* where the vaccine is approved only for emergency use

Custody and termination of parental rights have been litigated in multiple federal and state courts. Because of the fundamental nature of parental rights, the state must jump a high hurdle to remove a child from the custody of his/her parents or to terminate a parent's rights entirely. Parental rights, like other "liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society … come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., ***12** concurring). The unwed father in *Stanley* was entitled to a fitness hearing before termination of his parental rights, where the child's mother had died.

Even where parents "have not been model parents," or "blood relationships are strained," or custody has been temporarily lost, fundamental parental rights "do not evaporate." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Due process is required and the state must present "clear and convincing evidence" to "completely and irrevocably" terminate a natural parent's rights. *Id.* at 747-748. When the state intervenes "to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-754. Choices about raising children "are among associational rights … sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996). These rights are ranked as "of basic importance in our society." *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971). In *M.L.B. v. S.L.J.*, where the mother lacked funds to pay the costs of the record she needed to appeal a decision terminating her parental rights, the U.S. Supreme Court held that, "just as a State may not block an indigent petty offender's access to ***13** an appeal afforded others, … so Mississippi may not deny M.L.B., because of her poverty, appellate review of the sufficiency of the

evidence on which the trial court found her unfit to remain a parent." *M.L.B. v. S.L.J.*, 519 U.S. at 107. Parental rights were found "sufficiently strong to require the state to pay those costs." *Ibid.*

Troxel, one of the U.S. Supreme Court's major recent decisions about parental rights, upheld the right of fit custodial parents to control their children's associations, even with respect to other close relatives. The Court invalidated a Washington state statute that provided for any person to petition the court for child visitation rights that might serve the child's best interests. In the case examined, paternal grandparents had petitioned for the right to visit the children of their deceased son, who had never married the mother. The mother had married and her husband had adopted the children. Based on the Due Process Clause, U.S. Const. amend. XIV, the Court held that the "breathtakingly broad" nonparental visitation statute infringed the mother's parental right to control her children's associations, even if visiting their grandparents might have benefited the children. *Troxel*, 530 U.S. at 67.

*14 III. NORTH CAROLINA PRECEDENT AFFIRMS THE FUNDAMENTAL NATURE OF PARENTAL RIGHTS.

Decisions of this Court for well over a century confirm that North Carolina is in lockstep with the U.S. Supreme Court on the fundamental nature of parental rights. "It is fully recognized in this State that parents have prima facie the right of the custody and control of their infant children, a natural and substantive right not to be lightly denied or interfered with except when the good of the child clearly requires it." *Atkinson v. Downing*, 175 N.C. 244, 247, 95 S.E. 487, 488 (1918), citing *In re Mercer Fain*, 172 N.C. 790, 90 S.E. 928 (1916); *In re Mary J. Jones*, 153 N.C. 312, 69 S.E. 217 (1910); *Newsome v. Bunch*, 144 N.C. 15, 56 S.E. 509 (1907); *Latham v. Ellis*, 116 N.C. 30, 20 S.E. 1012 (1895); *see also Brickell v. Hines*, 179 N.C. 254, 254-255, 102 S.E. 309, 310 (1920) (same - prima facie right of parents may be disregarded only when child's welfare requires it). In a case where the mother was previously hospitalized for mental illness, custody was properly awarded to the father *and* mother, noting that "[a]s a general rule at common law, and in this State, parents have the natural and legal right to the custody, companionship, control, and bringing up of their infant children, and the same being a natural and substantive right may not *15 lightly be denied or interfered with by action of the courts." *Spitzer v. Lewark*, 259 N.C. 50, 53-54, 129 S.E.2d 620, 623 (1963).

In more recent decades, an adoption was voided where the mother had attempted to set aside her consent and the father had attempted to legitimize his son, and neither was shown to be unfit. This Court explained that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403-404, 445 S.E.2d 901, 905 (1994); *In re J.M.*, 384 N.C. 584, 603, 887 S.E.2d 823, 835 (2023) (same, citing *Petersen, Troxel*, and *Adams v. Tessener*, 354 N.C. 57, 60, 550 S.E.2d 499, 501 (2001)).

Foreshadowing the landmark *Troxel* case, this Court held that "parents who have lawful custody of their minor children have the prerogative of determining with whom their children shall associate." *Moore v. Moore*, 89 N.C. App. 351, 353, 365 S.E.2d 662, 663 (1988) (refusing to order grandparent visitation).

Other rulings also echo key principles articulated in U.S. Supreme Court decisions, including procedural protections. "[F]undamentally fair *16 procedures" must be provided "[w]hen the State moves to destroy weakened familial bonds." *In re Murphy*, 105 N.C. App. 651, 653, 414 S.E.2d 396, 397 (1992). Clear and convincing evidence is required to determine that a parent's conduct is inconsistent with constitutionally protected parental status. *Adams v. Tessener*, 354 N.C. at 63, 550 S.E.2d at 503; *cf. Santosky*, 455 U.S. at 747-748 (clear and convincing evidence is needed "before a State may sever completely and irrevocably the rights of parents in their natural child").

A parent threatened with termination of rights "must be afforded an adequate opportunity to present evidence enabl[ing] the trial court to make an independent determination" regarding the pertinent facts. *In re C.A.B.*, 381 N.C. 105, 112, 871 S.E.2d

468, 474 (2022), citing *In re T.N.H.*, 372 N.C. 403, 409, 831 S.E.2d 54 (2019) (internal quotation marks omitted). Due process rights are implicated if a parent is unable to attend the termination hearing and the court refuses to grant a continuance - even if the parent is incarcerated. *In re C.A.B.*, 871 S.E.2d at 474 (father, who was in prison and unable to attend hearing due to covid-19 lockdown, was entitled to due process prior to termination of his parental rights).

***17** For a third party to prevail over the natural (or legal) parents, "there must be substantial reasons or, as various courts have put it, the reasons must be real, compelling, cogent, weighty, strong, powerful, serious, or grave." *James v. Pretlow*, 242 N.C. 102, 105, 86 S.E.2d 759, 761 (1955) (custody dispute between mother and stepmother, affirming the "natural and legal right" of a sole legal parent to custody of her children). The government must not "impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child." *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003), citing *Adams v. Tessener*, 354 N.C. at 62, 550 S.E.2d at 503. The court may only employ the "best interest of the child" standard when it is shown by clear and convincing evidence "that a natural parent's behavior, viewed cumulatively, has been inconsistent with his or her protected status." *Owenby*, 357 N.C. at 148, 579 S.E.2d at 268. In *Owenby*, a grandmother's allegations of a father's alcohol abuse were not supported by sufficient evidence to terminate his parental rights. *Id.*, 357 N.C. at 144-145, 579 S.E.2d at 266.

***18 CONCLUSION**

This Court should reverse the decision of the Court of Appeals, based on the fundamental federal and state constitutional rights of parents to the care, custody, and control of their children, including the right to make medical decisions.

/s/ Deborah J. Dewart

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Footnotes

1 *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

2 Courts have ordered medical care (e.g., blood transfusions) over parental objections in cases where the child's life was in danger. *See, e.g., In re McCauley*, 565 N.E.2d 411 (Mass. 1991); *In re Guardianship of L.S. & H.S.*, 87 P.3d 521 (Nev. 2004). But that is far afield from the situation presented in *Happel*.

2024 WL 3634431 (N.C.) (Appellate Brief)
Supreme Court of North Carolina,
Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and Emily Happel on behalf of Tanner Smith as his mother, Plaintiffs,
v.
GUILFORD COUNTY BOARD OF EDUCATION and Old North State Medical Society, Inc., Defendants.

No. 86PA24.
July 23, 2024.

No. 22CVS7024
No. COA23-487
From Guilford County

Plaintiffs-Appellants' New Brief

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*1 STATEMENT OF JURISDICTION

This matter was initiated on August 19, 2022, by the plaintiffs' filing of a verified complaint and the issuance of a summons by the Clerk to the defendants. Both defendants were properly served, and the Superior Court, Guilford County had subject matter and *in-personam* jurisdiction over the parties. On January 30, 2023, a hearing was held before the Honorable Lora Cubbage, Superior Court Judge in Superior Court, Guilford County. Following the hearing, Judge Cubbage entered an order dismissing plaintiffs' complaint, with her written order being signed February 27, 2023, and filed March 1, 2023. On March 9, 2023, plaintiffs, by and through counsel, caused to be filed a Notice of Appeal, appealing the matter to the Court of Appeals. Subject matter and personal jurisdiction lied with the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b). The Court of Appeals entered an opinion affirming the trial court on March 5, 2024. A petition for discretionary review was timely filed by plaintiffs, which was allowed by this Honorable Court as to the first issue raised on May 23, 2024. This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-31.

STATEMENT OF THE CASE

Plaintiffs initiated this action on August 19, 2022 by the filing of a verified complaint and the issuance of a summons by the Clerk to the defendants. (R. 3-17) On November 21, 2022, Defendant Guilford County ***2** Board of Education filed its answer, a motion to dismiss, and a cross-claim. (R. 20) On December 30, 2022, Defendant Old North State Medical Society, Inc. filed its answer, motion to dismiss, and reply to crossclaims. (R. 34) On January 30, 2023, a hearing was held on the defendants' motions to dismiss before the Honorable Lora Cubbage, Superior Court Judge in Superior Court, Guilford County. Following the hearing, Judge Cubbage entered an order dismissing plaintiffs' complaint, with her written order being signed February 27, 2023, and filed March 1, 2023. (R. 51) On March 9, 2023, plaintiffs, by and through counsel, caused to be filed a Notice of Appeal, appealing the matter to the Court of Appeals. The Court of Appeals entered an opinion affirming the trial court on March 5, 2024. A petition for discretionary review was timely filed by plaintiffs, which was allowed by this Honorable Court as to the first issue raised on May 23, 2024. The matter is ripe for decision by this Honorable Court.

STATEMENT OF FACTS

For the purposes of this appeal, with no evidentiary hearings being held, the facts are as stated in the complaint. (R. 9-16).

At the time relevant to this matter, Plaintiff Tanner Smith was 14 years of age and was a football player at Western Guilford High School, a public school that is within the Guilford County Schools school district. On August 14, 2021, Tanner was informed by letter on Guilford County Schools letterhead that there was a cluster of COVID-19 cases among the football ***3** team, and because of this cluster he would need to report for a COVID-19 test to continue participating as a player on the Western Guilford High School football team. The letter informed Tanner that he would be tested on August 20, 2021, that the testing would take place from 2:00 p.m. to 6:00 p.m. at Northwest Guilford High, and that Old North State Medical Society "will be conducting testing, consent for testing is required." (R. 18).

On August 20, 2021, Tanner was driven by his stepfather, Brett Happel, to the testing facility. When they arrived, Tanner went into the testing site to be tested, and Mr. Happel remained in his vehicle. Upon Tanner's entrance to the facility, workers at the testing site gave Tanner a form to fill out. Tanner believed the form to be related to the required COVID-19 test.

Unbeknownst to Tanner, there was a COVID-19 vaccination clinic also being held at the testing site. A flyer promoting the vaccination clinic stated "Old North State Medical Society in partnership with Guilford County Schools presents FREE COVID-19 Vaccines." (R. 19). It indicated that there would be a vaccine clinic held on Friday, August 20th, 2021 from 2:00 p.m. to 6:00 p.m. at Northeast Guilford High and Northwest Guilford High. Further, the flyer clearly stated: "Students age 12-17 must have their parent or guardian sign the consent form and bring the completed form to the vaccination site."

***4** Tanner was shown to a seat, and the workers at the clinic attempted to contact Tanner's mother, Plaintiff Emily Happel, without success. They were attempting to contact her to gain consent to administer a COVID-19 vaccination to Tanner. At no point did the clinic workers attempt to contact Mr. Happel, who was waiting in the vehicle outside the testing clinic.

After the workers failed to contact Mrs. Happel, one of the workers instructed the other worker to "give it to him anyway." Tanner then indicated to the workers that he did not want to receive the vaccine, and that he was just expecting to be tested for COVID-19. Despite failing to get parental consent or the consent of Tanner himself, the workers administered a COVID-19 dose to Tanner. (R. 11)

Tanner was administered a dose of the Pfizer COVID-19 vaccine, and at the time that Tanner was administered that dose, the Pfizer COVID-19 vaccine was granted only Emergency Use Authorization by the Food and Drug Administration for minors 14 years of age. (R. 11)

STANDARD OF REVIEW

In ruling on pretrial motions to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, the allegations of the complaint are viewed as true and admitted. *Asheville Lakeview Properties, LLC v. Lake View Park Comm'n, Inc.*, 254 N.C. App. 348, 351-52, 803 S.E.2d 632, 636 (2017).

> It is well-settled that a plaintiffs claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals ***5** that no law supports the claim; (2)

the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.

Id. at 352, 803 S.E.2d at 636. (Citations omitted). Appellate courts review a trial court's order dismissing a complaint pursuant to Rule 12(b)(6) *de novo*. *Id.* Similarly, a trial court's order dismissing a complaint pursuant to Rule 12(b)(1) of the Rules of Civil Procedure is reviewed *de novo*. *Bunch v. Britton*, 253 N.C. App. 659, 666, 802 S.E.2d 462, 469 (2017).

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT DETERMINED THAT THE PREP ACT PROVIDED IMMUNITY TO THE BOARD AND TO OLD NORTH STATE MEDICAL SOCIETY, INC. AND PRE-EMPTED ALL STATE LAW CLAIMS.

a. The PREP Act does not provide immunity in cases in which there is a lack of any consent.

The trial court determined, and the Court of Appeals affirmed, that the federal Public Readiness and Emergency Preparedness ("PREP Act") provided broad immunity to defendants for their actions. The PREP Act provides, in relevant part:
Subject to the other provisions of this section, a covered person shall be immune 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 if a declaration under subsection (b) has been issued with respect to such countermeasure. ***6** 42 U.S.C. § 247d-6d(a)(1). It is not disputed that the Pfizer COVID-19 vaccine was a "covered countermeasure." The trial court found that both ONSMS and the Board were "covered persons." It is unclear under what theory the Board was a covered person under the trial court's reasoning, but the only acceptable theory is that it is because of the Board's involvement in the partnership with ONSMS in operating and providing the locations for the vaccine clinics. *See* 42 U.S.C. § 247d-6d(i)(2) (defining "covered persons"). The PREP Act further provides 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 ... by such covered person." 42 U.S.C. § 247d-6d(d)(1). Despite the Act's apparent "exclusivity" of a federal remedy, courts' interpretations of the exclusivity of such a remedy have been mixed.

In the *Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19*, 85 Fed. Reg. 15198, 15200 (March 17, 2020), the Secretary [1] stated:

Thus, it is the Secretary's interpretation that, when a Declaration is in effect, the Act precludes, for example, liability claims alleging negligence by a manufacturer in creating a vaccine, or negligence by a health care provider in prescribing the wrong dose, absent willful misconduct. Likewise, the Act precludes a liability claim relating to the management and operation of a ***7** countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure at a retail store serving as an administration or dispensing location that alleges, for example, lax security or chaotic crowd control. However, a liability claim alleging an injury occurring at the site that was not directly related to the countermeasure activities is not covered, such as a slip and fall with no direct connection to the countermeasure's administration or use. In each case, whether immunity is applicable will depend on the particular facts and circumstances.

In the instant case, the particular facts and circumstances do not give rise to the types of liability for which Congress was attempting to provide immunity. The PREP Act's purpose was to provide for quick action when all the answers may not be

readily apparent during a time of emergency. It was to promote that by providing immunity for negligent acts, for unknown side-effects, and for other matters directly related to the countermeasures (such as breakdowns in crowd control). However, in this case, defendants assert immunity for a willful act - the administration of a medical procedure without the required consent of the patient or the patient's parent. This was not the type of act for which Congress was seeking to provide immunity, and this Court should find that immunity does not exist. Congress made this clear in the Emergency Use Authorization Act, when it required as a condition for authorization of an unapproved product "[a]ppropriate conditions designed to ensure that individuals to whom the product is administered are informed ... of the option to accept or refuse administration of the product ...." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III).

***8** Just as Congress envisioned individuals to be able to refuse administration of a EUA vaccine, the General Assembly made it crystal clear that parents could also make that decision for their children. At the time of the vaccine administration to Tanner, the law of the land of North Carolina required parental consent: "Notwithstanding any other provision of law to the contrary, a health care provider shall obtain written consent from a parent or legal guardian prior to administering any vaccine that has been granted emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age." N.C. Gen. Stat. § 90-21.5(al). Defendants' view of the PREP Act is so sweeping that it would sweep this important act of the General Assembly into the dustbin as a statute that states nothing more than an aspirational goal, rather than a concrete and enforceable mandate.

It is important to note that the claims made by plaintiffs are not **because** this relates to COVID-19, but they **happen** to relate to COVID-19. Plaintiffs' battery and state constitutional claims are not dependent on COVID-19 and the COVID-19 vaccine and its administration. Those claims would result regardless of what substance had been administered to Tanner. It matters not whether it was a COVID-19 vaccine, a chickenpox vaccine, an Aspirin, or open-heart surgery. The trial court's broad reading of the PREP Act to provide immunity in a situation such as this does not further the purpose of the PREP Act "[t]o encourage the expeditious development and ***9** deployment of medical countermeasures during a public health emergency ...." The PREP Act and COVID-19, Part 1: *Statutory Authority to Limit Liability for Medical Countermeasures*, Congressional Research Service Legal Sidebar, LSB 10443 (April 13, 2022).

Taking the defendants' interpretation of the PREP Act to its logical conclusion, had defendants injected Tanner with saline, they would have been liable, but since they injected him with a vaccine they are not liable. Should a covered person have a slip-of-the-hand and inject saline into a person's heart there would be no immunity, but if the substance was a COVID-19 vaccine, there would be immunity. This certainly could not be the intent of Congress. *Reductio ad absurdum*, a covered person could tackle anyone who did not wish to provide consent to the COVID-19 vaccine, jab a needle in their arm, and be totally immune from any consequence of his actions.

The intent of Congress, when reading the Act as a whole, was to limit the liability for adverse effects and promote the quick development and deployment of the countermeasure, not to give *carte blanche* to medical providers to perform medical procedures without consent. To hold otherwise would violate the canon against absurdities. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 470-471 (1989) (Kennedy, J., concurring in judgment) (explaining the canon as requiring interpretation when the plain language of the statute applied to the case would be "in a genuine sense, ***10** absurd"); *Sturges v. Crowninshield*, 4 Wheat. 122, 203, 4 L.Ed. 529 (1819) (for the canon against absurdities to apply, the interpretation "must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application"). That the PREP Act would provide immunity to covered persons to immunize persons against their will and without consent (not just informed consent, but without *any* consent) would be an injustice that would meet the level of absurdity required to reject such an application to this case.

Finally, as to the question of immunity, holding that the PREP Act does not provide immunity in this case would avoid the substantial question of whether Congress had the power to provide immunity for defendants pursuant to any enumerated power

under the United States Constitution. "The courts of this State will avoid constitutional questions ... where a case may be resolved on other grounds." *Anderson v. Assimos*, 356 N.C. 415, 416, 572 S.E.2d 101, 102 (2002) (citing *State v. Crabtree*, 286 N.C. 541, 543, 212 S.E.2d 103, 105 (1975); *Rice v. Rigsby*, 259 N.C. 506, 512, 131 S.E.2d 469, 473 (1963). There exists a serious question as to whether Congress' power under the Commerce Clause would be so broad as to provide immunity to clear intrastate activities that have an infinitesimally small impact on interstate commerce.

11** ***b. The PREP Act does not preempt all state law claims.

Other than the decision of the Court of Appeals below, it does not appear that North Carolina appellate courts, North Carolina's federal district courts, or the Fourth Circuit have interpreted these provisions of the PREP Act. Other courts' interpretations have been varied on the scope of preemption and immunity, but they have spoken with one voice that the PREP Act does not completely preempt claims that do not fall under the "willful misconduct" provisions of the Act.

> Although our court has not previously considered whether the PREP Act completely preempts state-law claims within its ambit, several federal courts of appeals have addressed the issue in similar cases involving claims against assisted-living facilities and nursing homes during the COVID-19 pandemic. *See Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 406-13 (3d Cir. 2021); *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 584-88 (5th Cir. 2022); *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 242-46 (5th Cir. 2022); *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210, 1213-14 (7th Cir. 2022); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 687-88 (9th Cir. 2022). These courts have taken different views as to whether the PREP Act completely preempts any state-law claims, **but the courts have all held that the Act does not completely preempt claims, like Hudak's, that do not allege willful misconduct related to the administration or use of covered COVID-19 countermeasures. We agree.**

Hudah v. Elmcroft of Sagamore Hills, 58 F.4th 845, 853 (6th Cir. 2023) (emphasis added).

Of particular note in this line of cases is *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679 (9th Cir. 2022), *cert. denied* 143 S.Ct. 444 (2022). The Supreme Court of the United States let stand the decision of the ***12** 9th Circuit, which rejected Glenhaven Healthcare LLC's argument that the PREP Act completely preempted the plaintiffs' state law claims. The plaintiffs in Saldana were relatives of a nursing home resident who allegedly died of COVID-19 complications. *Id.* at 683. They brought various state law claims against the defendants, to include elder abuse, negligence, and wrongful death, and using the PREP Act as a means for federal jurisdiction, defendants removed the case to federal court. *Id.* Upon hearing the case, the district court remanded the case to state court, and the 9th Circuit agreed. *Id.* It held that those state law claims were not preempted by the PREP Act, and that the PREP Act did not operate as a complete preemption of all state law claims. *Id.* at 688. The 9th Circuit held that the PREP Act did not rise to the level of a comprehensive statutory scheme that would entirely supplant state law claims. *Id.* This persuasive holding was left undisturbed when the Supreme Court denied certiorari review.

Plaintiffs claim battery, and violations of their rights under the North Carolina Constitution. This Court should find that the claims presented by plaintiffs in this matter, are not preempted by the PREP Act and further that immunity does not extend to claims regarding lack of consent. Particularly, this Court should hold that state constitutional claims are not preempted and that state actors are not immune from liability for their violations of the Constitution when the allegations are not specific to the countermeasure or its adverse effect, but to the administration of medicine without consent.

*13 CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed, and the case should be remanded to the Court of Appeals for further proceedings consistent with this Honorable Court's opinion.

RESPECTFULLY SUBMITTED, this the 23rd day of July, 2024.

<<signature>>

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Footnotes

1 While this interpretation may be considered by the Court, the decision on the correct interpretation lies squarely with this Court. *See* *Loper Bright Enterprises v. Raimondo,* ___ U.S. ___, 144 S.Ct. 2244 (2024).

2024 WL 1774722 (N.C.) (Appellate Brief)
Supreme Court of North Carolina,
Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and, Emily Happel on behalf of Tanner Smith as his mother, Plaintiffs-Appellants,

v.

GUILFORD COUNTY BOARD OF EDUCATION and OLD NORTH STATE MEDICAL SOCIETY, INC., Defendants-Appellees.

No. 86P24.
April 12, 2024.

From Guilford County No. COA23-487 File No. 22CVS7024

Brief of Amici Curiae Rep. Neal Jackson Etal. (Members of the North Carolina General Assembly) in Support of Plaintiffs-Appellants' Notice of Appeal and Petition for Discretionary Reviewt

† No person or entity other than Amici Curiae, their members, or their counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

i** iINDEX***

*iii TABLE OF AUTHORITIES

Cases:

***2 TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:**

Amici Curiae, several individual members of the North Carolina General Assembly, hereby respectfully submit this brief in support of Plaintiffs-Appellants' notice of appeal and petition for discretionary review filed 5 April 2024: [1]

NATURE OF THE INTEREST OF THE AMICI CURIAE

Amici Curiae are individual members of the North Carolina General Assembly. They have a special interest in protecting the fundamental rights of the parents they represent and for whom the General Assembly enacted legislation in 2021 on the very subject embraced by this appeal. As members of the General Assembly, they have a unique role in ensuring that local governmental bodies, particularly those charged with public education, or who otherwise regularly interact with children, abide by and are governed according to North Carolina state law. In this same vein, they further have a strong interest in ensuring that the enactments of the General Assembly are upheld against erroneous findings of federal preemption, as occurred in the instant case. Certain of these *Amici* also possess experience as elected members of local governmental bodies, prior to serving in the General Assembly.

***3** *Amici* are specifically the following members of the North Carolina General Assembly:

Name	Counties Represented	Years of Service
Rep. Neal Jackson	Moore, Randolph	2023-Present
Rep. Brian Biggs	Randolph	2023-Present

Rep. Mark Brody	Anson, Union	2011-Present
Rep. Keith Kidwell	Beaufort, Dare, Hyde, Pamlico	2017-Present
Rep. Donnie Loftis	Gaston	2021-Present
Rep. Joseph Pike	Harnett	2023-Present
Rep. Frank Sossamon	Granville, Vance	2023-Present
Rep. Jeff Zinger	Forsyth	2021-Present

ISSUES TO BE ADDRESSED

Amici Curiae members of the North Carolina General Assembly here seek to address the following two issues:
(1) Whether this Court should accept Plaintiffs-Appellants' notice of appeal because the case presents a substantial question arising under the North Carolina Constitution warranting review under N.C. Gen. Stat. § 7A-30(1)?

***4** (2) Whether discretionary review should be granted under N.C. Gen. Stat. § 7A-31(c)(1) & (2) because the subject matter of the appeal has significant public interest and the case involves legal principles of major significance to the jurisprudence of the State?

Amici respectfully urge that both issues be answered in the affirmative by this Court.

ARGUMENT

Summary

Love the COVID-19 vaccines or despise them. Either way those sentiments are irrelevant to resolution of the legal questions here presented.

On its underlying merits, this case instead offers up two interrelated questions that are far more foundational to our republican form of government: (1) whether, as this Court and the U.S. Supreme Court have repeatedly held, parents have a fundamental constitutional right to direct the care, custody, and control of their children; and (2) whether a state can have the very local governmental entities it has created commandeered by the federal government to serve ends directly contrary to the express statutory directives of the Legislature.

Unfortunately, the opinion that the panel of the Court of Appeals below felt constrained to issue subverts basic tenets of federalism and fundamental parental rights by permitting rogue action by local bodies and their agents to escape ***5** meaningful regulation by state government. Despite labeling the conduct of Defendants-Appellees "egregious," the Court of Appeals affirmed the trial court's dismissal of Plaintiff-Appellants' complaint on the grounds that each of its claims was precluded by the federal PREP Act's preemption provision, 42 U.S.C. § 247d-6d. *See Happel v. Guilford County Bd. of Educ.*, No. COA23-487, _____ S.E.2d _____, 2024 WL 925471, at *6 (Mar. 5, 2024).

Accordingly, the decision of the Court of Appeals affirming the trial court's dismissal of the case calls out for further review and correction by this Court, not only because the case presents a substantial question of constitutional law, but also because

discretionary review should be granted on the grounds of significant public interest and the presence of legal principles of major significance to the jurisprudence of the state.

I. THIS CASE PRESENTS A SUBSTANTIAL QUESTION ARISING UNDER THE NORTH CAROLINA CONSTITUTION WARRANTING SUPREME COURT REVIEW PURSUANT TO N.C. GEN. STAT. § 7A-30(1).

A. This Case Presents A Major Question Regarding Preemption Of State Constitutional Protections For Parents' Fundamental Liberty Interests.

Like the United States Constitution, the North Carolina Constitution vigorously protects the fundamental rights of parents to direct the care, custody, and control of their children. Basing its reasoning on the Due Process and Equal ***6** Protection Clauses of the Fourteenth Amendment, as well as the Ninth Amendment, the U.S. Supreme Court held decades ago in *Stanley v. Illinois* that "the right to raise one's children is ... ***'essential,' Meyerv. Nebraska,*** 262 U.S. 390,399 (1923), and ***one of the 'basic civil rights of man,' Skinner v. Oklahoma,*** 316 U.S. 535, 541 (1942)[.]" 405 U.S. 645, 651 (1972) (internal citations cleaned up and emphasis added). Thus, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)) (italics in original removed). As these are "[r]ights far more precious ... than property rights," they *exceed* a person's right to property in legal esteem and constitutional protection. *Id.* (quoting *May v. Anderson*, 345 U.S. 528, 533 (1953)).

While acknowledging the importance of these federal principles, this Court has explained that "North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children ***antedates*** the [U.S.] constitutional protections set forth in *Stanley." Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994) (emphasis added); *see Price v. Howard*, 346 N.C. 68, 75, 484 S.E.2d 528 (1997) ("North Carolina law traditionally has protected the interests of natural parents in the companionship, custody, care, and control of their children[.]"); *see also* N.C. Const., art. I, §§ 1,13 & 19. Indisputably then, under both federal and state ***7** constitutional law, parental rights are "a ***'fundamental liberty interest which warrants due process protection."' In re E.B.***, 375 N.C. 310,316, 847 S.E.2d 666,671 (2020) (quoting *In re Montgomery*, 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984)) (internal quotations and citations omitted) (emphasis added); *see also In re Murphy*, 105 N.C. App. 651, 657, 414 S.E.2d 396, 400 (1992) (North Carolina constitution provides procedural due process protections to parents). "This parental liberty interest 'is perhaps the ***oldest of the fundamental liberty interests [.]"' Owenby v. Young,*** 357 N.C. 142, 144, 579 S.E.2d 264, 266 (2003) (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)) (emphasis added).

B. Defendants-Appellees Are Alleged To Have Violated The Constitutional Liberty Interests Of Parents, And The North Carolina Constitution Provides A Means For Redress.

In this case, these constitutionally protected parental liberty interests were violated in a most alarming manner. As alleged in the pleadings, which must be taken as true for purposes of a Rule 12(b)(6) motion to dismiss, Defendants-Appellees worked in conjunction to give a COVID-19 vaccination to a 14-year-old child without any parental consent, written or otherwise. *Happel*, 2024 WL 925471, at *1. The minor was only present at the COVID-19 vaccination site (located at Northwest Guilford High School, a public school operated by the Guilford County School Board) because it doubled as a COVID testing location, and the Guilford County ***8** Schools had written to inform the child's parents that he could not return to participation in school athletics unless he was *tested* (not vaccinated) for COVID-19. *Id.* When a clinic site worker was unable to reach the minor's parent for consent to administer a COVID-19 vaccine, "one of the [site] workers instructed the other worker to 'give it to him anyway."' *Id.* Though the child protested that he did not want a vaccine, and he was only expecting a COVID *test* when he came to the site, the worker injected him anyway with a Pfizer COVID-19 vaccine-over his objection and without any parental consent. *Id.*

The North Carolina Constitution provides a private right of action for citizens whose state constitutional rights are violated. *See, e.g., Corum v. Univ. of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). "[W]hen the plaintiff has a cognizable state constitutional claim and cannot access the courts to obtain any form of relief," then she may bring an action under the state constitution. *Washington v. Cline*, Case No. 148PA14-2, _____ N.C. _____, _____ S.E.2d _____, 2024 WL 1222548, at *4 (N.C. Mar. 22, 2024) (citations omitted). Nevertheless, by finding federal preemption under the PREP Act, the decision of the Court of Appeals pretermits any state constitutional redress for governmental violation of the "oldest" and most "essential" of the "civil rights of *man"--viz.*, the parental liberty interest to direct the care, custody, and control of one's children.

***9 C. The Lower Courts Here Failed To Correctly Analyze The Question Of Federal Preemption.**

Nothing in the text of the PREP Act ***specifically and expressly*** speaks to a violation of the state constitution, especially the deprivation of a parent's right to determine the care, custody, and control of her minor child. So, Defendants-Appellees rest on the notion that PREP Act immunity flows from the language stating that a covered entity is immune from "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 vaccine. 42 U.S.C. § 247d-6d(a)(1) (emphasis added). If allowed to stand, however, the decision of the Court of Appeals would permit *any* constitutional violation and immunize all manner of "egregious" conduct so long as it is done in connection with the provision of a COVID-19 vaccine.

Such broad federal preemption of state law is highly disfavored.[2] As the U.S. Supreme Court has emphasized, "[W]e have ***never assumed lightly*** that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the **starting presumption *that Congress does* not *intend to supplant state law."*** ***10** *New York State Conf of Blue Cross & Blue Shield Plans v. Travelers, Ins.*, 514 U.S. 645, 654 (1995) (citations omitted) (emphasis added). Thus, "[i]f a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008). In determining whether a state law is preempted, courts "wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *California Div. of Labor Standards Enforcement v. Dillingham Constr., N. A., Inc.*, 519 U.S. 316, 325, (1997) (internal quotation marks and citation omitted); *see Wyeth v. Levine*, 555 U.S. 555, 565 (2009) ("In all pre-emption cases, and particularly in those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (cleaned up and citations omitted).

The Court of Appeals, though, did not begin with (or even reference) this presumption against federal preemption in areas of traditional state concern. Protections of the familial relationship and parental rights could hardly be more historically and traditionally within the realm of state law. *Cf., e.g., Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (explaining that "regulation of domestic relations" is "an area ***11** that has long been regarded as a virtually exclusive province of the States"). Unsurprisingly then, the U.S. Supreme Court has "consistently recognized that ***the whole subject*** of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Rose v. Rose*, 481 U.S. 619, 625 (1987) (cleaned up, citations omitted, and emphasis added). Therefore, "[b]efore a state law governing domestic relations will be overridden, it must do *major damage* to clear and substantial federal interests." *Id.* (cleaned up, citations omitted, and emphasis added); *see Row v. Row*, 185 N.C. App. 450, 456, 650 S.E.2d 1, 4 (2007) (quoting *Rose v. Rose).* Rather than read the PREP Act to avoid friction between a federal statute and the longstanding protection of fundamental parental liberties by a state-as the U.S. Supreme Court has *repeatedly* instructed-the Court of Appeals here brought state and federal law into direct conflict and resolved that dispute against the most sacred of constitutionally protected liberty interests.

The text of the PREP Act's preemption provision itself reveals no intent to reach constitutional liberty interests. To the contrary, it grants immunity against "all claims for loss," and "loss" is-as shown by the plain language of the statutory text- contemplated by Congress to mean the traditional tort claims that might arise from a dangerous or defective product. 42 U.S.C. § 247d-6d(a)(2)(A). As such, it defines "loss" inclusively as "(i) *death;* (ii) physical, mental, or emotional *injury*, ***12** ***illness, disability,*** or condition; (iii) *fear* of physical, mental, or emotional injury, illness, disability, or condition, including any need for *medical monitoring;* and (iv) loss of or *damage to property*, including business interruption loss." *Id.* (emphasis added); *see* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 195 (2012) ("When ... any words ... are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar ... [A] listing is not prerequisite. An 'association' is all that is required."). [3] Particularly in light of the presumption against finding preemption of historic state powers, it is more than a reach to say these clearly defined categories of "loss" also include the violation of fundamental constitutionally protected parental rights, rather than the general tort losses associated with a medical negligence or product liability claim.

Limiting the PREP Act's language to exclude preemption of parents' constitutional liberty interests accords with the instructions of the U.S. Supreme Court, which has directed against reading an express preemption provision "to the furthest stretch of its indeterminacy," since such an expansive approach "would be to read Congress's words of limitation as [a] mere sham [] and to read the ***13** presumption against pre-emption out of the law whenever Congress speaks to the matter with generality." *Travelers, Inc.*, 514 U.S. at 655; *see Dillingham Constr.*, 519 U.S. at 335 ("[A]s many a curbstone philosopher has observed, everything is related to everything else.") (Scalia, J., concurring). Unfortunately, the trial court and Court of Appeals both engaged in just such a "stretch to indeterminacy." To reach the correct result here, as the U.S. Supreme Court has stated, requires a different approach: " [G]o beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to ***the objectives*** of the [] statute as a guide to the scope of the state law that Congress understood would survive." *Travelers, Ins.*, 514 U.S. at 656. Taken in this light, the PREP Act's grant of immunity from state medical malpractice and product liability law claims in no way compels immunity from liability that would arise when a ***State's own public school system (and its agents)*** disregard the ***separate and distinct*** state constitutional restrictions long placed on a public school to honor parents' fundamental liberties regarding the rearing of their children.

D. The Lower Courts' Decisions Permit The Federal Government To Unconstitutionally Commandeer Local Governments.

While the actions of Defendants-Appellees violate the rights of parents that have existed from time immemorial, the opinion of the Court of Appeals radically undermines the validity of the state statute enacted by the General Assembly to cover ***14** precisely these kinds of situations. In 2021, amid the COVID-19 pandemic, the General Assembly spoke directly to these facts:

> Notwithstanding any other provision of law to the contrary, a health care provider shall obtain ***written consent from a parent or legal guardian*** prior to administering any vaccine that has been granted emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age.

N.C. Gen. Stat. § 90-21.5(al) (emphasis added). What happened in this case shows the General Assembly's fears were well-founded.

In our federal system, the United States and the State of North Carolina are dual sovereigns. *See Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (describing "dual sovereignty"). While the federal government possesses *only* those powers expressly enumerated in the Constitution, "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," U.S. Const. amend. X. "As James Madison wrote, 'the powers delegated by the ... Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'" *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting *The Federalist No.* 45, pp. 292-293 (C. Rossiter ed. 1961)). This division between the powers of the federal and State governments is not a trifling technicality, but rather "was adopted ***15** by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero StateHosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

Because "the Framers rejected the concept of a central government that would act upon and through the States," *Printz v. United States*, 521 U.S. 898, 920 (1997), the Constitution prohibits using the states as mere instrumentalities of the federal government. *See New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."); *cf. Medellin v. Texas*, 552 U.S. 491,532 (2008) (President's foreign affairs powers could not support "a Presidential directive issued to state courts, much less one that reaches deep into the heart of the State's police powers and compels state courts to reopen final criminal judgments and set aside neutrally applicable state laws"). More specifically, this means that the federal government may not give a "command to the States to promulgate and enforce laws and regulations," *FERCv. Mississippi*, 456 U.S. 742,761-62 (1982), nor may it "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," *Hodel v. Va. Surface Mining &ReclamationAss'n, Inc.*, 452 U.S. 264, 288 (1981).

16** The U.S. Supreme Court has likewise invalidated laws that had the effect of commandeering the states to do the work of the federal government. For example, in *New York v. United States*, the Supreme Court held that Congress could not compel states to make "a 'choice' of either accepting ownership of [radioactive] waste [sites] or regulating [them] according to the instructions of Congress." 505 U.S. at 175. Neither option was something Congress could compel a state to accept, and thus forcing a state to "choose" between them amounted to an unconstitutional "'commandeer[ing]' of state governments into the service of federal regulatory purposes[.]" *Id.* The program failed constitutional scrutiny because "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; ***it may not conscript state governments as its agents." *Id.* at 178 (emphasis added).

Several years later, in *Printz v. United States*, the U.S. Supreme Court again struck down a law for commandeering the states into federal service. In that case, the Court invalidated a provision of federal law that required state law enforcement officers to conduct firearms background checks for gun purchases. 521 U.S. at 922-25. Writing for the majority, Justice Scalia reaffirmed that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs," *id.* at 925, because "it is an essential attribute of the States' ***17** retained sovereignty that they remain independent and autonomous within their proper sphere of authority," *id.* at 928 (citation omitted).

Yet, contrary to the teachings of *Printz*, the interpretation given to the PREP Act's preemption by the Court of Appeals rends the connection between a state government and its local governmental entities by limiting the state in the ways it may regulate localities' conduct. Federalism dictates that, if a state so desires, it can make a local government amenable to civil suit when it violates *state* constitutional rights. The PREP Act, however, has here been read such that the State of North Carolina cannot "remain independent and autonomous within [its] proper sphere of authority" over local governments, including its schools, *see Printz*, 521 U.S. at 928.

The North Carolina General Assembly spoke unmistakably and unambiguously on the issue of consent for minors to receive a COVID-19 vaccine that is granted emergency use authorization but not yet fully approved by the United States Food and Drug

Administration by prohibiting COVID-19 vaccinations of minors without written parental consent. Section 90-21.5(al) thereby affirms the fundamental right of parents to determine the care, custody, and control of their minor children, and the exercise thereof with regard to each parent's decision about the COVID-19 vaccine while under emergency use authorization. The Court of Appeals therefore erred in its limited focus on the "administration" of the COVID-19 ***18** vaccine. Instead, it should have centered its analysis on the parent who was deprived of her fundamental right to make decisions for her minor child about the COVID-19 vaccine, as that is the relevant right abridged by the conduct of Defendants-Appellants.

The Court of Appeals itself correctly acknowledged that the General Assembly legislated with the purpose of avoiding just what transpired in this case: "[The] intent [of newly added subsection (al)] is to prevent the egregious conduct alleged in the case before us, and to safeguard the constitutional rights at issue- [the parent's] parental right to the care and control of her child, and [the minor's] right to individual liberty." *Happel*, 2024 WL 925471 at *6. But, the provision is now of no readily apparent force or consequence given the court's holding that a state lacks the power to entertain a cause of action for the unconsented to vaccination of a minor if the vaccine is covered by the PREP Act. Why? Because (per the lower courts) the *federal* government, under the auspices of the PREP Act, has seized from the states even their public-school boards so as to achieve (non-educational) *federal* policy objectives and has *by federal* statute freed those school boards from the consequences of failing to abide by the laws enacted by the very state that created those public schools. This is a form of federal commandeering far more invasive than requiring ***19** local law enforcement to conduct background checks for firearms purchases. *Cf. Printz*, 521 U.S. at 931-32.

Precedent firmly admonishes courts against liberally embracing the idea that broadly written federal statutes earnestly capture within their reach the vital organs by which a state sovereign discharges its *own* constitutional powers and prerogatives. When a reading of federal powers "would result in a significant impingement of the States' traditional and primary power[s]," courts must "read the statute as written to avoid the significant constitutional and federalism questions raised[.]" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173-74 (2001) (holding that, under the Commerce Clause, permitting government to apply the Clean Water Act to a "municipal landfill" would raise federalism concerns); *see Bond v. United States*, 572 U.S. 844, 859-60 (2014) (when confronted with "an improbably broad reach" of a federal statute, it is appropriate to seek recourse to principles of federalism, including a presumption against "interpreting the statute's expansive language in a way that intrudes on the police power of the States" to reach purely local matters) (internal citations omitted).

Sadly, the lower courts in this case took a far different course. They vitiated our State's constitutional protections for fundamental parental rights *and* gave ***20** judicial imprimatur to federal commandeering of local school boards to engage in conduct expressly prohibited by state law.

The Court of Appeals was clear that there was no governing law from North Carolina courts, the Fourth Circuit, or North Carolina's federal district courts squarely addressing the preemption issue it confronted. *See**Happel*, 2024 WL 925471 at *5. It looked for guidance from other courts, and though there was some, the utility of the cases is limited due to those decisions being from jurisdictions outside of North Carolina and the Fourth Circuit; one case, from New York, even pre-dated COVID. *Id.*

Accordingly, this case presents a major constitutional question regarding the scope of federal preemption by the PREP Act's immunity provisions and requires a full and rigorous analysis by *this* Court of Congressional intent as to preemption, since it has not previously spoken to the issue. *See, e.g., State v. Colson*, 274 N.C. 295, 305,163 S.E.2d 376, 383 (1968) (substantial constitutional question exists when there is need to "review a constitutional question which has not already been the subject of conclusive judicial determination").

***21 II. DISCRETIONARY REVIEW IS ALSO PROPER UNDER N.C. GEN. STAT. § 7A-31(C)(1) & (2) BECAUSE THE SUBJECT MATTER OF THE APPEAL HAS SIGNIFICANT PUBLIC INTEREST AND THE CASE INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE.**

A. The Subject Matter Of The Appeal Has Significant Public Interest.

As Justice Gorsuch wrote last summer about our nationwide experience with COVID-19, "Since March 2020, we may have experienced ***the greatest intrusions on civil liberties in the peacetime history of this country."*** *Arizona v. Mayorkas*, 143 S. Ct. 1312,1314 (2023) (Gorsuch,J., dissenting) (emphasis added). Lest this statement seem hyperbolic, he reminded us of what governments did in the name of "public health:"

> Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent.

***22** *Id.* at 1314-15 (citations omitted).

To this list of civil liberties violations, one can now add the allegations that gave rise to this case. Since there is hardly a "social or public interest ... comparable with the importance of the social interest involved in the maintenance of personal liberty guaranteed by the Constitution," *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854, 862 (1940), the significance of the issues involved here merit judiciary scrutiny, if only so the violations will never recur.

Furthermore, it should go without saying that this case presents issues of "significant public interest," N.C. Gen. Stat. § 7A-31(c)(1), when the people's representatives in the General Assembly legislated in 2021 on this very topic by amending N.C. Gen. Stat. § 90-21.5 to add subsection (al). Nullifying, or even curtailing the reach of, enactments of the General Assembly is always a serious business and must be undertaken with extreme care by the judiciary:

Since [the] earliest cases applying the power of judicial review under the Constitution of North Carolina, ... [this Court has] indicated that ***great deference will be paid to acts of the legislature-*** **the** ***agent of the people for enacting laws.*** This Court has always indicated that it ***will not lightly assume*** that an act of the legislature violates the will of the people of North Carolina as expressed by them in their Constitution and that [it] will find acts of the legislature repugnant to the Constitution only "if the repugnance do really exist and is plain." ***23** *State ex rel. Martin v. Preston*, 325 N.C. 438, 448,385 S.E.2d 473, 478 (1989) (quoting *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 9 (1833) (Ruffin, C.J.), *overruled on other grounds by Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903)) (emphasis added). Principal among these reasons for paying this great respect to legislative enactments is that "[i]n this state, '[a]ll political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.'" *Community Success Imitative v. Moore*, 384 N.C. 194, 211, 886 S.E.2d 16, 31-32 (2023) (quoting N.C. Const. art. I, § 2). And, " [o]rdinarily, the people exercise this sovereign power through their elected representatives in the General Assembly." *Id.* (citing *Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895)).

For two lower courts to have found that the General Assembly's new statutory provision-and its clear legislative intent-run afoul of federal law, and thus will not be honored by the courts as written, is a matter of the highest judicial significance not only for the people and their elected representatives in the General Assembly but also for the separation of powers within our state's republican form of government. *See* N.C. Const., art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."); *see generally* John V. Orth & Chief Justice Paul Martin Newby, THE NORTH CAROLINA ***24** CONSTITUTION 50 (2d ed., 2013) ("Along with popular sovereignty, separation of powers is one of the most fundamental principles on which state government is constructed."); *cf.* U.S. Const., art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government[.]").

Therefore, discretionary review is proper given the significant public interest presented by this case.

B. This Appeal Involves Legal Principles Of Major Significance To The Jurisprudence Of The State.

Additionally, under N.C. Gen. Stat. § 7A-31(c)(2), it is appropriate to grant a petition for discretionary review because of the legal principles of major significance to the jurisprudence of this state implicated in this appeal. Namely, as discussed above, the appeal involves federal preemption of state law--a question that is never to be decided lightly. *See, e.g., Travelers, Ins.*, 514 U.S. at 654. That would be true enough for a federal law that simply preempted a claim against a wholly private actor. Here, however, there is far more at stake. A federal statute has been interpreted to invade upon the ability of the General Assembly to regulate the state's *own* local governments, thereby permitting those governments to be commandeered by the federal government and act freely in contravention of a state law specifically passed to protect fundamental parental rights under the very circumstances presented.

***25** Indeed, as it stands, significant doubt has now been cast on the scope and validity of N.C. Gen. Stat. § 90-21.5(al), an enactment of the General Assembly in an important area of interest to citizens across North Carolina. Are local governments now free to disregard this statute? If so, to what extent? And, how could the General Assembly, now in light of *Happel*, meaningfully constrain local government officials to ensure parental rights are not cavalierly violated without risking another finding of federal preemption by the state judiciary?

This appeal is so freighted with issues of major significance that only this Court can now speak in an authoritative manner to resolve the weighty questions it raises.

CONCLUSION

For the foregoing reasons, these *Amici* respectfully pray that this Court accept the case for appellate review so that the issues raised by Plaintiffs-Appellants may be fully briefed and argued before the Court. And, in the event the Court allows the petition for discretionary review, *Amici* respectfully support Plaintiffs-Appellants' request to present the issues for review set forth in their petition of 5 April 2024.

***26** Respectfully submitted, this the *12th* day of April, 2024.

Electronically submitted

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Footnotes

1 No person or entity other than *Amici Curiae*, their members, or their counsel, directly or indirectly, either wrote this brief or contributed money for its preparation.

2 The preemption decision in this case is premised on a theory of express preemption. Therefore, this brief does not address other theories of preemption, including implied preemption.

3 The Court of Appeals similarly divorced the word "administration" from its context. *See Happel*, 2024 WL 925471 at *3-4; *see also* 42 U.S.C. § 247d-6d(a)(2)(B).

2023 WL 6793632 (N.C.App.) (Appellate Brief)
Court of Appeals of North Carolina,
Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and Emily Happel on behalf of Tanner Smith as his mother, Plaintiffs,
v.
GUILFORD COUNTY BOARD OF EDUCATION and Old North State Medical Society, Inc., Defendants.

No. COA23-487.
September 29, 2023.

From Guilford County No. 22CVS7024

Plaintiffs-Appellants' Reply Brief

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*ii *TABLE OF AUTHORITIES*

*1 REPLY TO APPELLEES' BRIEFS

Pursuant to Rule 28(h) of the Rules of Appellate Procedure, the Plaintiffs-Appellants' provide a concise rebuttal to the arguments of defendants-appellees. The Plaintiffs-Appellants rest on the arguments provided in their substantive brief, except to draw the Court's attention to a paragraph contained in Defendant-Appellant Old North State Medical Society's appendix.

In the *Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19*, 85 Fed. Reg. 15198, 15200 (March 17, 2020), the Secretary stated:

> Thus, it is the Secretary's interpretation that, when a Declaration is in effect, the Act precludes, for example, liability claims alleging negligence by a manufacturer in creating a vaccine, or negligence by a health care provider in prescribing the wrong dose, absent willful misconduct. Likewise, the Act precludes a liability claim relating to the management and operation of a countermeasure distribution program or site, such as a slip-and-fall injury or vehicle collision by a recipient receiving a countermeasure at a retail store serving as an administration or dispensing location that alleges, for example, lax security or chaotic crowd control. However, a liability claim alleging an injury occurring at the site that was not directly related

> to the countermeasure activities is not covered, such as a slip and fall with no direct connection to the countermeasure's administration or use. In each case, whether immunity is applicable will depend on the particular facts and circumstances.

In the instant case, the particular facts and circumstances do not give rise to the types of liability for which Congress was attempting to provide immunity. The PREP Act's purpose was to provide for quick action when all ***2** the answers may not be readily apparent during a time of emergency. It was to promote that by providing immunity for negligent acts, for unknown side-effects, and for other matters directly related to the countermeasures (such as breakdowns in crowd control). However, in this case, defendants assert immunity for a willful act – the administration of a medical procedure without the required consent of the patient or the patient's parent. This was not the type of act for which Congress was seeking to provide immunity, and this Court should find that immunity does not exist.

CONCLUSION

For the foregoing reasons, and the reasons stated more fully in Plaintiffs-Appellants' initial brief, the decision of the Superior Court should be reversed, and the matter should be remanded to Superior Court, Guilford County for further proceedings consistent with the opinion of this Honorable Court.

RESPECTFULLY SUBMITTED, this the 29th day of September, 2023.

<<signature>>

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2023 WL 6223055 (N.C.App.) (Appellate Brief)
Court of Appeals of North Carolina,
Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and EMILY HAPPEL on behalf of Tanner Smith as his mother, Plaintiffs-Appellants,

v.

GUILFORD COUNTY BOARD OF EDUCATION and Old North State Medical Society, Inc., Defendants-Appellees.

No. COA 23-487.
September 20, 2023.

From Guilford County No. 22 CVS 7024

Defendant-Appellee Guilford County Board of Education's Brief

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*iii *TABLE OF CASES AND AUTHORITIES*

CASES

SUMMARY OF ARGUMENT

The trial court in this case dismissed Plaintiffs' claims for multiple, independently sufficient reasons - various fatal flaws in the pleadings, adequate remedies without the need to reach direct constitutional claims, and immunity from multiple statutory sources. On appeal, Plaintiffs unsuccessfully attempt to undercut several of the alternative grounds discussed by the trial court, but this Court need not even reach many of those issues. This Court should affirm the decision of the trial court on any of the available bases, but can easily exercise constitutional avoidance by deciding the case on a straightforward application of Rule 12(b)(6).

STANDARD OF REVIEW

"An appellate court reviews an order granting a 12(b)(6) motion to determine whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed." *Wynn v. Tyrrell Cnty. Bd. of Educ.*, 253 N.C. App. 658, 799 S.E.2d 286 (2017) (internal quotation marks and citations omitted). "The complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity." *Wells* ***2** *Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d 374, 377 (2014). Furthermore, the court is not required to accept as true allegations in the complaint that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *Good Hope Hosp., Inc. v. N.C. Dep't of Health and Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005). Affirmance of a dismissal under Rule 12(b)(6) is proper where one of the following three conditions is satisfied: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact which necessarily defeats the plaintiff's claim." *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citations omitted); *Sutton*, 277 N.C. at 102-03, 176 S.E.2d at 166.

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED CLAIMS AGAINST THE BOARD FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

A. *Plaintiffs failed to allege the lack of an adequate state law remedy, so their constitutional claims were properly dismissed.*

As an initial matter, to sufficiently plead a direct constitutional claim under the North Carolina Constitution, "a plaintiff **must allege** that ***3** no adequate state remedy exists to provide relief for the injury." *Copper ex rel. Copper v. Denlinger*, 363 N.C. 784, 788, 688 S.E.2d 426, 428 (2010) (emphasis added). *See also Frank v. Savage*, 205 N.C. App. 183, 191, 695 S.E.2d 509, 514 (2010) (dismissing constitutional claim where "Plaintiffs' complaint failed to allege that no adequate state remedy exists"); *Gilreath v. Cumberland Cnty. Bd. of Educ.*, 253 N.C. App. 238, 798 S.E.2d 438 (2017) ("[B]ecause Plaintiff has failed to meet his burden of alleging the inadequacy of an available state law remedy, he is not entitled to assert a direct constitutional claim under North Carolina law.").

Here, no such allegation appears anywhere in the Complaint. Plaintiffs' allegations in their constitutional claims simply assert the existence of a liberty interest and that it was violated. (R pp 13-16). While the trial court did not expressly address this pleading failure in its dismissal order, it is fatal to Plaintiffs' constitutional claims. The Board raised this argument in its briefing to the trial court, and it remains available as the appropriate initial step in this Court's analysis. For lack of a required element in the pleadings, *both* Plaintiffs' state constitutional claims are appropriately dismissed under Rule 12(b)(6).

*4 B. *The trial court properly determined that direct claims under the North Carolina constitution are unavailable against the Board due to the existence of an adequate state law remedy.*

Even if Plaintiffs had alleged a lack of adequate state law remedy, the Complaint contains on its face the possibility of a remedy under state law in the battery claim asserted against the Board as well as the battery claim asserted against Defendant Old North State Medical Society, a private entity not entitled to governmental immunity. As such, the state constitutional claims should be dismissed, because "a direct cause of action under the State Constitution is permitted only 'in the absence of an adequate state remedy.'" *Davis v. Town of Southern Pines*, 116 N.C.App. 663, 675, 449 S.E.2d 240, 247 (1994) (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)).

There are several different avenues by which Plaintiffs had an adequate state law remedy available to them. Our Court of Appeals has held:

> [A]dequacy of a state law remedy depends upon the injury alleged by a plaintiff, rather than upon the party from whom a plaintiff seeks recovery. While the law generally allows plaintiffs to select the defendant(s) from whom they wish to obtain relief, such is not the case when doing so requires the extraordinary exercise of the judiciary's constitutional power necessary to permit a *Corum* claim. *See, e.g., Wilcox [v. City of Asheville]*, 222 N.C. App. [285,] 301-02, 730 S.E.2d [226,] 238-39 [(2012)] ***5** (holding that suit against a defendant in his individual capacity is sufficient to preclude the plaintiff from asserting a *Corum* claim against the defendant in his official capacity); *Phillips v. Gray*, 163 N.C. App. 52, 57-58, 592 S.E.2d 229, 233 (2004) (holding that a plaintiff's rights were adequately protected by a wrongful discharge claim against a Sheriff in his individual capacity so that dismissal of the plaintiff's free speech claim against the Sheriff in his official capacity was appropriate). **So long as a plaintiff has a means of recovering for the alleged**

constitutional injury, the plaintiff may not use *Corum* to assert a direct constitutional claim against the State as a means of bypassing some fatal defense.

Taylor v. Wake Cty., 258 N.C. App. 178, 188-89, 811 S.E.2d 648, 656, *appeal dismissed, rev. denied*, 371 N.C. 569, 819 S.E.2d 394 (2018) (emphasis added); *see also DeBaun v. Kuszaj*, 238 N.C. App. 36, 41, 767 S.E.2d 353, 357, *rev. denied*, 368 N.C. 244, 768 S.E.2d 853 (2014) (holding that plaintiff could not bring cause of action under state constitution against city or police officer because he could seek remedy for alleged injuries through other claims, including assault and battery, use of excessive force, and malicious prosecution). It is also well-established that a remedy is not inadequate simply because it fails to provide a remedy against the governmental entity itself. *Rousselo v. Starling*, 128 N.C. App. 439, 448, 495 S.E.2d 725, 731, *appeal dismissed*, 348 N.C. 74, 505 S.E.2d 876, *rev. denied*, 348 N.C. 74, 505 S.E.2d 876 (1998) ("the existence of an adequate alternate remedy is premised on whether there ***6** is a remedy available to plaintiff for the violation, not on whether there is a right to obtain that remedy from the State in a common law tort action").

Here, Plaintiffs raise a common law battery claim under state law. That tort claim is clearly an adequate state law remedy for the violation complained of - namely, an allegedly unconsented-to invasion of the person of Tanner Smith. Plaintiff does not appear to argue that a battery claim is substantively inadequate related to remedy Tanner Smith's constitutional claim, only that the battery claim was also dismissed and therefore is unavailable. Any argument that a properly pled battery claim would not adequately remedy the injury is therefore waived. Even if it weren't waived, Tanner Smith's constitutional claim is based on the liberty interest in bodily autonomy, which was allegedly violated by the injection of a vaccine into his arm without consent. That is precisely the alleged violation supporting the battery claim as well - an unconsented invasion of his body. There can be no question that the battery claim represents an appropriate state law remedy for Tanner Smith's claims.

But while Plaintiff argues otherwise, Emily Happel's constitutional claims are *also* adequately remedied by a properly brought battery claim. ***7** Exact alignment between the state law tort and the alleged constitutional violation is not required in the adequate remedy analysis. For example, in *Taylor*, a wrongful discharge claim was deemed an adequate remedy for a free speech violation. In *DeBaun*, assault, battery, and excessive force claims where adequate remedies for constitutional deprivations related to searches and other liberty interests. Courts do not reach constitutional claims where the *injury* can be remedied via state law remedies. Here, both Tanner Smith's bodily autonomy and Emily Happel's parental rights, if they were in fact violated, are properly remedied by damages under state tort law. In addition, as noted in the argument below with respect to the PREP Act, there is a federal fund available for all claims for loss related to a covered countermeasure. The availability of this federal remedy is another adequate avenue for relief that precludes a direct constitutional claim. *See Freeman v. Duke Power Co.*, No. 1:00CV00665, 2003 WL 21981291, at *6 (M.D.N.C. Aug. 15, 2003), *aff'd*, 114 F. App'x 526 (4th Cir. 2004) ("Mr. Freeman was entitled to seek relief pursuant to § 301 of the [federal Labor Management Relations Act]. He is not without an adequate legal remedy and thus cannot state a claim directly under the North Carolina Constitution.")

***8** Finally, Plaintiffs' argument that the Board's statutory immunity to the battery claim renders it an inadequate remedy ignores three key issues. First, the Board's statutory immunity does not prevent battery claims against Old North State. Second, the Complaint alleges a waiver of governmental immunity and the Board has not denied that, so governmental immunity is not an "absolute bar" to Plaintiff's claims as discussed in *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.* 363 N.C. 334, 340, 678 S.E.2d 351, 355 (2009) ("Plaintiff's common law cause of action for negligence does not provide an adequate remedy at state law when **governmental immunity** stands as an **absolute bar** to such a claim.") (emphasis added). Rather, the Board's immunity argument in this case is based on a federal statute and a state statute, not a state jurisdictional barrier. But third, and perhaps most importantly, the trial court dismissed the battery claim against the Board *under Rule 12(b)(6)*, and only referred to immunity arguments as an alternative, additional ground. (R p 55). Plaintiffs cannot fail to state a claim on an available tort claim, and

then use their own inadequate pleadings as the reason the available state law remedy is inadequate. Direct constitutional claims do not spring up as a protection against flawed pleadings. *Taylor*, 258 N.C. App. at 189, 811 S.E.2d at 656 ***9** ("the plaintiff may not use *Corum* to assert a direct constitutional claim against the State as a means of bypassing some fatal defense").

C. *While the trial court correctly dismissed Emily Happel's constitutional claims because of the existence of an adequate state law remedy, Plaintiff Happel also fails to state a claim more generally.*

As argued above and as found by the trial court, Emily Happel's constitutional claims are also subject to dismissal because of the failure to plead the absence of an adequate state law remedy, and because the battery claim, properly pleaded, would have served as an adequate state law remedy, whether against the Board or Old North State. The fact that Plaintiff has re-labeled the interest at issue as a constitutional right does not change the fact that the injury arises out of the physical delivery of the vaccine to Tanner, for which the battery claim represents an adequate remedy at law.

However, should this Court for any reason determine that Emily Happel's constitutional claim is categorically different such that it cannot be remedied by the battery claim by her minor child or via access to the federal fund under the PREP Act, the Board also argues that such a claim is not cognizable in and of itself.

***10** First, there is no specific constitutional right alleged in the Complaint beyond a generic reference to a "liberty interest" to "raise her son and to have control over his care and custody." (R p 13). No specific text of the North Carolina Constitution is cited in reference to this parental right, (R p 13-14); Plaintiff merely invokes broad constitutional ideals, including Article 1 (The Equality and Rights of Persons), Article 13 (Religious Liberty), and Article 19 (the Law of the Land Clause). Articles 1 and 13 have nothing to offer this case. Article 1 simply reaffirms that "all persons are created equal" and the existence of "certain inalienable rights." The Complaint does not mention religion or religious beliefs at all, so Article 13 has no bearing on the analysis either. Thus, Plaintiff Emily Happel must rely entirely on the Law of the Land Clause as the basis for a claim that her child receiving a vaccine without her direct consent is a *constitutional* violation for which damages may be collected.

An examination of the scope of the right to custody and control reveals that Plaintiff Happel seeks a vast expansion of an otherwise narrow right in this case. While parental rights under the 14th Amendment of the United States Constitution have been litigated ***11** extensively and have a body of case law analyzing them, Plaintiffs have expressly abandoned all federal constitutional claims here. Emily Happel's remaining claim is entirely under the North Carolina Constitution, and while "North Carolina's recognition of the paramount right of parents to custody, care, and nurture of their children antedates the constitutional protections set forth in *Stanley* [*v. Illinois*, 405 U.S. 645 (1972)]," *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994), case law on a parent's right to custody and control of their child under the North Carolina Constitution is quite limited in reach. North Carolina cases discussing constitutional rights regarding parenting relate almost exclusively to custody disputes or child protection services decisions - the literal "custody and control" of the child. *E.g., Penland v. Harris*, 135 N.C. App. 359 (1999) (custody dispute); *Matter of D.C.* 378 N.C. 556, 862 S.E.2d 614 (2021) (child protection proceeding). These cases do not analyze the scope of the right beyond that specific context. *See, e.g., Matter of M.S.*, 888 S.E.2d 242 (2023) (stating that state constitution "protects a natural parent's paramount constitutional right to custody and control of his or her children and ensures that the government may take a child away from his or her natural parent only upon a showing ***12** that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status.") (citing *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001)). Such cases have little relevance to this case, in which the alleged violation is not one of custody and control, but rather adherence to a *brand new* statutory requirement for parental consent for vaccines under an Emergency Use Authorization. [1]

Outside of the specific context of child custody, there is almost no case law on the subject. Undersigned counsel has been able to locate three appellate cases that even discuss this right under the North Carolina Constitution outside of custody disputes and

child protection services. *Kelly v. State*, 286 N.C. App. 23, 875 S.E.2d 841 (2023) was a dispute about a motion to intervene in litigation about the Opportunity Scholarship Program and whether a case was properly assigned to a three-judge panel, which mentioned the right to direct a child's upbringing only once in passing, *id.* at 38 (rejecting effort at transfer of venue, stating that "they claim the trial court's Order affects the right 'of ***13** parents to use Program scholarships to direct their children's upbringing and education.' This contention is meritless.") *Wake Cares, Inc. v. Wake County Bd. Of Educ.*, 363 N.C. 165, 675 S.E.2d 345 (2009), was a case regarding year-round school calendars in which the right was cited only in one paragraph of the dissent as a general comment, *id.* at 188. *Delconte v. State*, 313 N.C. 384, 329 S.E.2d 636 (1985), was a case about compulsory attendance in which the right was referenced with respect to whether the state compulsory attendance law prohibited homeschooling, and the Court declined to decide the constitutional question because it could decide the case on standard statutory interpretation grounds, *id.* at 401. No North Carolina court has created a private right of action under the state constitution for a parent whose wishes were allegedly disregarded in a school-related context.

Plaintiff's claim to a constitutional violation related to her desire for her child not to be vaccinated is also contrary to long-standing precedent supporting that schools may require vaccinations for students to even attend. *Hutchins v. School Committee of Town of Durham*, 137 N.C. 68, 49 S.E. 46 (1904). While in this case the vaccination was not compulsory for school attendance, the fact that it lawfully *could* have ***14** been strongly supports the argument that an undesired vaccination cannot be the source of a constitutional claim related to parental rights.

Moreover, as noted in footnote 1, even the *statutory* violation at issue here was mere hours old when the alleged violation occurred. That very morning, Tanner himself had the statutory right to consent to the vaccination. Absent an argument that N.C.G.S. § 90-21.5 was or is unconstitutional (which Plaintiffs have not made), it is difficult to see how a technical change in a single statute - creating a new requirement for parental consent only for vaccines available under an Emergency Use Authorization - can operate to vastly expand the reach of the parental right to direct the upbringing of their child.

While there is no question that a parent's right to custody and control of their child exists in North Carolina as against governmental intervention regarding custody, it does not provide for a damages claim every time a parent's wishes are not adhered to by a governmental entity interacting with their child. This Court need not explore the scope of the constitutional right to parent in this case because of the other available bases for dismissal, but it would be an alternative ground on which to affirm.

15 D.** ***The trial court correctly concluded that Plaintiff's allegations related to their battery claim failed to state a claim as to the Board.

The trial court also correctly relied on Rule 12(b)(6) to dismiss Plaintiffs' battery claims on two independent grounds. First, Plaintiffs failed to raise any allegation that would support vicarious liability of the Board. In addition, battery is an intentional tort, and Plaintiffs failed to sufficiently allege facts that would support liability of the Board for the intentional tort of an employee or agent.

"As a general rule, liability of a principal for the torts of its agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business[;] or (3) when the agent's act is ratified by the principal." *Hendrix v. Town of W. Jefferson*, 273 N.C. App. 27, 32-33, 847 S.E.2d 903, 907 (2020). But importantly, battery is an intentional tort, and it is well-established in North Carolina that intentional tortious acts "are rarely considered to be within the scope of an employee's employment." *Medlin v. Bass*, 327 N.C. 587, 594, 398 S.E.2d 460, 464 (1990). *See also Robinson v. Durham Pub. Sch. Bd. of Educ.*, No. 1:13CV652, 2014 WL 3894368, at *7 (M.D.N.C. Aug. 7, 2014) ***16** (dismissing claims against school board for assault and battery committed by school employee upon co-worker).

Here, the trial court correctly identified that the Complaint on its face fails to identify any employee or agent of the Board who administered the vaccine to Tanner Smith, or even to allege that the vaccine *was* administered by an employee or agent of the Board. It makes no allegation about the Board expressly authorizing the act of vaccinating a student without parent consent. It makes no allegation that the vaccine was administered within the scope of the employment of a Board employee, or that vaccinating a student without parental consent furthered the Board's business. It makes no allegation that the Board ratified the action of such person. In fact, the Complaint alleges on its face that the Board had published a flyer specifically stating that parental consent was required in order to receive a vaccine. (R p 11). In addition, there is no allegation that a Board employee administered the vaccine or was involved in any way. Rather, as presented in the Complaint, the vaccine was administered after Tanner declined consent and the clinic "worker" overseeing the vaccination said "Give it to him anyway." (R pp 10-11). Taken as true, the pleadings themselves appear ***17** to show a clinic worker operating outside of protocols intentionally, which cannot be attributed to the Board.

Plaintiffs attempt to paper over these glaring pleading flaws with conclusory statements in the brief like "The scope of their employment was to administer vaccines." The problem with these statements in Plaintiffs' brief is that they aren't alleged in the Complaint or supported by the allegations in the Complaint. No employment relationship is alleged anywhere in the Complaint, let alone an explanation of the scope of that employment. Plaintiffs also attempt to draw analogies to "negligent driving" and "frolic and detour" concepts, which are entirely inapposite here when the tort as alleged was neither negligence-based nor related to a frolic-and-detour.

Without specific allegations to support that this alleged battery, an intentional tort, was undertaken by a Board employee within the scope of employment, the Complaint fails to state a claim for vicarious liability of the Board. [2]

*18 II. THE TRIAL COURT PROPERLY FOUND THAT THE BOARD HELD STATUTORY IMMUNITIES TO LIABILITY UNDER RULE 12(b)(6).

A. *The Board has statutory immunity* [3] *to claims regarding the administration of a covered measure under the PREP Act.*

It has been and remains the Board's primary position that it had no role in the administration of the vaccine that is the basis of this lawsuit, and that liability (if any) would lie solely with Defendant Old North State Medical Society. However, because the Complaint alleges that the vaccine clinic was a "joint venture" and "operated jointly" by the Defendants, (R p 10), and such allegations are taken as true in the current procedural posture, the Board also has asserted that it is immune as a "covered person" under the Public Readiness and Emergency Preparedness Act ("PREP Act"). *See* 42 U.S.C. § 247d-6d(i)(2). [4] Plaintiffs do not appear to contest the trial court's determination that the Board is a "covered person" - they merely note in briefing that "it is unclear under what theory the Board was a covered person" and then affirmatively state ***19** that "the only acceptable theory is that it is because of the Board's involvement in the partnership with ONSMS…" Since Plaintiffs acknowledge this theory is "acceptable" and do not argue against it, they appear to have waived the issue and the Board will not respond further on this point. N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *Bridges v. Parrish*, 222 N.C. App. 320, 328, 731 S.E.2d 262, 268 (2012), *aff'd*, 366 N.C. 539, 742 S.E.2d 794 (2013) ("[B]ecause plaintiff merely alluded to this … but did not support it with any substantive arguments, it is deemed waived on appeal.").

The PREP Act provides that a "covered person shall be **immune 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 if a declaration [5] under subsection (b) has been issued with respect to such countermeasure." 42 U.S.C. § 247d-6d(a)(1). "The ***20** immunity under paragraph (1) applies to any claim for loss that has a

causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the…dispensing [or] administration…or use of such countermeasure." 42 U.S.C. § 247d-6d(a)(2)(B).

In this case, it is alleged that the Board was involved in a joint venture to administer and dispense a covered countermeasure while the required declaration was in effect. Therefore, the Board is "immune from suit and liability under Federal and State Law with respect to all claims for loss" related to the administration of a vaccine to Tanner Smith (including Emily Happel's constitutional claim regarding parental rights), and the claims against the Board must be dismissed for failure to state a claim upon which relief may be granted.

B. ***The Board has statutory immunity to claims regarding a third party using school facilities.***

In addition to the PREP Act immunity, the trial court also properly identified that the Complaint as pled supports application of statutory immunity for claims arising from non-school events held on school property under N.C.G.S. § 115C-524. That statute reads:

> ***21** Notwithstanding the provisions of G.S. § 115C-263 and 115C-264, local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. **No liability shall attach to any board of education**, individually or collectively, for personal injury suffered by reason of the use of such school property pursuant to such agreements.

N.C.G.S. § 115C-524(c) (emphasis added).

The immunity for school boards related to third-party facility use under this statute is expansive - it applies despite any allegation of negligence by the Board and without regard to the purchase of liability insurance. *See Lindler v. Duplin Co. Bd. of Ed.*, 108 N.C. App. 757, 425 S.E.2d 465 (1993). More than one plaintiff has argued unsuccessfully that the statute should be narrowly construed. *See id.; see also Plemmons by Teeter v. City of Gastonia*, 62 N.C. App. 470, 302 S.E.2d 905 (1983). However, the statute itself "provides no chink in its armor of immunity, even for the sword of active negligence." *Plemmons*,62 N.C. App. at 473, 302 S.E.2d at 907. The language of the statute plainly indicates that the legislature intended to preclude liability from attaching to boards when school buildings are used for non-school purposes. *Lindler*, 108 N.C. App. at 760, 425 S.E.2d at 467.

***22** Plaintiffs argue in their brief that this case does not fall under section 115C-524 because "[t]his is not a situation where the school facility was simply being used by a third-party with little-to-no oversight." This statement has no bearing on the application of the statute, which by its text does not apply based on the amount of oversight, but instead on the existence of an agreement. Plaintiffs pled such an agreement in their Complaint, and cannot now evade that fatal pleading.

There is no dispute, taking the allegations in the Complaint as true, that Tanner Smith was at Western Guilford High School for a non-school purpose - he came to campus on a Saturday to receive a COVID-19 test. (R p 10). The Complaint on its face alleges that the vaccine clinic was a "joint venture" between the Board and ONSMS. (R p 10). As such, taken as true, the Complaint provides on its face that the Board and ONSMS had agreed to hold this clinic on school grounds, supporting the application of N.C.G.S. § 115C-524, and the Board is completely immune to Plaintiffs' claims arising out of Tanner Smith's attendance at this non-school activity.

*23 CONCLUSION

The trial court presented this Court with an order that provides numerous paths to affirmance of the dismissal of Plaintiffs' case. This Court need not engage in complicated constitutional issues in order to affirm the trial court's order, and could do so solely on the inadequacy of the pleadings. But even if this Court reaches the constitutional issues, the trial court's analysis is correct and should be affirmed.

Respectfully submitted this 20th day of September 2023.

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Footnotes

1 An amendment to N.C.G.S. § 90-21.5 (titled “Minor's consent sufficient for certain medical health services”) added a parental consent requirement specific to vaccines offered under an Emergency Use Authorization the very same day as this incident, mere hours before Tanner Smith received the vaccine in question. *See* S.L. 2021-110 (effective August 20, 2021 at 12pm).

2 Even if ONSMS's staff could be considered agents or employees of the Board (an idea the Board does not concede and which the Complaint does not allege), there is no allegation nor any reason to infer that providing vaccines over the objection of a minor would be within the scope of such employment or agency.

3 While sovereign and governmental immunity are considered jurisdictional in North Carolina, statutory immunities are not and relate instead to Rule 12(b)(6). *See Shannon v. Testen*, 243 N.C. App. 386, 392, 777 S.E.2d 153, 157 (2015).

4 The PREP Act provides, in effect, "field preemption" on this issue and directs claims to a federal fund rather than courts. *See Dupervil v. All. Health Operations, LCC*, 516 F. Supp. 3d 238, 251 (E.D.N.Y. 2021) (opinion vacated, appeal dismissed pursuant to voluntary dismissal of suit) 2022 WL 3756009 (2d Cir. Aug. 1, 2022). Plaintiffs' remedy, if any, is to make a claim to that fund.

5 The trial court properly took judicial notice of the fact that the required declaration by the U.S. Department of Health and Human Services was in place for the Pfizer COVID-19 vaccine at the time of the vaccination at issue in this case. *https://aspr.hhs.gov/legal/PREPact/Pages/ default.aspx*. *See Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 641, 256 S.E.2d 692, 696 (1979) ("[I]t is clear that judicial notice can be used in rulings on demurrers or motions to dismiss for failure to state a claim.")

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2023 WL 6223058 (N.C.App.) (Appellate Brief)
Court of Appeals of North Carolina,
Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and Emily Happel on behalf of Tanner Smith as his mother, Plaintiff-Appellants,

v.

GUILFORD COUNTY BOARD OF EDUCATION and Old North State Medical Society, Inc., Defendant-Appellees.

No. COA23-487.
September 18, 2023.

From Guilford County 22-CVS-7024

Response to Appellants' Brief By Defendant-Appellee Old North State Medical Society, Inc.

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***ii** *INDEX*

iv** ***TABLE OF CASES AND AUTHORITIES

INTRODUCTION

Many appeals present difficult legal issues. This is not one of those appeals, because all of plaintiffs' claims are expressly precluded by the immunity provision of the federal PREP Act, 42 U.S.C. § 247d-6d. (A copy of the PREP Act is attached at App. 1-16). Beyond that, Plaintiffs' claims against Defendant Old North State Medical Society, Inc. (the "Medical Society") fail for the additional reasons identified by the trial court such as that: Plaintiffs failed to allege that the Medical Society was acting under color of law or was a state actor, that Plaintiffs' lack standing for a direct ***2** constitutional claim, that Plaintiffs failed to adequately allege the intentional tort of battery, and that Defendants had statutory immunity under N.C. Gen. Stat. § 1150 524. (See Rpp 52-59).

ARGUMENT

I. All of Plaintiffs' Claims Are Preempted by the PREP Act

The PREP Act was enacted on December 30, 2005. It authorizes the Secretary of Health and Human Services - in response to a public health emergency - to issue declarations recommending the manufacture, testing, development, distribution, administration, or use of "covered countermeasures." 42 U.S.C. § 247d-6d(b)(l). "Covered countermeasures" include, among other things, vaccines authorized for emergency use to combat a public health emergency. *See* 42 U.S.C. § 247d-6d(i)(l)(C).

When the Secretary has issued such a declaration, the PREP Act grants "covered persons" immunity "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). This immunity applies only if the countermeasure is used or administered: (1) during the effective period of the declaration; (2) for the category of diseases specified in the declaration; and (3) to an individual in the population and geographic area specified by the declaration. 42 U.S.C. § 247d-6d(a)(3).
The immunity granted under the PREP Act is broad and applies to

any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, ***3** packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.

42 U.S.C. § 247d-6d(a)(2)(B).

The Act defines "loss" as "any type of loss, including - (i) death; (ii) physical, mental, or emotional injury, illness, disability, or condition; (iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and (iv) loss of or damage to property, including business interruption loss." 42 U.S.C. § 247d-6d(a)(2)(A).

The PREP Act's preemption clause is similarly sweeping, stating that during the effective period of a declaration of a public health emergency:
[N]o State … may estabhsh, enforce, or continue in effect with respect to a covered countermeasure any provision of law or legal requirement that -

(A) is different from, or is in conflict with, any requirement applicable under this section; and

(B) relates to the design, development, chnical testing or investigation, formulation, manufacture, distribution, sale, donation, purchase, marketing, promotion, packaging, labeling, licensing, use, any other aspect of safety or efficacy, or the prescribing, dispensing, or administration by qualified persons of the covered countermeasure, or to any matter included in a requirement applicable to the covered countermeasure under this section or any other provision of this chapter

....

42 U.S.C. § 247d-6d(b)(8). This language includes tort claims. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("[a]bsent other indication, reference to a State's 'requirements' includes its common-law duties").

The sole exception to this immunity is a federal action for death or serious physical injury caused by willful misconduct. 42 U.S.C. § 247d-6d(d)(1). Any such ***4** claim must be brought exclusively in the United States District Court for the District of Columbia. 42 U.S.C. § 247d-6d(e)(1). This exception does not apply to negligent or reckless conduct resulting in loss. 42 U.S.C. § 247d-6d(c)(1)(B).

Alongside the PREP Act's grant of immunity, Congress established an alternative administrative process for redressing the harm caused by covered countermeasures - the Covered Countermeasure Process Fund. *See* 42 U.S.C. § 247d-6e. This fund provides compensation to "eligible individuals for covered injuries directly caused by the administration or use of a

covered countermeasure" pursuant to a declared public health emergency. *See* 42 U.S.C. § 247d-6e(a). The fund furnishes monetary damages, including unreimbursed medical expenses, lost-employment income, and survivor death benefits to eligible individuals. 42 U.S.C. § 247d-6e.

In early 2020, the Secretary issued a declaration (the "Declaration") determining that COVID-19 was a public health emergency and activating the PREP Act's liability immunity for activities related to medical countermeasures against COVID-19. This declaration identified the covered countermeasures for which liability immunity is in effect 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" that also meets the definition of "covered countermeasure" provided in the Act. Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198, 15202 (March 17, 2020). (A copy of the Declaration is attached at App. 17-22).

***5 A. The PREP Act Applies to This Situation**

Plaintiffs' allegations, in a nutshell are that, in the course of conducting a free COVID-19 vaccination clinic, the Medical Society administered the Pfizer COVID-19 vaccine to Tanner Smith, a minor, without his or his parents' consent. That is precisely the sort of claim that is expressly preempted by the PREP Act's broad immunity provisions.

A court analyzing the meaning of a statute or regulation should first look at its "plain and unambiguous meaning," and if the language is clear, the analysis ends. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *see also Raleigh Hous. Auth. v. Winston*, 2021-NCSO16, ¶ 9, 376 N.C. 790, 795. "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

Here, the PREP Act provides liability protections for persons who administer pandemic countermeasures. *See* 42 U.S.C. § 247 d-6d. The Act's immunity provision states:

> [A] ***covered person*** shall be immune 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*** if a declaration [of a public health emergency] has been issued [by the Secretary] with respect to such countermeasure.

§§ 247d-6d(a)(1), 247d-6d(b) (emphasis added).

The scope of this immunity "applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered ***6** countermeasure, including a causal relationship with the … distribution, … dispensing, … administration, … or use of such countermeasure." § 247d-6d(a)(2)(B) (emphasis added).

Pursuant to the plain language of the statute, therefore, immunity exists where the allegations of the complaint show a *covered loss* arising from a *covered person's* use of a *covered countermeasure.*

1. Plaintiffs Acknowledge That the Pfizer COVID-19 Vaccine Is a "covered countermeasure"

Plaintiffs do not dispute, and, in fact, repeatedly allege, that Tanner was injected with the Pfizer COVID-19 vaccine. (*See* R pp 11-16 (¶¶ 23, 25-26,31-36, 44, 46, 53, 57, 59, 66)). Further, Plaintiffs do "not dispute[] that the Pfizer COVID-19 vaccine was a 'covered countermeasure.'" (Appellants' Br. p15). Accordingly, they have waived any argument to the contrary. In any event, the vaccine that Tanner received was a covered countermeasure under the PREP Act. *See, e.g., M. T. as next friend of M.K. v. Walmart Stores, Inc.*, 63 Kan. App. 2d 401, 411, 528 P.3d 1067, 1075 (2023).

In March 2020, the Secretary issued the Declaration regarding the COVID-19 pandemic under the PREP Act. Trial and appellate courts may take judicial notice of "important public documents" such as the Declaration. *See Utilities Comm. v. Southern Bell Telephone Company*, 289 N.C. 286, 288, 221 S.E.2d 322, 323 (1976). Pursuant to Section VI of that Declaration, as a vaccine used to prevent or mitigate COVID-19 or the transmission of SARS-CoV-2, the Pfizer COVID-19 vaccine ***7** received by Tanner was a covered countermeasure. *See* Declaration, § VI (85 Fed. Reg. 15202);

2. Plaintiffs Do Not Dispute That the Medical Society Is A "Covered Person" Under the PREP Act

Plaintiffs dispute whether *the Board* is a covered person under the Act, but appears to accept that the Medical Society was. (*See* Appellant's Br. p 15 ("The trial court found that both ONSMS and the Board were 'covered persons.' It is unclear under what theory the Board was a covered person under the trial court's reasoning, but the only acceptable theory is that it is because of the Board's involvement in the partnership with ONSMS in operating and providing the locations for the vaccine clinics. *See* 42 U.S.C. §247d-6d(i)(2) (defining 'covered persons')."").

By not disputing the issue in its brief, Plaintiffs have waived any argument that the Medical Society was not acting as a covered person. *See*, N.C.R. App. 28(b)(6) (issues in support of which no reason or argument is stated, will be taken as abandoned). In any event, with regard to the acts alleged, the Medical Society and its agents and employees were covered persons because they were authorized to administer and dispense, and were administering and dispensing, the covered countermeasure, i.e., the COVID-19 vaccine. *See* 42 U.S.C.A § 247d-6d(i)(2)(B); *see also Goins v. Saint Elizabeth Med. Ctr.*, 640 F. Supp. 3d 745, 754 (E.D. Ky. 2022) (finding Kroger Company, who distributed and administered the vaccine, to be a covered person); *M.T. v. Walmart*, 63 Kan. App. 2d at 413, 528 P.3d at 1077 (finding Walmart Stores, who distributed and administered the vaccine, to be a covered person).

***8 3. Plaintiffs' Claims Are for a Covered Loss**

In the PREP Act, Congress plainly provided immunity under both 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." *See 42* U.S.C. § 247d-6d(a)(1).

All of Plaintiffs' claims arise from the same alleged act, i.e., the Medical Society's administration of a COVID vaccine to Tanner without the consent of Tanner or a parent. Every case we have found that addressed the issue has held that the PREP Act's immunity provisions extend to qualified persons who administer a covered countermeasure to an individual without consent, including to a plaintiff's minor child. *See Parker v. St. Lawrence Cnty. Pub. Health Dep't*, 102 A.D.3d 140, 144, 954 N.Y.S.2d 259, 262 (2012); *Cowen v. Walgreen Co.*, No. 22-CV-157, 2022 WL 17640208, at *3 (N.D. Okla. Dec. 13, 2022), *appeal dismissed*, No. 23-5003, 2023 WL 4419805 (10th Cir. June 5, 2023); *M.T. v. Walmart*, 63 Kan. App. 2d at 411, 528 P.3d at 1075.

Parker was a pre-COVID case, which dealt with the Secretary's declaration authorizing covered countermeasures (including vaccines) regarding the H1N1 influenza virus. In *Parker*, the defendant County Health Department held a vaccination clinic at a public school pursuant to the Secretary's declarations. *Parker*, 102 A.D.3d at 141, 954 N.Y.S.2d at 261. A nurse employed by defendant administered a vaccination to a kindergartner without first obtaining consent from either parent. *Id.* The parents of the

kindergartner sued the county health department, claiming ***9** that the administration of the inoculation to the kindergartner by the department's nurse without the parents' consent constituted negligence and resulted in a battery upon her. *Id.*

The sole issue was whether plaintiffs' claims were preempted by the immunity provisions of the PREP Act. In considering the matter, the New York Appellate Division looked at the "plain wording" of the immunity provision and held that "[c]onsidering the breadth of the preemption clause together with the sweeping language of the statute's immunity provision, we conclude that Congress intended to preempt all state law tort claims arising from the administration of covered countermeasures by a qualified person pursuant to a declaration by the Secretary, including one based upon a defendant's failure to obtain consent." *Id.* at 143-44, 954 N.Y.S.2d at 262. Accordingly, all of plaintiffs' claims were barred by the immunity provision of the PREP Act.

In *Cowen v. Walgreen*, plaintiff alleged that she went to Walgreens for a flu vaccination, and instead received a COVID-19 vaccination without her consent. *Cowen*, No. 22-CV-157, 2022 WL 17640208, at *3. Walgreen argued that it had immunity under the PREP Act because plaintiff's claims that she was administered a vaccine without her consent related directly to Defendant's use and administration of a covered countermeasure - i.e., the COVID-19 vaccine that plaintiff received. *Id.* at *2. In opposition to immunity, plaintiff contended "that her claims should be construed more broadly because her injury could have happened whether she received a COVID-19 vaccine or any other vaccine." *Id.* This argument - which was ***10** rejected by the Court - is the same argument that *these plaintiffs* have made. (*See, e.g.*, Appellants' Br. p 15 (arguing that their claims "are not because this related to COVID-19, but they happen to relate to COVID-19"), *id.* at p 16 (arguing it would not be "logical" for there to be immunity simply because the "substance was a COVID-19 vaccine" when there would be no immunity if "defendants had injected Tanner with saline").

After reviewing the relevant law, the Court held that Walgreen had immunity from plaintiff's state law claims and that her remedy for any alleged injuries was through the Countermeasures Injury Compensation Program. "In the PREP Act, Congress plainly provided immunity under both 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 if the HHS Secretary issues a declaration." *Cowen*, No. 22-CV-157, 2022 WL 17640208, at *3. Despite Cowen's argument that the harm "could have resulted from any vaccination or other medical procedure at Walgreens," the "chain of events" she alleged could not "be separated from the administration of a covered countermeasure - the COVID-19 vaccine she received." *Id.* "While it is true that other vaccinations or procedures might have also been administered, this does not change the fact that Plaintiff's injuries actually resulted from administration of the COVID-19 vaccine. The PREP Act therefore applies." *Id.*

In *M.T. v. Walmart Stores*, the Kansas Court of Appeals followed *Parker* and *Cowen* and held that PREP Act immunity applied to claims based on the failure to ***11** secure parental consent. *See M.T. v. Walmart*, 63 Kan. App. 2d at 423-27, 528 P.3d at 1082-85. The Kansas court noted that the PREP Act provides immunity for "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." *Id.* at 423, 528 P.3d at 1082 (quoting 42 U.S.C. § 247d-6d(a)(l)). Further, the statute explicitly instructs that immunity applies to "any claim for loss that has a *causal relationship* with the administration to … an individual of a covered countermeasure." *Id.* at 423-24 (*quoting* 42 U.S.C. § 247d-6d(a)(2)(B)) (emphasis added).

The Court acknowledged that the PREP Act did not expressly mention parental consent. However, Congress' "intent to preempt all state claims relating to the administration of a covered countermeasure, including those related to the administration of a vaccine to a minor without parental consent" was clear from the broad language of the statute. *Id.* at 425, 528 P.3d at 1083. This included *all* claims, including allegations of violation of fundamental constitutional rights. *See id.*

The Kansas court observed that in federal statutes preempting state causes of action, the phrases "relate to" and "relating to" must be read broadly. *See id. (citing Pilot Life Ins. Company v. Dedeaux*, 481 U.S. 41 (1987) (explaining that the phrase "relate to" has a broad common-sense meaning, such that a state law "relates to" An ERISA benefit plan "in the normal sense of the

phrase, if it has a connection with or reference to such a plan"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383- 84 (1992) ***12** (describing the term "relating to" as "deliberately expansive" and "conspicuous for its breadth").

The Court further observed that the test for causation in fact is a "but for" test. Clearly, "but for the administration of the vaccine, Mother would have no claim based on the administration of the vaccine without consent." *Id.* at 424. Because all of her claims were relating to, or resulting from, defendant's administration of a covered countermeasure, all claims were barred by PREP Act immunity.

In so finding, the Court favorably considered *Parker* and *Cowen*, which it found to be on point and persuasive because each of those cases directly addressed the actual administration of a covered countermeasure without consent. In contrast, the Court correctly rejected applicability of the "plethora of federal district court cases" cited by mother for her proposition that "the PREP Act does not apply to 'claims of inaction,'" which, she argued, would include a failure to obtain consent. *See Id.* at 414, 528 P.3d at 1077 (and cases cited thereat).

All, or most, of the cases cited by mother were situations where the claims came from defendant's alleged wrongful ***failure to administer*** a countermeasure. Typically, these were nursing home cases where plaintiffs claimed they were harmed by COVID because the nursing home ***did not administer*** a vaccine. The Court noted that those cases did not hold that PREP Act immunity does not apply to claims based on "failures to act," as plaintiff alleged. "Rather, the district court in each case found that while the Act applies to claims causally related to the administration or use of covered countermeasures, it does not apply to claims based on the failure to ***13** administer or use covered countermeasures." *Id.* at 415, 528 P.3d at 1078. But *M.T.* did not present such a scenario. Rather, in *M.T.* (just as in this case), the claims did not arise because defendants *failed* to administer a countermeasure. Rather, all claims flowed inexorably from the fact that defendants did - in fact - administer a covered countermeasure, i.e., a vaccine. Accordingly, immunity was required by the statute.

Here, Plaintiffs argue that PREP Act immunity should not apply because their claims (according to Plaintiffs' brief) "are not dependent on COVID-19 and the COVID-19 vaccine and its administration." (Appellants' Br. p 15). In Plaintiffs' present telling, plaintiffs' claims "are not because this relates to COVID-19, but they **happen** to relate to COVID-19." *Id.* Plaintiffs argue that they would have their claims "regardless of what substance had been administered to Tanner." *Id.*

Plaintiffs' arguments entirely ignore their own allegations, which are clearly rooted first, foremost and always in Tanner having been administered a *COVID-19 vaccine.* More significantly, though, their arguments are contrary to the broad reach of the PREP Act as found by every court to examine the issue.

First, a motion to dismiss is based on Plaintiffs' allegations taken as true. In this case, it is impossible to read Plaintiffs' complaint without seeing that all of the facts alleged relate to the Medical Society's efforts in furtherance of combatting the spread of COVID-19. Tanner was at the high school because COVID was spreading. (R p 10 (§ 11), R p 18). The Medical Society was there to conduct a COVID-19 ***14** vaccination clinic. (Rp 10 (§§ 16-19); Rp 19). That was the framework for all of the interactions that would take place.

Again and again, the inescapable gravamen of Plaintiffs allegation is that Tanner received a *COVID-19 vaccine* without his or his parents' consent. In fact, Plaintiffs' complaint makes *fifteen* allegations concerning Tanner receiving a "COVID-19 vaccine." (R pp 10-16 (§§ 19, 23, 25, 26, 31-36, 44, 46, 53, 59, 66)).

Plaintiffs acknowledge that the vaccine was a covered countermeasure and that the Medical Society was a covered person. They would have no potential claims if the Medical Society had not administered the COVID-19 vaccine. This situation, then, is essentially the same as in *Parker, Cowen*, and *M.T. v. Walmart.* Every one of plaintiffs' claims come from the exact same nucleus of operative facts, specifically, that the Medical Society administered a COVID-19 vaccine to Tanner without his or his

parents' consent. That's their case in a sentence. Under the plain, broad, unambiguous language of the statute, all claims have a "causal relationship" with the administration and use of the COVID-19 vaccine, a covered countermeasure. Accordingly, all of Plaintiffs' claims are barred by PREP Act immunity.

Having failed to escape the broad language of the PREP Act's immunity provision, Plaintiffs then make a failed policy argument. Specifically, Plaintiffs argue that it "could not be the intent of Congress" that there would be liability if Tanner had been injected with saline solution (which is not a covered countermeasure) as opposed to a COVID-19 vaccine. *Id.* at p 16.

***15** First, as this Court well-knows, policy arguments cannot trump the clear and unambiguous language of a statute. The statute is clear - a covered person has full immunity for all claims whenever there is a causal relationship between the claims and the covered person's administration of a covered countermeasure. Whether this is a good idea is a matter for Congress, not the courts.

Second, this is exactly the argument that has been considered, and properly rejected, by other courts. *See, e.g., Cowen*, No. 22-CV-157, 2022 WL 17640208, at *3. Just as in *Cowen*, the "chain of events" alleged here cannot "be separated from the administration of a covered countermeasure - the COVID-19 vaccine [Tanner] received." *Id.* "While it is true that other vaccinations or procedures might have also been administered, this does not change the fact that Plaintiff's injuries actually resulted from administration of the COVID-19 vaccine. The PREP Act therefore applies." *Id.*

Finally, Plaintiffs' "saline solution" argument just shows an unwillingness to accept that the PREP Act means what it says. The statute's immunity only arises when the claims involve a covered countermeasure. Congress provided a definition for "covered countermeasure" and that definition limits immunity. The Pfizer vaccine was a covered countermeasure under the Act. Saline solution is ***not a covered countermeasure.*** So, clearly, it was - in fact - the intent of Congress that there should be immunity arising from the use of the COVID-19 vaccine (i.e., a covered countermeasure) but not saline solution (i.e., something other than a covered ***16** countermeasure). Again, Plaintiffs argument to the contrary is a policy argument that has no bearing on the interpretation and application of the statute at issue.

B. "Complete Preemption" Is a Federal Jurisdiction Concept That Has Nothing to Do with the Scope of Immunity

Plaintiffs' final argument against PREP Act immunity entirely misapprehends the difference between "complete preemption" (which is a federal subject matter jurisdiction concept) and the federal defense of "ordinary" or "express" preemption. (*See* Appellants' Br. pp 16-17 (*citing Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 853 (6th Cir. 2023)). As many courts have explained, complete preemption pertains only to whether a claim *may* be brought in State court or *must only* be brought in Federal court. It has no bearing on which claims are immunized. *See, e.g.*, 14C Wright and Miller, Fed. Prac. and Proc. Civ. § 3722.2 (Rev. 4th ed.) (discussing the unique contours of complete preemption compared to "ordinary' preemption") (a copy, without the 76 pages of footnotes, is attached at Appendix pp 23-29).

"Complete preemption" is a federal jurisdiction doctrine. The complete preemption doctrine "provides that if the subject matter of a putative state law claim has been totally subsumed by federal law - such that state law cannot even treat on the subject matter - then removal is appropriate." *Lontz v. Tharp*, 413 F.3d 435, 439 (4th Cir. 2005). For complete preemption to apply, "the preempting statute must not only create a federal cause of action, but must also show that Congress intended it to provide the exclusive cause of action for claims of overwhelming national interest." ***17** *Id.* at 441. Put another way, when complete preemption applies, federal law provides the *exclusive* cause of action and the claim *must* be brought in federal court.

In contrast, the defense of "federal preemption" (also referred to as "ordinary preemption" or "express preemption") "is a question and analysis entirely distinct from the doctrine of complete preemption." *Parker through Parker v. St. Jude Operating*

Co., LLC, No. 3:20-CV-01325-HZ, 2020 WL 8362407, at *6 (D. Or. Dec. 28, 2020). Unlike complete preemption, ordinary preemption (which is the type of preemption created by the PREP Act) "serves as a federal defense to state law claims, but otherwise does not confer subject-matter jurisdiction on a claim filed in state court." *See Goins*, 640 F. Supp. 3d at 752 n.4.

The PREP Act does not create any exclusive federal cause of action that would encompass Plaintiffs' state-law claims. *See Solomon v. St. Joseph Hosp.*, 62 F.4th 54, 61 (2d Cir. 2023). "Instead, the PREP Act principally creates an immunity scheme. And immunity has no bearing on complete preemption, which is a jurisdictional doctrine, not a preemption-defense doctrine." *Id.* The PREP Act merely creates federal defenses that "can be raised in the normal course of litigation." *Leroy v. Hume*, No. 21-2158-CV, 2023 WL 2928353, at *4 (2d Cir. Apr. 13, 2023). The trial court must then determine whether the defense applies. "If the answer is no … there is no federal law left to apply and the case can proceed under state law. And if the answer is yes, *the defense ends the case." Id*. (*quoting Solomon*, 62 F.4th 54, 61 n.4).

Here, the question of "complete preemption" is a red herring. The PREP Act provides federal defenses to state law claims relating to, or resulting from, the ***18** administration or use a covered countermeasures. Those claims may proceed in state court (as opposed to federal court). However, the state court must apply the immunity provided by the Act, which acts as a complete bar to Plaintiffs' claims.

C. Plaintiffs Did Not Avail Themselves of Either of the Two Avenues of Redress Permissible Under the PREP Act

The sole exception to PREP Act immunity is a federal action for death or serious physical injury caused by willful misconduct. *Cannon v. Watermark Ret. Cmtys., Inc.*, 45 F.4th 137 (D.C. Cir. 2022); 42 U.S.C. § 247d-6d(d)(l). However, any such claim must be brought exclusively in the United States District Court for the District of Columbia. 42 U.S.C. § 247d-6d(e)(1). This exception does not apply to negligent or reckless conduct resulting in loss. 42 U.S.C. § 247d-6d(c)(l)(B). The present appeal does not involve such an action.

The PREP Act also created a "Covered Countermeasure Process Fund," "for purposes of providing timely, uniform, and adequate compensation to eligible individuals for covered injuries directly caused by the administration or use of a covered countermeasure pursuant to such declaration." § 247d-6e(a). The Health Resources and Services Administration ("HRSA") administers the program. *See* Countermeasures Injury Compensation Program (CICP) (Nov. 2020), *https7/www.hrsa.gov/cicp*. Again, the present appeal does not involve such an action. Further, there is no judicial review of the agency's actions; the process is purely administrative. § 247d-6e(b)(5)(C).

*19 II. Plaintiffs' Second Through Fifth Claims Fail to State a Cause of Action Against The Medical Society Because They Fail to Allege That the Medical Society Was a State Actor

As set forth at length above, all of Plaintiffs claims fail because of the total immunity provided by the PREP Act. Beyond that, with regard to the Medical Society, Plaintiffs' Second through Fifth claim fail to state a claim because: (1) each such claim applies only to wrongful actions of a state actor and (2) for each such claim, Plaintiffs have failed to allege that the Medical Society was acting under color of law or as a state actor. (*See* R pp 13-16). With regard to those claims, Plaintiffs' failure to allege that necessary element provides an independent basis for dismissal of those to the extent that they may be against the Medical Society.

III. The Medical Society Is Entitled to Any Defenses Asserted by Defendant Board of Education

For the reasons set forth above, the immunity provisions of the PREP Act are a total bar to any and all claims Plaintiffs have asserted or could assert against the Medical Society arising from the Medical Society's administration of the Pfizer vaccine to Tanner without full consent.

This entire case can, and should, be decided based on that federal defense. Nevertheless, the Medical Society anticipates and expects that the Defendant Board of Education will put forth additional defenses, such as Plaintiffs' lack of standing for a direct constitutional claim, failure to adequately the intentional tort of battery, and statutory immunity under N.C. Gen. Stat. § 115C-524. Those defenses, which were identified and accepted by the trial court (R pp 52-59), apply equally to the Medical ***20** Society and provide additional independent bases for affirmance of the trial court's dismissal of Plaintiffs' claims.

CONCLUSION

For the reasons set forth herein, the trial court's Judgment dismissing plaintiffs' claims should be affirmed.

Respectfully submitted, this, the 18th day of September, 2023.

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I certify that the attorney listed below has

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Appendix not available.

2023 WL 5322223 (N.C.App.) (Appellate Brief)
Court of Appeals of North Carolina,
Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and Emily Happel on behalf of Tanner Smith as his mother, Plaintiffs,
v.
GUILFORD COUNTY BOARD OF EDUCATION and Old North State Medical Society, Inc., Defendants.

No. COA23-487.
July 21, 2023.

From Guilford County No. 22CVS7024

Plaintiffs-Appellants' Brief

***i** *INDEX*

ii** ***TABLE OF AUTHORITIES

Cases

*1 STATEMENT OF JURISDICTION

This matter was initiated on August 19, 2022, by the plaintiffs' filing of a verified complaint and the issuance of a summons by the Clerk to the defendants. Both defendants were properly served, and the Superior Court, Guilford County had subject matter and *in-personam* jurisdiction over the parties. On January 30, 2023, a hearing was held before the Honorable Lora Cubbage, Superior Court Judge in Superior Court, Guilford County. Following the hearing, Judge Cubbage entered an order dismissing plaintiffs' complaint, with her written order being signed February 27, 2023, and filed March 1, 2023. On March 9, 2023, plaintiffs, by and through counsel, caused to be filed a Notice of Appeal, appealing the matter to this Honorable Court. Subject matter and personal jurisdiction lie with the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE CASE

Plaintiffs initiated this action on August 19, 2022 by the filing of a verified complaint and the issuance of a summons by the Clerk to the defendants. (R. 3-17) On November 21, 2022, Defendant Guilford County Board of Education filed its answer, a motion to dismiss, and a cross-claim. (R. 20) On December 30, 2022, Defendant Old North State Medical Society, Inc. filed its answer, motion to dismiss, and reply to crossclaims. (R. 34) On January 30, 2023, a hearing was held on the defendants' motions to dismiss ***2** before the Honorable Lora Cubbage, Superior Court Judge in Superior Court, Guilford County. Following the hearing, Judge Cubbage entered an order dismissing plaintiffs' complaint, with her written order being signed February 27,

2023, and filed March 1, 2023. (R. 51) On March 9, 2023, plaintiffs, by and through counsel, caused to be filed a Notice of Appeal, appealing the matter to this Honorable Court. The matter is ripe for decision by this Honorable Court.

STATEMENT OF FACTS

For the purposes of this appeal, with no evidentiary hearings being held, the facts are as stated in the complaint. (R. 9-16).

At the time relevant to this matter, Plaintiff Tanner Smith was 14 years of age and was a football player at Western Guilford High School, a public school that is within the Guilford County Schools school district. On August 14, 2021, Tanner was informed by letter on Guilford County Schools letterhead that there was a cluster of COVID-19 cases among the football team, and because of this cluster he would need to report for a COVID-19 test to continue participating as a player on the Western Guilford High School football team. The letter informed Tanner that he would be tested on August 20, 2021, that the testing would take place from 2:00 p.m. to 6:00 p.m. at Northwest Guilford High, and that Old North State Medical Society "will be conducting testing, consent for testing is required." (R. 18).

***3** On August 20, 2021, Tanner was driven by his stepfather, Brett Happel, to the testing facility. When they arrived, Tanner went into the testing site to be tested, and Mr. Happel remained in his vehicle. Upon Tanner's entrance to the facility, workers at the testing site gave Tanner a form to fill out. Tanner believed the form to be related to the required COVID-19 test.

Unbeknownst to Tanner, there was a COVID-19 vaccination clinic also being held at the testing site. A flyer promoting the vaccination clinic stated "Old North State Medical Society in partnership with Guilford County Schools presents FREE COVID-19 Vaccines." (R. 19). It indicated that there would be a vaccine clinic held on Friday, August 20th, 2021 from 2:00 p.m. to 6:00 p.m. at Northeast Guilford High and Northwest Guilford High. Further, the flyer clearly stated: "Students age 12-17 must have their parent or guardian sign the consent form and bring the completed form to the vaccination site."

Tanner was shown to a seat, and the workers at the clinic attempted to contact Tanner's mother, Plaintiff Emily Happel, without success. They were attempting to contact her to gain consent to administer a COVID-19 vaccination to Tanner. At no point did the clinic workers attempt to contact Mr. Happel, who was waiting in the vehicle outside the testing clinic.

After the workers failed to contact Mrs. Happel, one of the workers instructed the other worker to "give it to him anyway." Tanner then indicated ***4** to the workers that he did not want to receive the vaccine, and that he was just expecting to be tested for COVID-19. Despite failing to get parental consent or the consent of Tanner himself, the workers administered a COVID-19 dose to Tanner. (R. 11)

Tanner was administered a dose of the Pfizer COVID-19 vaccine, and at the time that Tanner was administered that dose, the Pfizer COVID-19 vaccine was granted only Emergency Use Authorization by the Food and Drug Administration for minors 14 years of age. (R. 11)

STANDARD OF REVIEW

In ruling on pretrial motions to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, the allegations of the complaint are viewed as true and admitted. *Asheville Lakeview Properties, LLC v. Lake View Park Comm'n, Inc.*, 254 N.C. App. 348, 351-52, 803 S.E.2d 632, 636 (2017).

> It is well-settled that a plaintiffs claim is properly dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the claim; (2) the complaint on its face reveals the absence of facts sufficient to make a valid claim; or (3) the complaint discloses some fact that necessarily defeats the claim.

Id. at 352, 803 S.E.2d at 636. (Citations omitted). The Court of Appeals reviews a trial court's order dismissing a complaint pursuant to Rule 12(b)(6) de novo. *Id.* Similarly, a trial court's order dismissing a complaint pursuant to Rule 12(b)(1) of the Rules of Civil Procedure is reviewed de novo. *Bunch v. Britton*, 253 N.C. App. 659, 666, 802 S.E.2d 462, 469 (2017).

***5 ARGUMENT**

I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT ALLEGING STATE CONSTITUTIONAL CLAIMS ON THE BASIS OF THE AVAILABILITY OF AN ADEQUATE STATE LAW REMEDY.

The trial court found that the plaintiffs' state tort claim for battery "provides an opportunity for Plaintiffs to enter the courthouse doors and present their claim, and would, if successful, provide the same remedy (monetary relief for an unconsented vaccination) sought under the state constitutional claims." (R. 52-53). Because of this finding, the trial court dismissed the plaintiffs' state constitutional claims. Despite the trial court's reliance on the availability of a battery claim against the defendants as a rationale for the dismissal of the plaintiffs' state constitutional claims, the trial court similarly dismissed the battery claim. This inconsistency demonstrates the faulty reasoning behind the trial court's dismissal of the plaintiffs' state constitutional claims. Additionally, the right of a parent under the North Carolina Constitution to raise one's child and to have control over his care and custody in accordance with her conscience is not similar in nature to battery, and thus, battery does not constitute an adequate state law remedy.

In the complaint, plaintiffs alleged that Emily Happel had a liberty interest under NC Const. Art. I, §§ 1, 13, and 19 "to raise her son and to have ***6** control over his care and custody, and to do so in accordance with her conscience." (R. 13). The complaint further alleged that her liberty interest could only be deprived but by the law of the land. (R. 13). At the time of the vaccine dose, the law of the land of North Carolina required parental consent: "Notwithstanding any other provision of law to the contrary, a health care provider shall obtain written consent from a parent or legal guardian prior to administering any vaccine that has been granted emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age." N.C. Gen. Stat. § 90-21.5(al). The complaint further alleged that Guilford County Schools was a state actor, and that parental consent was not received by defendants prior to the administration of the vaccine to Tanner.

As to Tanner's state constitutional rights, the complaint alleged that "Tanner Smith has a liberty interest under the North Carolina Constitution to his own bodily autonomy, subject to the similar rights as his mother, Emily Happel, to the care, custody, and control of her children." (R. 15). The complaint further alleges that Tanner did not give consent to the vaccine being administered. (R. 15).

"[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "[T]o be considered ***7** adequate in redressing a constitutional wrong, a plaintiff must have at least the opportunity

to enter the courthouse doors and present his claim." *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 339-40, 678 S.E.2d 351, 355 (2009).

In *Craig*, the Supreme Court of North Carolina held that a plaintiff whose claims were barred by sovereign immunity did not have an adequate state remedy on common law negligence, and accordingly was allowed to make a colorable claim under the North Carolina Constitution. *Id. See also, Deminski on behalf of C.E.D. v. State Bd. of Educ.*, 2021-NCSC-58, ¶ 18, 377 N.C. 406, 413, 858 S.E.2d 788, 794 (2021) (discussing the interplay of immunity and *Corum*). This case is similar to *Craig* and *Deminski.*

While the trial court asserts that the plaintiffs' battery claim was not "adequately pled," the trial court also dismissed the battery claim based on the immunity of 42 U.S.C. § 247d-6d(a)(1) and N.C. Gen. Stat. § 115C-524. While the trial court may have dismissed the battery claims for an alleged failure to adequately plead the claim, it is clear that the trial court was dismissing the claim based upon immunity as well. The trial court stated that these immunities "provide an independently sufficient basis for that dismissal." Thus, had the trial court found that the battery claim was sufficiently pled, the trial court still would have dismissed the battery claim on immunity grounds. If the battery claim was barred by these assertions of immunity (as the trial court concluded as to the battery claim for **both** ***8** defendants), then the battery claim could not be an adequate state law remedy that shuts the courthouse doors to plaintiffs' otherwise colorable North Carolina Constitutional claims. There is no rational reason that a claim barred by statutory immunity should be treated any different than the claims barred by sovereign immunity in *Craig* and *Deminski.*

Moreover, the battery claim was Tanner's claim, not Mrs. Happel's claim. The complaint alleges "[p]laintiff Tanner Smith is entitled to compensation for defendants' battery." (R. 13). It is unconscionable that a claim of one plaintiff for battery would somehow bar the state constitutional claim of another plaintiff who was not the victim of the alleged battery. Mrs. Happel's claim is not that she was battered, but that the actions of a government actor violated her well-established rights as a parent.

Counsel will concede that, if this Honorable Court finds that Tanner Smith's battery claim against defendant Board was dismissed in error and is not subject to immunity, that necessarily would defeat Tanner Smith's state constitutional claims as being precluded by an adequate state law remedy. However, if this Court finds that the battery claim was dismissed in error only as to Old North State Medical Society, Inc., counsel contends that Tanner Smith's state constitutional claims against defendant Board are colorable and not subject to dismissal based on an adequate state law remedy. Regardless, Tanner Smith's battery claim is not an adequate state law remedy as to Emily Happel's state constitutional claims.

***9** The trial court erred in finding that battery was an adequate state law remedy that served as a bar to plaintiffs' state constitutional claims because the Court also dismissed the battery claim on statutory immunity grounds, and because the battery claim only pertained to Tanner Smith, and is, therefore, inadequate to provide a remedy to Mrs. Happel.

II. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' COMPLAINT WHEN IT DETERMINED THAT THE COMPLAINT FAILED TO ADEQUATELY PLEAD VICARIOUS LIABILITY AGAINST THE BOARD OF EDUCATION ON PLAINTIFFS' BATTERY CLAIM.

The trial court dismissed plaintiff Tanner Smith's battery claim against the Board when it found that there were insufficient facts to support vicarious liability. (R. 55). The trial court concluded "[p]laintiffs also do not allege facts to show that administering vaccines without consent was within the scope of any employee's or agent's duties." The trial court's definition and interpretation of "the scope of any employee's or agent's duties" is too narrow to pass muster.

"As a general rule, liability of a principal for the torts of its agent may arise in three situations: (1) when the agent's act is expressly authorized by the principal; (2) when the agent's act is committed within the scope of his employment and in furtherance of the principal's business[;] or (3) when the agent's act is ratified by the principal." *Hendrix v. Town of W. Jefferson*, 273 N.C. App. 27, 32-33, 847 S.E.2d 903, 907 (2020) (internal quotation marks and citations omitted). "An act is within the scope of an employee's implied ***10** authority, even if it is contrary to the employer's express instructions, when the act is done in the furtherance of the employer's business and in the discharge of the duties of employment." *Edwards v. Akion*, 52 N.C. App. 688, 693, 279 S.E.2d 894, 897, aff'd, 304 N.C. 585, 284 S.E.2d 518 (1981). For instance, an employee threatening to gouge out the eyes of a customer is clearly outside the scope of employment, but to shatter a glass in anger, and thereby injuring a person, is within the scope of employment. *Wegner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 68, 153 S.E.2d 804, 809 (1967) (an employee's "negligent or improper method of doing [an act he was hired to do] would have been the act of his employer in the contemplation of the law").

The clinic workers were present at the vaccine clinic to carry on and further the business of the partnership that had been formed by defendants. They were there to administer vaccines. The scope of their employment was to administer vaccines. When they administered the vaccine to Tanner, they were doing so in furtherance of their employer's business and within the scope of their employment. That they did so without consent does not move them outside the scope of their employment. The trial court's narrowing of the scope of the employment or duties of the vaccine clinic workers to be the "administering of vaccines without consent" would serve to obliterate the doctrine of *respondeat superior* in North Carolina. As soon as an agent or employee commits a wrongful act, they would be immediately removed from the scope of their employment or duties. For instance, a hypothetical ***11** company's truck driver is employed to transport goods safely. If he negligently injures another, then that would be outside the scope of his employment, because "negligent driving" is not within the scope of his employment. The vaccine workers were not on a frolic and detour. They were carrying out the duties they had been assigned, and those actions are attributable to the partnership of the defendants. The trial court erred in determining that the complaint failed to adequately plead vicarious liability for battery.

III. THE TRIAL COURT ERRED WHEN IT DETERMINED THE BOARD WAS IMMUNE FROM LIABILITY UNDER THE THIRD-PARTY USE OF SCHOOL FACILITIES STATUTE. N.C. GEN. STAT. § 115C-524.

The trial court found that N.C. Gen. Stat. § 115C-524 provided immunity to defendant Board, stating that statute "provides immunity to school boards who enter into agreements with third parties for use of school facilities." (R. 57). N.C. Gen. Stat. § 115C-524 (c) provides:

> Notwithstanding the provisions of G.S. 115C-263 and 115C-264, local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education or to any individual board member for personal injury suffered by reason of the use of such school property pursuant to such agreements. ***12** The clear import of this statute is to shield local boards of education from liability when the local board has created a policy to allow the use of school property for non-school uses with third parties and enters into agreements consistent with that policy.

This interpretation of the statute is consistent with appellate court decisions applying N.C. Gen. Stat. § 115C-524(c). *See e.g. Henderson v. Charlotte-Mecklenburg Bd. of Educ.*, 253 N.C. App. 416, 801 S.E.2d 145, 146 (2017) (no liability for school board

when referee was injured during a third-party basketball club's tournament where the board "complied with its own rules and regulations when it entered into a valid contract" permitting the use of the gym); *Lindler v. Duplin Cnty. Bd. of Educ.*, 108 N.C. App. 757, 425 S.E.2d 465, 466 (1993) (no liability when plaintiff fell and was injured during a fundraising auction for a third-party honors sorority); *Plemmons by Teeter v. City of Gastonia*, 62 N.C. App. 470, 471, 302 S.E.2d 905, 906 (1983) (no liability when minor was injured after falling from the bleachers during a non-school event conducted by a third-party city government).

The instant case is quite distinguishable. In this case, Tanner Smith was directed by letter from Guilford County Schools to report for COVID-19 testing to continue his participation in a school activity-playing football for his school. (R. 18). This is not a situation where the school facility was simply being used by a third-party with little-to-no oversight by the school system. In fact, the vaccine clinic was held by "Old North State Medical Society in ***13** partnership with Guilford County Schools." (emphasis added) (R. 19). While one may doubt the wisdom of conducting a testing clinic and a vaccine clinic in the same location, no one can doubt that it was the collective wisdom of both defendants. The facts as stated in the complaint make it clear that Tanner went to the clinic at the direction of Guilford County Schools, and when he ended up in a vaccine clinic, it was a clinic that was operated with two partners-the defendants. The trial court erred in finding that the statutory immunity of N.C. Gen. Stat. § 115C-524(b) barred plaintiff Tanner Smith's claim for battery against defendant Board.

IV. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE CONSTITUTIONAL CLAIMS AGAINST OLD NORTH STATE MEDICAL SOCIETY, INC. MUST BE DISMISSED BECAUSE THAT DEFENDANT WAS NOT ACTING UNDER COLOR OF STATE LAW OR WAS A STATE ACTOR.

The trial court erroneously concluded that the Old North State Medical Society, Inc. had no liability relating to the constitutional claims because ONSMS was not acting under color of state law or was a state actor. While, as will be later stated, plaintiffs are abandoning their federal constitutional claims, a resort to federal decisions regarding the state constitutional claims is appropriate and instructive.

"[T]o act 'under color of' state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, ***14** jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions." *Dennis v. Sparks*, 449 U.S. 24 (1980), (emphasis added). "[T]he question is whether the State was sufficiently involved to treat that decisive conduct as state action." *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 192 (1988).

Here, there is no dispute that there was significant state involvement that led to ONSMS's decisive action that violated the state constitutional rights of plaintiffs. First, it was the defendant Board, through its employees and officers, that directed Tanner to the clinic as a condition of his continued activity in school related sports. Second, the vaccine clinic that was held at the school facility was a partnership between the defendants. Finally, the idea that vaccine administration--paid for by governmental actors, promoted by governmental actors, and provided as part of a push by federal, state, and local governments--is totally divorced from government action ignores the facts that are plain from every American's experience during the COVID-19 crisis.

ONSMS was acting as a government actor, in partnership with a government actor, and violated the constitutional rights of the plaintiffs while doing so. The trial court erred in holding otherwise.

V. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE PREP ACT PROVIDED IMMUNITY TO THE BOARD AND TO OLD NORTH STATE MEDICAL SOCIETY, INC. AND PRE-EMPTS STATE LAW CLAIMS.

***15** The trial court determined that the federal PREP Act provided broad immunity to defendants for their actions. The PREP Act provides, in relevant part:

> Subject to the other provisions of this section, a covered person shall be immune 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 if a declaration under subsection (b) has been issued with respect to such countermeasure.

42 U.S.C. § 247d-6d(a)(1). It is not disputed that the Pfizer COVID-19 vaccine was a "covered countermeasure." The trial court found that both ONSMS and the Board were "covered persons." It is unclear under what theory the Board was a covered person under the trial court's reasoning, but the only acceptable theory is that it is because of the Board's involvement in the partnership with ONSMS in operating and providing the locations for the vaccine clinics. *See* 42 U.S.C. § 247d-6d(i)(2) (defining "covered persons").

It is important to note that the claims made by plaintiffs are not because this relates to COVID-19, but they happen to relate to COVID-19. Plaintiffs' battery and state constitutional claims are not dependent on COVID-19 and the COVID-19 vaccine and its administration. Those claims would result regardless of what substance had been administered to Tanner. It matters not whether it was a COVID- 19 vaccine, a chickenpox vaccine, an Aspirin, or open-heart surgery. The trial court's broad reading of the PREP Act to provide immunity in a situation such as this does not further the ***16** purpose of the PREP Act "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency ... ... " *The PREP Act and COVID-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures*, Congressional Research Service Legal Sidebar, LSB 10443 (April 13, 2022).

Taking the trial court's interpretation of the PREP Act to its logical conclusion, had defendants injected Tanner with saline, they would have been liable, but since they injected him with a vaccine they are not liable. Should a covered person have a slip-of-the-hand and inject saline into a person's heart there would be no immunity, but if the substance was a COVID-19 vaccine, there would be immunity. This certainly could not be the intent of Congress. The intent of Congress, when reading the Act as a whole, was to limit the liability for adverse effects and promote the quick development and deployment of the countermeasure, not to give *carte blanche* to medical providers to perform medical procedures without consent.

It does not appear that North Carolina appellate courts, North Carolina's federal district courts, or the Fourth Circuit have interpreted these provisions of the PREP Act. Other courts' interpretations have been varied on pre-emption and immunity.

> Although our court has not previously considered whether the PREP Act completely preempts state-law claims within its ambit, several federal courts of appeals have addressed the issue in similar cases involving claims against assisted-living facilities and nursing homes during the COVID-19 pandemic. *See Maglioli v. All. HC Holdings LLC*, 16 F.4th 393, 406-13 (3d Cir. 2021); ***17** *Mitchell v. Advanced HCS, L.L.C.*, 28 F.4th 580, 584-88 (5th Cir. 2022); *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 242-46 (5th Cir. 2022); *Martin v. Petersen Health Operations, LLC*, 37 F.4th 1210, 1213-14 (7th Cir. 2022); *Saldana v. Glenhaven Healthcare LLC*, 27 F.4th 679, 687-88 (9th Cir. 2022). These courts have taken different views as to whether the PREP Act completely preempts any state-law claims, but the courts have all held that the

> Act does not completely preempt claims, like Hudak's, that do not allege willful misconduct related to the administration or use of covered COVID-19 countermeasures. We agree.

Hudak v. Elmcroft of Sagamore Hills, 58 F.4th 845, 853 (6th Cir. 2023). North Carolina's courts should find that the claims presented by plaintiffs in this matter, are not pre-empted by the PREP Act and further that immunity does not extend to claims regarding lack of consent. Particularly, this Court should hold that state constitutional claims are not pre-empted and that state actors are not immune from liability for the violation of the Constitution when the allegations are not specific to the countermeasure or its adverse effect, but to the administration of medicine without consent.

VI. PLAINTIFFS-APPELLANTS ABANDON THEIR FEDERAL CONSTITUTIONAL CLAIMS

Plaintiffs-Appellants hereby give notice to this Honorable Court and the opposing parties that they abandon their federal constitutional claims.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be reversed, and the matter should be remanded to Superior Court, Guilford ***18** County for further proceedings consistent with the opinion of this Honorable Court.

RESPECTFULLY SUBMITTED, this the 21st day of July, 2023.

<<signature>>

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2024 WL 1714730 (N.C.) (Appellate Petition, Motion and Filing)
Supreme Court of North Carolina,
Eighteenth District.

Emily HAPPEL, individually, Tanner Smith, a minor and Emily Happel on behalf of Tanner Smith as his mother, Petitioners,
v.
GUILFORD COUNTY BOARD OF EDUCATION and Old North State Medical Society, Inc., Respondents.

No. 86P24.
April 12, 2024.

From Guilford County No. COA23-487

Response to Petitioners' Notice of Appeal and Petition for Discretionary Review

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***1** TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES Respondent Old North State Medical Society, Inc. (the “Society”), by and through its undersigned counsel, to respond in opposition to the Notice of Appeal and Petition for Discretionary Review filed by Petitioners on 5 April 2024.

The Society has reviewed the Response filed earlier today by Respondent Guilford County Board of Education (the “Board”) and is in full agreement with such Response. We believe that this Court should, and likely will, find the Board's ***2** arguments to be a thorough, accurate, concise, and convincing analysis of the (many) reasons why Petitioner's request for another appeal should be rejected. Accordingly, rather than burden this Court with duplicative argument, the Society adopts and incorporates the arguments of the Board as if made herein.

WHEREFORE, for the reasons presented in the Board's Response, Petitioners' Notice of Appeal should be dismissed and their Petition for Discretionary Review denied.

Respectfully submitted, this 12th day of April, 2024.

/s/ Gavin J. Reardon

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