No. SC100099

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. CLINTON NO. 1, INC.
Relator,

v.

THE HONORABLE BRANDON BAKER,
CIRCUIT COURT OF HENRY COUNTY,
Respondent,

DONNA S. YARNELL,
Plaintiff.

Proceeding in mandamus and/or prohibition
from the Circuit Court of Henry County, Missouri, No. 21HE-CC00053-01

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Federal Statutes

State Statutes

Federal Regulations and Other Executive Materials

State Regulations and Other Executive Materials

Other Authorities

PRELIMINARY STATEMENT

Plaintiff Donna S. Yarnell alleges that, in November 2020, despite a contractual agreement that her mother, Mary Gray, would reside in a private room, and contrary to relevant infection control protocols, Clinton Healthcare and Rehabilitation Center, operated by Relator Clinton No. 1, placed a COVID-19-positive roommate in Ms. Gray's room. Ms. Yarnell alleges that, as a result, Ms. Gray contracted COVID-19, and died.

This special proceeding arrives to this Court with these allegations, and little more, arising from the Circuit Court's denial of Clinton's pre-discovery motion to dismiss. The question before the Court is whether Clinton met its burden to establish that any of the three statutory immunity defenses that it asserted are so irrefutably shown on the face of Ms. Yarnell's petition as to warrant the extraordinary discretionary writ of mandamus or prohibition commanding the dismissal of Ms. Yarnell's wrongful death action. Based on Ms. Yarnell's allegations and the ordinary principles of statutory construction and requirements of the Missouri Constitution, Clinton has not met this high bar.

First, Clinton asserts that various sections of the federal Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. §§ 247d-6d, 247d-6e, require dismissal of Ms. Yarnell's suit. The PREP Act's limitations on liability, however, are relevant only where a plaintiff seeks to recover for an injury that has a "causal relationship with the administration to or use by an individual" of a "covered countermeasure"—a specific biological product, drug, or diagnostic device designated as covered by the United States Secretary of Health and Human Services (HHS), which "was administered or used" under specific conditions. 42 U.S.C. § 247d-6d(a)(1), (2), (3). As four federal courts of appeals,

five state appellate courts, and dozens of state and federal trial courts have held, the statute does *not* apply to general claims of inadequate infection control, and does not immunize a "covered person" from all claims relating to a pandemic simply because that covered person used a covered countermeasure at some place in time. As the plain text makes clear, only where the use or administration of a specific covered countermeasure to a specific individual causes a plaintiff's injury does the statute come to bear. And despite Clinton's attempts to rewrite Ms. Yarnell's pleadings, Ms. Yarnell has not alleged that the administration to or use by an individual of any covered countermeasure caused her mother's death. Accordingly, Clinton's defenses based on the PREP Act lacks merit.

Second, section 44.045(1), which Clinton refers to as the "Missouri Emergency Management Act" or "MEMA," is likewise inapplicable. That statutory provision gives the Governor and state agencies the authority to "deploy" health care providers to respond to a medical emergency, and then confers a qualified immunity for services performed during such a "deployment." Here, Clinton does not identify any action by which a state official "deployed" it pursuant to this statute, and thus the statutory immunity is irrelevant. While Clinton—along with thousands of other entities in Missouri—was regulated by state agencies during the pandemic, as it has been throughout its existence, regulation is not the same as deployment.

Finally, Clinton argues that sections 537.1005 and 537.1010—part of what it refers to as the "Missouri COVID-19 Liability Protections Act" or "MCLPA"—bar Ms. Yarnell's claim. Those provisions require the plaintiff to show recklessness or willful misconduct in any action concerning COVID-19 exposure and any "COVID-19 medical liability action."

§§ 537.1005, 537.1010, RSMo. But the statute was not effective until August 2021—nine months *after* Ms. Yarnell's mother died and her claim accrued. There is no evidence that the Legislature intended for these provisions to be retroactive, and thus the presumption against retroactivity applies as a matter of statutory interpretation. Moreover, applying these provisions in this case would run afoul of the Missouri Constitution's prohibition on retrospective laws. Although Clinton concedes that the application of sections 537.1005 and 537.1010 to this case would be retrospective, it suggests that the Missouri Constitution does not apply where the Legislature is acting pursuant to the state's traditional police powers. Unsurprisingly, this Court's precedent provides no support for such a massive carveout from the Constitution. In any event, Ms. Yarnell's allegations of complete indifference and conscious disregard for the safety of her mother and others are sufficient to meet the statute's recklessness requirement at the pleading stage.

Given the inapplicability of the three statutes invoked, the Circuit Court correctly denied Clinton's motion to dismiss. The extraordinary relief requested by Clinton in the form of a permanent writ should not issue.

STATEMENT OF FACTS

Mary L. Gray moved into the Clinton Healthcare and Rehabilitation Center in Clinton in July 2018. Ex. A, A2 ¶ 4.[1] The contract between Clinton and Ms. Gray provided that, "for her protection and well-being," Ms. Gray would reside in a private room, without a roommate. *Id.* ¶¶ 9–10.

[1] Except where otherwise noted, all references to Exhibits are to those included in Relator's Appendix to its Opening Brief.

In November 2020, despite this contract, and contrary to relevant infection control procedures and protocol relating to COVID-19, Clinton placed another resident in the same room as Ms. Gray. *Id.* at A3 ¶¶ 11, 17. That person was infected with COVID-19, and Clinton failed to timely separate Ms. Gray from her. *Id.* ¶ 17. As a result, Ms. Gray became sick with COVID-19. *Id.* ¶¶ 12–13. After Ms. Gray was diagnosed with COVID-19 on November 23, 2020, contrary to her advanced directives, and without notifying her family, Clinton transported Ms. Gray to a hospital, where she died on November 30, 2020. *Id.* ¶¶ 15–17.

On August 19, 2021, Ms. Gray's daughter, Donna S. Yarnell, brought this wrongful death action in the Henry County Circuit Court. Ex. A, A2. Ms. Yarnell alleged that her mother's death was the result of Clinton's placement of her mother in a double room, failure to follow individualized infection control, and failure to timely separate her from her COVID-19-infected roommate. *Id.* at A3 ¶ 17. She alleged that these actions and inactions were negligent, and also "showed a complete indifference to and conscious disregard for the safety of" her mother and others. *Id.* at A3–4 ¶¶ 17–19.

Clinton removed the action to the United States District Court for the Western District of Missouri on September 29, 2021, arguing that that court had jurisdiction under 28 U.S.C. § 1442(a)(1) because Clinton was "acting under" the direction of federal officers at the relevant times, and under 28 U.S.C. § 1331 because the PREP Act "completely preempted" Ms. Yarnell's claim. *See Yarnell v. Clinton No. 1, Inc.*, 591 F. Supp. 3d 432, 434 (W.D. Mo. 2022). On March 16, 2022, the federal district court rejected those arguments and remanded the action to the Circuit Court. As to federal-officer removal, the

court held that federal guidance and regulations relating to COVID-19 had not brought Clinton under the control of any federal officer. *Id.* at 436. As to Clinton's PREP Act argument, the court rejected it on two independent grounds. First, the court held that the PREP Act is not a complete preemption statute. *Id.* at 438–39. Second, the court held "that the PREP Act does not apply to Plaintiff's state law claims" at all, "as no allegations implicating a covered countermeasure appear on the face of the Petition." It explained:

> Plaintiff's allegations that Defendant was negligent in its care of her mother by placing her mother with a roommate and by moving her to a hospital against her wishes do not implicate a drug, vaccine, or other product that is a covered countermeasure under the PREP Act. Failing to timely separate Plaintiff's mother from her roommate once the latter had been infected with COVID also does not relate to any product or device. While Plaintiff's Petition does allege a failure on Defendant's part "to follow individualized infection control during the pandemic," it does not mention any covered countermeasures in relation to such infection control.

Id. at 439. Clinton did not appeal.

On remand to the Circuit Court, Clinton moved to dismiss Ms. Yarnell's action, asserting lack of subject matter jurisdiction and failure to state a claim, and invoking the PREP Act, MEMA, and MCLPA. Ex. C, A17. After briefing, the Circuit Court held an extensive oral argument on December 19, 2022. Ex. G, A220–45. On April 11, 2023, the Circuit Court issued an order denying Clinton's motion to dismiss. Ex. K, A302–03. Citing the federal district court's reasoning, the court held that the PREP Act "does not apply to Plaintiff's Petition." *Id.* It also held that the MEMA and MCLPA did not apply. *Id.* at A303.

Clinton sought a writ of prohibition or, in the alternative, petition for writ of mandamus from the Court of Appeals, which was denied on May 12, 2023. Pet. App., Ex.

O, A358. It then sought the same relief from this Court, which issued a preliminary writ of mandamus on July 20, 2023.

LEGAL STANDARD

"The writ of prohibition, an extraordinary remedy, is to be used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Zahnd v. Van Amburg*, 533 S.W.3d 227, 229 (Mo. banc 2017) (quoting *State ex rel. Douglas Toyota III, Inc. v. Keeter*, 804 S.W.2d 750, 752 (Mo. banc 1991)). While the writ may issue "to remedy an excess of authority, jurisdiction, or abuse of discretion where the lower court lacks the power to act as intended," the issuance of such a writ "is discretionary." *State ex rel. Dep't of Health & Sr. Servs. v. Slusher*, 638 S.W.3d 496, 498 (Mo. banc 2022).

The writ of mandamus is discretionary. *BG Olive & Graeser, LLC v. City of Creve Coeur*, 658 S.W.3d 44, 47 (Mo. banc 2022). For it to be issued, "there must be an existing, clear, unconditional, legal right in relator, and a corresponding present, imperative, unconditional duty upon the part of respondent, and a default by respondent therein." *Id.* (quoting *State ex rel. Healea v. Tucker*, 545 S.W.3d 348, 353 (Mo. banc 2018)).

In reviewing a motion to dismiss, "the Court must accept all properly pleaded facts as true, giving the pleadings their broadest intendment, and construe all allegations favorably to the pleader." *Forester v. May*, 671 S.W.3d 383, 386 (Mo. banc 2023) (quoting *R.M.A. ex rel. Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 424 (Mo. banc 2019)). A motion to dismiss based on an affirmative defense, including one based on a statutory immunity, may be sustained only "if the defense is irrefutably shown by the

petition." *Id.* (quoting *Huch v. Charter Commc'ns, Inc.*, 290 S.W.3d 721, 724 (Mo. Banc 2009)).

ARGUMENT

Neither a writ of prohibition nor a writ of mandamus should issue. Clinton has established neither that the Circuit Court acted in excess of authority, nor that Clinton has a clear and unconditional right to dismissal of this action.

I. The PREP Act does not provide Clinton a right to dismissal of Ms. Yarnell's claim. (Responding to Points Relied On 1 and 2)

Initially enacted in 2005 "[t]o encourage the expeditious development and deployment of medical countermeasures during a public health emergency, the [PREP Act] authorizes the Secretary of Health and Human Services (HHS) to limit legal liability for losses relating to the administration of medical countermeasures such as diagnostics, treatments, and vaccines." Cong. Rsch. Serv., *The PREP Act and COVID-19, Part 1: Statutory Authority to Limit Liability for Medical Countermeasures* 1 (updated April 13, 2022).[2] Clinton argues that the PREP Act, and the Secretary's 2020 declaration issued pursuant to it, required the Circuit Court to dismiss Ms. Yarnell's claim for three separate reasons. Each fails for the threshold reason that Ms. Yarnell's claim does not arise out of an injury caused by the "administration to or use by an individual of a covered countermeasure," 42 U.S.C. § 247d-6d(a)(1), (a)(2)(B), as is necessary to trigger the statute's limitations on liability, as well as for other reasons.

[2] https://crsreports.congress.gov/product/pdf/LSB/LSB10443.

A. The PREP Act and the Secretary's Declaration

The HHS Secretary triggers the PREP Act by issuing a declaration determining that a public health emergency exists and "recommending" the "manufacture, testing, development, distribution, administration, or use of one or more covered countermeasures," under certain conditions. 42 U.S.C. § 247d-6d(b)(1). The Secretary may designate only certain drugs, biological products, and devices authorized or approved for use by the Food and Drug Administration or the National Institute for Occupational Safety and Health as "covered countermeasures." 42 U.S.C. § 247d-6d(i)(1)(A)–(D).

Neither the PREP Act nor any resulting declaration imposes an obligation on any entity. Instead, the PREP Act functions by "limit[ing] an injured person's ability to secure a remedy in some circumstances." *Polanco v. Diaz*, 76 F.4th 918, 933 (9th Cir. 2023). Broadly speaking, the statute does so by (1) creating an immunity for some claims arising out of "the administration to or use by an individual of" covered countermeasures, 42 U.S.C. § 247d-6d(a), (2) carving out an exception to that immunity for claims that meet the statutory definition of willful misconduct, *id.* § 247d-6d(d); (3) creating special judicial procedures for such willful misconduct claims, to be brought solely in the United States District Court for the District of Columbia, *id.* § 247d-6d(e); and (4) creating an administrative compensation mechanism for claims that are subject to the immunity provision, *id.* § 247d-6e.

On March 10, 2020, then-HHS Secretary Alex Azar issued a Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19. 85 Fed. Reg. 15,198 (published Mar. 17, 2020). The Declaration

recommended the "manufacture, testing, development, distribution, administration, and use" of certain countermeasures to combat COVID-19: "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, or the transmission of SARS-CoV-2 or a virus mutating therefrom, or any device used in the administration of any such product, and all components and constituent materials of any such product." *Id*. at 15,202.[3]

B. The PREP Act's immunity provision, section 247d-6d(a), does not require dismissal of Ms. Yarnell's claim.

Clinton's primary argument is that Ms. Yarnell's action is barred by subsection (a) of the PREP Act, which provides "covered persons" with immunity from suit and liability "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).[4] "Lest that provision be read too broadly," section 247d-

[3] The Secretary has amended the initial Declaration several times, though not in manners relevant to this case. All of the amendments are available at https://aspr.hhs.gov/legal/PREPact/Pages/default.aspx.

[4] The statutory definition of "covered persons" includes "program planner[s] of [a given] countermeasure." 42 U.S.C. § 247d-6d(i)(2). For purposes of this proceeding, Ms. Yarnell does not dispute that Clinton satisfies the statutory definition of "program planner," *id.* § 247d-6d(i)(6), as to *some* covered countermeasures and thus is eligible to invoke the statute as to claims with a causal relationship to the administration or use of those covered countermeasures. The question whether Clinton is a "program planner" has no other relevance here. Nonetheless, Clinton's repeated suggestion that it was "formally confirmed as a PREP Act 'covered person' and 'program planner,'" *e.g.*, Relator Br. 4, is incorrect and not supported by the letter on which Clinton relies. That explicitly non-binding opinion letter, not directed at or otherwise referencing Clinton, merely expresses the view that any

6d(a)(2)(B) "clarifies that it covers 'any claim for loss that has a causal relationship with the administration ... or use' of a covered countermeasure." *Manyweather v. Woodlawn Manor, Inc.*, 40 F.4th 237, 246 (5th Cir. 2022) (quoting 42 U.S.C. § 247d-6d(a)(2)(B)). In addition, immunity attaches only where (1) "the countermeasure was administered or used during the effective period of [a relevant PREP Act declaration];" (2) "the countermeasure was administered or used for the category or categories of diseases, health conditions, or threats to health specified in the declaration;" and (3) "the countermeasure was administered to or used by an individual who" was in a population and geographic area specified in the declaration. 42 U.S.C. § 247d-6d(a)(3).

"In determining whether PREP Act immunity applies in a given case, courts focus on the claims of the plaintiff, as pleaded in the complaint." *Mills v. Hartford Healthcare Corp.*, 298 A.3d 605, 630 (Conn. 2023). Here, Clinton has not met its burden to show these elements are satisfied by Ms. Yarnell's pleading. As the Circuit Court—like the federal district court—found, Ms. Yarnell did not bring a claim for loss with a causal relationship to the administration to or use by an individual of a covered countermeasure. Rather, Ms. Yarnell alleges that her mother died because, contrary to a contractual agreement and to infection control protocols, Clinton assigned a resident with COVID-19 to her room. As the federal district court explained:

> Plaintiff's allegations that Defendant was negligent in its care of her mother by placing her mother with a roommate and by moving her to a hospital

"senior living community meets the definition of a 'program planner' to the extent that it" performs certain tasks. Aug. 14, 2020 Letter from Robert P. Charrow to Thomas Barker, Ex. J, A280–81.

> against her wishes do not implicate a drug, vaccine, or other product that is a covered countermeasure under the PREP Act. Failing to timely separate Plaintiff's mother from her roommate once the latter had been infected with COVID also does not relate to any product or device. While Plaintiff's Petition does allege a failure on Defendant's part "to follow individualized infection control during the pandemic," it does not mention any covered countermeasures in relation to such infection control.

591 F. Supp. 3d at 439.

Given the procedural posture of this case, the Court must construe the allegations of the Petition in Ms. Yarnell's favor. Clinton nonetheless argues that the PREP Act applies because Ms. Yarnell's claim relates to Clinton's COVID-19 general "countermeasure program." Specifically, Clinton posits that any claim against it related to the transmission of COVID-19 is barred because Clinton utilized some COVID-19 countermeasures. Relator Br. 18. This argument is contrary to the statutory text and the overwhelming body of reasoned decisions of federal and state courts rejecting similar arguments.

The phrase "covered countermeasure" refers to one of the specific drugs, biological products, and medical devices that meet the criteria set forth in the statute and the governing PREP Act Declaration. 42 U.S.C. § 247d-6d(i)(1). Contrary to Clinton's suggestion, Relator Br. 18, under the statutory definition, "countermeasures do not include protocols or policies designed or implemented for the prevention or control of COVID-19." *Mills*, 298 A.3d at 631; *see Hansen v. Brandywine Nursing & Rehab. Ctr., Inc.*, 2023 WL 587950, at *5–7 (Del. Super. Ct. Jan. 23, 2023), *appeal refused*, 2023 WL 2544241 (Del. Mar. 16, 2023); *Moody v. Lake Worth Invs. Inc.*, 2021 WL 4134414, at *5 (N.D. Tex. May 26, 2021).

Clinton identifies no specific covered countermeasure that is implicated by Ms. Yarnell's claim.[5] Instead, it asks this Court to infer that covered countermeasures were used. Even if such an inference were permissible, "[t]he mere fact that a covered countermeasure was administered at some point does not, without more, entitle a defendant to immunity under the PREP Act." *Mills*, 298 A.3d at 636; *see Wilhelms v. Promedica Health Sys., Inc.*, 205 N.E.3d 1159, 1166 (Ohio Ct. App. 2023). The statutory immunity applies only to claims based on injuries with a causal relationship to "the administration to or use by an individual" of such a covered countermeasure. 42 U.S.C. § 247d-6d(b)(2). As the Ninth Circuit Court of Appeals put it, "for PREP Act immunity to apply, the underlying use or administration of a covered countermeasure must have played some role in bringing about or contributing to the plaintiff's injury." *Hampton v. California*, 83 F.4th 754, 764 (9th Cir. 2023);[6] *see also Pugh v. Okuley's Pharmacy & Home Med.*, --- N.E.3d ---, 2023 WL 5862281, at *4 (Ohio Ct. App. Sept. 11, 2023) (holding that PREP Act immunity applies only to injuries caused by the actual administration or use of a covered countermeasure). Thus, conducting some COVID-19 testing does not immunize a provider like Clinton from all claims related to COVID-19 transmission—only from claims based on injuries *caused* by the tests that it actually administered.

[5] Clinton's passing suggestion that Ms. Yarnell alleges that her mother died as a result of "negligence while administering COVID-19 diagnostic tests," Relator Br. 2, has no basis in her Petition and should be disregarded.

[6] "When construing a federal statute, this Court respectfully examines lower federal court opinions interpreting the federal statute 'for such aid and guidance as may be found therein.'" *Jackson v. Barton*, 548 S.W.3d 263, 267 n.4 (Mo. banc 2018) (quoting *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 910 (Mo. banc 2002)).

The facts of *Hampton* are instructive. There, prison officials transferred 122 inmates from a facility experiencing a COVID outbreak to a facility that had no known cases. An outbreak in the second facility followed, and the plaintiff alleged that this was caused by the officials' failures to test the transferees for COVID-19 before transfer and to isolate them from other prisoners upon their arrival while awaiting new test results. 83 F.4th at 759–60. The officials argued that the PREP Act provided them immunity because they had conducted COVID-19 testing on the transferees three weeks before the transfer and again after they arrived in the new prison. *Id.* at 763–74. But, the court of appeals explained, the plaintiffs did not allege that the testing that *did* occur "play[ed] a role in bringing about or contributing to the [decedent]'s death," and thus the causal relationship standard was not satisfied. *Id.* 764–65. The only testing relevant to the claim was testing that had *not* occurred, and the PREP Act's provisions cannot be logically read to apply to injuries tied to a countermeasure's "*non*-administration or *non*-use." 83 F.4th at 763. So too here, whatever testing *did* occur at Clinton's facility, Ms. Yarnell does not allege that it caused Ms. Gray to contract, and perish from, COVID-19.

To evade this result, Clinton argues that the phrase "administer" in the statute refers to program "administration." Relator Br. 16–20. To be sure, "administer" can mean "to manage or supervise the execution, use, or conduct of" something, as well as "to provide or apply; dispense." Merriam-Webster.com Dictionary.[7] Clinton appears to invoke the former definition, suggesting that all decisionmaking *generally* relating to COVID-19

[7] https://www.merriam-webster.com/dictionary/administer.

infection control is within the scope of the statute. But when the statutory provision is read as a whole, only the latter definition makes sense—given the use of the prepositions "to" and "by," and the inclusion of the term "an individual." *See* 42 U.S.C. § 247d-6d(a)(1); *see also* 42 U.S.C. § 247d-6d(a)(3) (limiting immunity to situations where covered countermeasure "was administered or used" in certain manners). It strains the English language to suggest that a facility's general program administration is "administered to" an individual.

For this reason, as the Sixth Circuit Court of Appeals explained in rejecting a similar argument, Clinton's argument that the HHS Secretary has indicated "management/operation activities and decisions" are within the scope of the statute, Relator Br. 17 (citing 85 Fed. Reg. at 15,200), "does not rescue [Clinton] from the fundamental flaw in its argument." *Hudak v. Elmcroft of Sagamore Hills*, 58 F.4th 845, 856 (6th Cir. 2023). As that Court explained:

> Setting aside the issue of what, if any, deference we owe to the Secretary's reading of the PREP Act, the declaration does not suggest that the term "administration" extends to all activities associated with the management or operation of a facility. Rather, the declaration states that the term encompasses management and operation activities that are taken *for the purpose of distributing and dispensing countermeasures*. The declaration suggests that an entity that dispenses an antiviral medication (a covered countermeasure) might be immune from a claim for loss sustained while waiting in line for the medication that alleges that the facility failed to design and implement an appropriate waiting procedure (the administration of the countermeasure). But that same entity would not receive immunity under the PREP Act for injuries unrelated to its provision of the covered countermeasure solely because it provides countermeasures.

Id. at 856–57 (citations omitted).[8] Applying this distinction in *Hudak*, the Sixth Circuit held that claims that a senior living facility "failed to use a COVID-19 countermeasure (facemasks) or to administer another (an infection protocol)," resulting in a resident's death, were outside the scope of the PREP Act. *Id.* at 856. The plaintiff, the court held, "d[id] not allege that [the decedent]'s illness or death was caused by [the facility]'s distribution or dispersal of countermeasures, but rather by its failure to use countermeasures or to take appropriate care of him." *Id.* at 857. So too, here.

Hudak, *Hampton*, and the decisions of the Circuit Court and the federal district court in this case are consistent with every other appellate court decision addressing the application of the PREP Act to claims arising out of inadequate infection control. Every one of those decisions has held that the Act applies only where a plaintiff alleges that the use of or administration to an individual of a specific covered countermeasure caused the relevant injury. *See Hampton*, 83 F.4th at 763–64; *Martin v. Petersen Health Operations,*

[8] To the extent the Secretary's preamble discussion could be read to provide for immunity for claims arising out of injuries that lack a causal relationship to the administration to or use by an individual of a covered countermeasure, that view is not entitled to any deference given the plain contrary text of the statute. *See Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 175 (2016) ("Even assuming, *arguendo*, that the preamble to the agency's rulemaking could be owed *Chevron* deference, we do not defer to the agency when the statute is unambiguous."). Further, Clinton's assertion that "Congress directed the Secretary to correctly determine what the 'administration' of countermeasures means in each unique public health crisis," Relator Br. 16 (citing 42 U.S.C. § 247d-6d(b)(2)(A)), lacks support in either the cited statutory provision or any other provision of the PREP Act. While the Secretary has the authority to, within statutory bounds, determine which drugs, products, and devices constitute "covered countermeasures," he has not been delegated authority to define the term "administration to or use by…an individual" of such drugs, products, and devices. *Cf.* 42 U.S.C. § 247d-6d(c)(2) (giving Secretary authority to define the term "willful misconduct").

LLC, 37 F.4th 1210, 1213–14 (7th Cir. 2022) (holding that a plaintiff's claims that her mother died because a "nursing home had too few nurses, permitted nurses to work when they were sick, and failed to isolate residents who showed signs of infection," were not "even arguably" within the scope of section 247d-6d(a)(1)); *Manyweather*, 40 F.4th at 241, 246 (holding that allegations that a nursing home failed to take adequate COVID-19 infection control measures and "knowingly exposed [the decedent] to a resident with the disease" were not allegations of "loss caused by the 'administration' or 'use' of COVID-19 countermeasures'"); *Arbor Mgmt. Servs., LLC v. Hendrix*, 875 S.E.2d 392, 397–98 (Ga. Ct. App. 2022) (holding that claims based on failures to properly isolate infected or exposed staff and residents of a senior living facility "ha[d] nothing to do with administration of a 'covered countermeasure' such as a drug, device, or other object as identified by HHS" and thus were not subject to PREP Act immunity).[9]

These cases are also consistent with dozens of state and federal trial court opinions rejecting nursing homes' and senior living facilities' arguments that the PREP Act applies to claims based on inadequate COVID-19 infection control similar to Ms. Yarnell's. *See, e.g.*, *Hansen*, 2023 WL 587950, at *5–8 (rejecting argument that infection control protocols are covered countermeasures as "beyond broad—it is unreasonable"); *Walker v. Arbor*

[9] *Martin*, *Merryweather*, and *Hudak* examined whether allegations that senior living facilities failed to take adequate infection control measures were within the scope of section 247d-6d(a)(1) as part of their analysis as to whether the PREP Act provided federal jurisdiction pursuant to the doctrine of complete preemption. Contrary to Clinton's suggestion, that those courts were construing the meaning of the very statutory language at issue here in a different procedural posture does not alter the persuasive value of those courts' consistent statutory interpretations.

Mgmt. Servs., LLC, 2022 WL 18777384, at *4–5 (N.D. Ga. Nov. 17, 2022) (rejecting similar argument that defendant was entitled to PREP Act immunity based on its "management and operation of countermeasure programs"); *Crupi v. Heights of Summerlin, LLC*, 2022 WL 489857, at *6 (D. Nev. Feb. 17, 2022) (agreeing with courts that "have found that the plain language of the PREP Act does not provide immunity for the administration of covered countermeasures generally," but only for the specific uses of covered countermeasures); *Lilly v. SSC Houston Sw. Operating Co. LLC*, 2022 WL 35809, at *3 (S.D. Tex. Jan. 4, 2022) (discussing and agreeing with the "avalanche of recent case law holding that state-law claims for failure to protect against COVID-19 do not fall within the purview of the PREP Act"), *report and recommendation adopted*, 2022 WL 209561(S.D. Tex. Jan. 24, 2022); *Beaty v. Delaware Cnty.*, 2021 WL 4026373, at *2 (E.D. Pa. Aug. 5, 2021) (holding PREP Act did not bar claim based on rooming decisions and infection control protocols, even though facility had "used" COVID-19 tests); *Brown v. Big Blue Healthcare, Inc.*, 480 F. Supp. 3d 1196, 1204–07 (D. Kan. 2020) (holding that the fact "that a facility using covered countermeasures *somewhere* in the facility is [not] sufficient to invoke the PREP Act as to all claims that arise in that facility").[10]

[10] *See also, e.g.*, *Guytan v. Northbridge Health Care Ctr.*, 2023 WL 7383218, at *7–8 (Conn. Super. Ct. Nov. 2, 2023); *West v. Brandywine Nursing & Rehab. Ctr., Inc.*, 2023 WL 7140798, at *4–7 (Del. Super. Ct. Oct. 30, 2023); *Adler v. Troy*, 2023 WL 6928148, (N.Y. Sup. Ct. Oct. 18, 2023); *Donohue v. PSL Rehab. & Healthcare*, 2023 WL 5196970, at *3 (S.D. Fla. July 12, 2023); *Estate of Petersen v. Koelsch Sr. Cmtys., LLC*, 2023 WL 2300650, at *4–5 (D. Mont. Mar. 1, 2023); *Lopez v. Cantex Health Care Centers II, LLC*, 2023 WL 2206558, at *9 (D.N.M. Feb. 24, 2023), *aff'd on other grounds*, 2023 WL 7321637 (10th Cir. Nov. 7, 2023); *Hodges v. Sunrise Sr. Living Mgmt., Inc.*, 2023 WL 2163887, at *6–7 (E.D. Pa. Feb. 21, 2023); *Barron v. Benchmark Sr. Living, LLC*, 2023

Against this overwhelming weight of authority, Clinton cites six cases. Three of these cases show only that *some* claims are properly dismissed pursuant to section 247d-6d(a)(1)—a proposition that Ms. Yarnell does not dispute. In *M.T. v. Walmart Stores, Inc.*, 528 P.3d 1067 (Kan. Ct. App. 2023), *cited in* Relator Br. 16, 20, for example, the Kansas Court of Appeals affirmed the dismissal of a mother's claims that a COVID-19 vaccine was administered to her daughter without consent—a situation where the claimed injury was caused by the administration of a covered countermeasure to the daughter. That scenario is far afield from this one. Indeed, *M.T.* explicitly distinguished cases holding that allegations like Ms. Yarnell's are not subject to the PREP Act on the ground that, in those cases, the "claims were not causally related to the administration or use of covered countermeasures—they were causally related to the failure to administer or use covered

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WL 1782246, at *4–5 (D.N.H. Feb. 6, 2023); *DeAngelo v. Artis Sr. Living of Elmhurst, LLC*, 2022 WL 3357276, at *3–4 (N.D. Ill. Aug. 15, 2022); *Cagle v. NHC HealthCare-Md. Heights*, 2022 WL 2833986 (E.D. Mo. July 20, 2022), *aff'd on other grounds*, 78 F.4th 1061 (8th Cir. 2023); *Whitehead v. Pine Haven Operating LLC*, 75 Misc. 3d 985, 991–93 (N.Y. Sup. Ct. 2022); *Testa v. Broomall Operating Co.*, 622 F. Supp. 3d 4, 10–12 (E.D. Pa. 2022); *Walsh v. SSC Westchester Operating Co.*, 592 F. Supp. 3d 737, 743–46 (N.D. Ill. 2022); *Ramirez v. Windsor Care Ctr. Nat'l City, Inc.*, 2022 WL 392899, at *4 (S.D. Cal. Feb. 9, 2022); *Pirotte v. HCP Prairie Village KS OpCo LLC*, 580 F. Supp. 3d 1012, 1025–27 (D. Kan. 2022); *Shankle v. Heights of Summerlin*, 574 F. Supp. 3d 820, 826 (D. Nev. 2021); *Mackey v. Tower Hill Rehab., LLC*, 569 F. Supp. 3d 740, 745–48 (N.D. Ill. 2021); *Lawler v. Cedar Operations, LLC*, 2021 WL 4622414, at *4 (C.D. Cal. Oct. 7, 2021); *Lollie v. Colonnades Health Care Ctr.*, 2021 WL 4155805, at *3 (S.D. Tex. Sept. 13, 2021); *Moody*, 2021 WL 4134414, at *4–5; *Padilla v. Brookfield Healthcare Ctr.*, 2021 WL 1549689, at *5–6 (C.D. Cal. Apr. 19, 2021); *Khalek v. S. Denver Rehab., LLC*, 543 F. Supp. 3d 1019, 1027–28 (D. Colo. 2021); *Stone v. Long Beach Healthcare Ctr., LLC*, 2021 WL 1163572, at *4–5 (C.D. Cal. Mar. 26, 2021); *Lyons v. Cucumber Holdings, LLC*, 520 F. Supp. 3d 1277, 1285–86 (C.D. Cal. 2021); *Anson v. HCP Prairie Village KS OPCO LLC*, 523 F. Supp. 3d 1288, 1298–1302 (D. Kan. 2021); *Estate of Maglioli v. Andover Subacute Rehab. Ctr.*, 478 F. Supp. 3d 518 (D.N.J. 2020), *aff'd on other grounds sub nom. Maglioli v. Alliance HC Holdings LLC*, 16 F.4th 393 (3d Cir. 2021).

countermeasures." 528 P.3d at 1077–78 (collecting cases). Two other cases on which Clinton relies are similar. *See McCloud v. Universal Health Servs. of Palmdale Inc.*, No. 22AVCV00794 (Cal. Super. Ct. Mar. 15, 2023), A319, 322, *cited in* Relator Br. 21 (dismissing a claim based on the allegedly negligent "administration of various COVID-19 treatments, including remdesivir"); *Politella v. Windham Se.*, 2023 WL 18143866 (Vt. Super. Ct. Dec. 28, 2022), *cited in* Relator Br. 20–21 (dismissing a claim arising out of the allegedly nonconsensual administration of a COVID-19 vaccination); *see also Bird v. Wyoming*, 537 P.3d 332, 2023 WL 7035806, at *5 (Wyo. Oct. 26, 2023) (affirming grant of immunity for claims "causally related to the administration of a COVID-19 vaccine"). That courts have applied the PREP Act to dismiss claims that *do* have a causal relationship with the affirmative administration of vaccines or other covered countermeasures says nothing about whether the statute applies here.

As to the four other unpublished, trial-court cases cited by Clinton, *see* Relator Br. 21, two of which were decided by the same judge, the dozens of decisions, including every appellate court decision, that support Ms. Yarnell's reading reveal the error of those four opinions. Furthermore, even these cases do not adopt Clinton's theory that all claims relating to COVID-19 are barred simply because a defendant administered a program involving COVID-19 countermeasures.

In sum, Ms. Yarnell does not allege that her mother died because a covered countermeasure was administered to or used by any individual. The PREP Act's subsection (a) immunity therefore does not bar her suit.

C. The PREP Act's express preemption provision, section 247d-6d(b)(8), does not apply to Ms. Yarnell's claim, because Missouri tort law is not different from, or in conflict with, any federal requirement.

Section 247d-6d(b) of the PREP Act, which relates to the requirements for a declaration by the HHS Secretary under the Act, includes an express preemption provision. That provision states that, while a PREP Act declaration is in effect or "with respect to conduct undertaken in accordance with such declaration":

> no State or political subdivision of a State may establish, 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 [the PREP Act]; and
>
> (B) relates to the design, development, clinical 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, or under the Federal Food, Drug, and Cosmetic Act.

42 U.S.C. § 247d-6d(b)(8). That is, where the PREP Act creates a "requirement" with respect to a covered countermeasure, a state may not adopt or enforce a different requirement with respect to that covered countermeasure.

This provision has no applicability to this action. Clinton's contrary "argument is a red herring; a rehash of its claim for immunity dressed in different clothes." *Barron*, 2023 WL 1782246, at *6 (rejecting similar argument). Clinton fails to identify any "requirement applicable" under the PREP Act or any aspect of Missouri law that is contrary to such a requirement. Instead, it points to the statute's "exclusive litigation remedy for willful

misconduct claims [(42 U.S.C. § 247d-6d(d)(1)] and the exclusive federal administrative remedy [*id.* § 247d-6e],” and asserts that “Plaintiff’s negligence allegations” somehow “differ from, or conflict with” those remedies. Relator Br. 23. This argument is circular. There is no dispute that if *other* provisions of the PREP Act specified that a different forum had exclusive jurisdiction over Ms. Yarnell’s claim, she would be required to proceed in that forum—irrespective of section 247d-6d(b)(8). As explained above, though, Ms. Yarnell’s claim does not concern an injury caused by the administration to or use of a covered countermeasure by an individual, as would be necessary for the cited remedial provisions to have any relevance. *See* 42 U.S.C. § 247d-6d(d)(1) (creating an “exception to the immunity … set forth in subsection (a)); *id.* § 247d-6d(e) (creating a compensation fund for “injuries directly caused by the administration or use of a covered countermeasure”).

Further, neither Ms. Yarnell’s cause of action under Missouri law nor the remedial schemes created by the PREP Act are “requirements” subject to section 247d-6d(b)(8). As the United States Supreme Court has recognized in three cases interpreting similar language in other statutes, the term “requirements” refers to substantive legal provisions, not remedial ones. Thus, laws that prohibit states from adopting *requirements* that differ from those available under federal law do not preclude states from prescribing *remedies* that differ from those available under federal law. *See Riegel v. Medtronic*, 552 U.S. 312, 330 (2008) (holding that a similarly worded provision of the Medical Device Amendments, 21 U.S.C. § 360k, does not bar states from creating remedies that differ from those available under the federal statute); *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005)

(holding that a similarly worded provision of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b), does not bar states from enacting different remedies); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 487 (1996) (plurality op.) (noting that the term "requirements" in 21 U.S.C. § 360k does not refer to "remedies"); *id.* at 509 (O'Connor, J., concurring in part and dissenting in part) ("Section 360k does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements*."). The similarly worded provision of the PREP Act should not be read differently. *See Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (holding that, where a judicial interpretation has "settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its … judicial interpretations as well"). In short, section 247d-6d(b)(8) is irrelevant to Ms. Yarnell's claim.

Finally, Clinton's reliance on *Brusewitz v. Wyeth LLC*, 562 U.S. 223 (2011), *see* Relator Br. 24, is misplaced. The statutory provision at issue in *Brusewitz* did not address different state-law "requirements"; it stated that "[n]o vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death" in certain circumstances. 562 U.S. at 231 (quoting 42 U.S.C. § 300aa-22(b)(1)). Justice Sotomayor's *Brusewitz* dissent compared the language at issue there to the language in the PREP Act's immunity provision, section 247d-6d(a)(1), *not* the section 247d-6d(b)(8) express preemption provision. 562 U.S. at 253.

D. Ms. Yarnell was not required to administratively exhaust her claim, as no administrative remedy for her claim exists.

The doctrine of administrative exhaustion, where it applies, requires that a "party seek all *available* remedies at the administrative level before applying to the courts for relief." *Green v. City of St. Louis*, 870 S.W.2d 794, 796 (Mo. banc 1994) (emphasis added); *see Farm Bureau Town & Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 352 (Mo. banc 1995) (noting that the rule "presuppose[s] an adequate administrative remedy").

Although the PREP Act creates an administrative compensation scheme, called the Countermeasures Injury Compensation Program (CICP), that scheme is available only to people who suffered injuries "directly caused by the administration or use of a covered countermeasure" subject to a PREP Act declaration. 42 U.S.C. § 247d-6e(a). HHS regulations specify that eligibility for compensation is limited to "injured countermeasure recipients" and their survivors, 42 C.F.R. § 110.10(a), and define "covered injuries" as excluding "injur[ies] sustained as the direct result of the covered condition or disease for which the countermeasure was administered or used … (e.g., if the covered countermeasure is ineffective in treating or preventing the underlying condition or disease)," *id.* § 110.20(d).

As discussed above, Ms. Yarnell does not seek to recover for any injury "directly caused by the administration or use of a covered countermeasure." To the contrary, her mother's death was the "direct result of the covered condition or disease" that the Secretary's PREP Act Declaration addresses, and thus, as made explicit by HHS regulation, is *not* a basis for administrative relief. *Cf. Reiter v. Cooper*, 507 U.S. 258, 268 (1993)

(rejecting administrative exhaustion argument where agency disclaimed power to award relief sought).

It should go without saying that a plaintiff need not exhaust unavailable administrative remedies. *See Ross v. Blake*, 578 U.S. 632, 642 (2016) (addressing exhaustion requirement of Prison Litigation Reform Act); *see Nicolai v. City of St. Louis*, 762 S.W.2d 423, 424–25 (Mo. banc 1988) (holding that a plaintiff was not required to proceed through an inapplicable administrative process to exhaust his claim). Here, there was no administrative process available to Ms. Yarnell and, therefore, no administrative exhaustion requirement.

II. Section 44.045(1) does not warrant dismissal of Ms. Yarnell's claim because Clinton was not "deployed" by a state official, and Ms. Yarnell does not seek to recover for a failure "in the delivery of health care necessitated by emergency during a such a deployment." (Responding to Point Relied On 3)

The Circuit Court correctly concluded that § 44.045(1), RSMo., part of the section of the Missouri statutes governing the State of Missouri Emergency Management Agency, does not bar Ms. Yarnell's claim. Section 44.045(1) has two operative parts. The first sentence, which has appeared since the statute was first enacted in 2005 with only minor modification, states that:

> Subject to approval by the state emergency management agency during an emergency declared by the governor, any health care provider licensed, registered, or certified in this state or any state who agrees to be so deployed as provided in this section may be deployed to provide care as necessitated by the emergency[.]

In 2007, a second sentence was added to the statute, providing that:

> During an emergency declared by the governor, health care providers deployed by the governor or any state agency shall not be liable for any civil

> damages or administrative sanctions for any failure, in the delivery of health care necessitated by the emergency during deployment, to exercise the skill and learning of an ordinarily careful health care provider in similar circumstances, but shall be liable for damages due to willful and wanton acts or omissions in rendering such care.

See H.B. No. 579 § A (2007).

Under the plain language of the statute, immunity requires satisfaction of three elements. First, the governor must have declared an emergency. Second, the health care provider "who agree[d] to be so deployed" must have been "deployed to provide care as necessitated by the emergency" by the governor or a state agency, with the "approval" of the state emergency management agency. Third, the claims must arise from an alleged "failure in the delivery of health care necessitated by the emergency during deployment." Neither the second or third elements are present here, as there is no evidence that Clinton was "deployed by the governor or any state agency" to "provide care" necessitated by COVID-19. Clinton's contrary assertion ignores the plain meaning of the statutory text and lacks any support in the record.

The statute does not define the term "deploy." "In the absence of statutory definitions, the plain and ordinary meaning of a term may be derived from a dictionary, and by considering the context of the entire statute in which it appears." *Swafford v. Treasurer of Missouri*, 659 S.W.3d 580, 583 (Mo. banc 2023) (quoting *State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007)). The dictionary definition of "deploy" is "to station (persons or forces) systematically over an area." Webster's II New

College Dictionary 364 (3d ed. 2005); *see* Merriam-Webster.com Dictionary[11] (defining deploy as "to place in battle formation or appropriate positions" or "to spread out, utilize, or arrange for a deliberate purpose"); Black's Law Dictionary (11th ed. 2019) (defining deploy as "to organize one or more … so as to be in the right place at the desired time" or "to use (something) for a particular purpose"). Inherent in this definition is both some control by the deployer over the deployee's performance of a task, and some change in the deployee's action from the pre-existing status quo. This same meaning is reflected in the structure and context of section 44.045(1). The first sentence creates an authority to "deploy" licensed health care providers to "provide care as necessitated by [a declared] emergency," and the second creates a qualified immunity for providers deployed pursuant to that authority.

Here, there is no evidence that either the Governor or any state agency exercised the authority conferred by section 44.045(1) to "deploy" Clinton, much less that any such deployment was approved by the state emergency management agency. Clinton points to no letter, order, or other document from a state government official putting Clinton into place to perform a specific task. Clinton refers to Executive Order 20-02, which, in relevant part, declared a state of emergency, activated the Missouri State Emergency Operations Plan, and directed certain actions by state agencies. Missouri Executive Order 20-02, March 13, 2020, Ex. G, A66. But that order did not direct Clinton or other private health care providers to do anything at all, much less "deploy" them.

[11] https://www.merriam-webster.com/dictionary/deploy

Clinton also asserts that, in connection with the signing of Executive Order 20-02, "the Governor expressly called on Long-Term Care facilities with 'large concentrations of senior citizens to strongly consider restrictions and closures, in consultation with health authorities, to protect those most vulnerable to this virus.'" Relator Br. 27 (citing Governor Parson Signs Executive Order 20-02 Declaring a State of Emergency in Missouri, Mar. 13, 2020).[12] But the quoted language does not appear anywhere in the cited material. Rather, it appears in a March 16, 2020, statement by Governor Parson, where he "ask[ed]" such facilities to comply with recommendations of the federal Centers for Disease Control. *See* Governor Parson's Statement Regarding CDC Recommendations on Mass Gatherings and Large Community Events, Mar. 16, 2020.[13] Asking regulated entities to comply with federal guidance is not a deployment by the Governor.

Finally, Clinton cites generally to two pages in its Circuit Court reply in support of its motion to dismiss in which it listed some industry-wide guidance documents issued by the Department of Health and Senior Services (DHSS) and to a filing of supplemental authority in which it cited DHSS's Pandemic Influenza Response Plan. *See* Relator Br. 29 (citing Ex. E., A92–93, and Ex. F, A187–90). It is unclear what parts of these lengthy documents Clinton believes effectuated a deployment, and the only authority over Clinton that these documents reflect is regulatory in nature. The fact that an entity is *regulated* by

[12] https://governor.mo.gov/press-releases/archive/governor-parson-signs-executive-order-20-02-declaring-state-emergency.

[13] https://governor.mo.gov/press-releases/archive/governor-parsons-statement-regarding-cdc-recommendations-mass-gatherings-and.

the state is not the same as *deployment* by the state. And although DHSS may have "work[ed] directly with long-term care facilities," Relator Br. 29, working with an entity is not the same as "deploying." These documents no more "deployed" all of Missouri's nursing homes than the guidance issued to dozens of others Missouri industries, and indeed to all Missouri residents, deployed those who received that guidance. *See, e.g.*, DHSS Order, Apr. 27, 2020 (imposing COVID-19 restrictions on restaurants, retailers, and others).[14]

Clinton's responsibility to protect Ms. Gray and other residents from infectious disease arose from the contracts it entered into with those residents, and from state and federal law, that predated the pandemic. *See, e.g.*, 19 CSR 30-85.042(13) (requiring skilled nursing facilities like Clinton "develop policies and procedures applicable to its operation to ensure the residents' health and safety and to meet the residents' needs," including "policies covering … infection control"); 42 C.F.R. § 483.80 (federal infection control standards). DHSS's guidance as to how carry out those responsibilities in the context of COVID-19 does not constitute a deployment.

Given the breadth of the documents that Clinton cites, Clinton's argument seems to be that *every* health care provider in Missouri was "deployed" by the Governor and/or DHSS, once DHSS issued applicable guidance. If Clinton were correct, any health care provider that provided COVID-19 necessitated care would be entitled to invoke section

[14] https://governor.mo.gov/sites/gov/files/media/pdf/2020/04/Economic-Reopening-Phase-1.pdf.

44.045(1). Such an outcome would deprive the statutory requirement of "deployment," and the relationship between the first and second sentences of the statutory provision, of any meaning, contrary to basic principles of statutory construction.[15] The Legislature did not provide immunity to all those who "provide care as necessitated by the emergency," but only to those who were "*deployed to* provide care as necessitated by the emergency." § 44.045(1) (emphasis added).

Additionally, Clinton's view would make the Legislature's enactment of the MCLPA in 2021 wholly unnecessary. MCLPA creates a qualified immunity for health care providers in actions based on injuries "alleged to have been caused by, arising out of, or related to a health care provider's act or omission in the course of arranging for or providing COVID-19 related health care services" and allows such claims to proceed only where they allege recklessness or willful misconduct. § 537.1000(5)(c), (10), RSMo. Under Clinton's view, however, *every* health care provider in the State that was providing COVID-19 related health care services was *already* entitled to the immunity conferred by section

[15] In a footnote, Clinton asserts that the Georgia Court of Appeals decision in *Arbor Management* "is instructive in its application of immunities under the analogous Georgia Emergency Management Act." Relator Br. 16 n.10 (citing 875 S.E.2d at 765–68). The Georgia Emergency Management Act is not analogous to section 44.045(1). The qualified immunity provided by the Georgia law is not based on "deployment," but rather applies to "emergency management activities." Ga. Code Ann. § 38-3-35. Moreover, in *Arbor Management*, the question was not whether the qualified immunity applied to the defendant's actions, but whether the plaintiff had overcome it by pleading "gross negligence or willful misconduct." 875 S.E.2d at 765–68; *cf. Resurgens, LLC v. Ervin*, 2023 WL 7011731, at *3 (Ga. Ct. App. Oct. 25, 2023) (holding that the defendant was not entitled to immunity under the Georgia law where he failed to establish that "he was engaged in emergency management activities pursuant to" the statute or a related executive order).

44.045(1), as a result of Executive Orders and guidance documents that predated the enactment of the MCLPA. As this Court "do[es] not presume that the legislature engages in redundant acts," the Court should not construe the Legislature's act as meaningless. *Garland v. Dir. of Revenue*, 961 S.W.2d 824, 828 (Mo. banc 1998).

III. Sections 537.1005 and 537.1010 do not require dismissal of Ms. Yarnell's claim, because they do not apply to claims accrued prior to their enactment, and because, even if they did, Ms. Yarnell has adequately pleaded recklessness or willful misconduct. (Responding to Point Relied On 4)

On July 7, 2021, the Governor signed into law Senate Bill 51, titled "Establishes provisions relating to civil actions arising from COVID-19 pandemic" and referred to by Clinton as "the Missouri COVID-19 Liability Protections Act" or "MCLPA." Effective August 28, 2021—after Ms. Yarnell commenced this action—that law provides immunity from liability "in any COVID-19 exposure action" and in "a COVID-19 medical liability action" absent a showing of "recklessness or willful misconduct." §§ 537.1005, 537.1010, RSMo.

Clinton argues that these provisions bar Ms. Yarnell's claim in this case, although it is based on alleged actions and inactions that took place in 2020, nine months *before* Senate Bill 51 was signed into law. *See* Ex. A, A2–3. Under well-established principles of Missouri law, sections 537.1005 and 537.1010 do not apply retroactively. Indeed, applying the statute retroactively would violate the prohibition on retrospective laws set out in Article I, section 13 of the Missouri Constitution. Moreover, even if the MCLPA applied to claims that accrued prior to its enactment, it would not require dismissal of Ms. Yarnell's claim, which adequately alleges recklessness or willful misconduct as required by that law.

A. The MCLPA does not apply to claims accrued prior to its effective date.

Missouri law recognizes both a presumption against retroactivity and a constitutional prohibition against statutes having retrospective application. *Cedar Cnty. Comm'n v. Parson*, 661 S.W.3d 766, 774 (Mo. banc 2023). As this Court recently explained, "the two concepts are different." *Id.* "A law is retroactive in its operation when it looks or acts backward from its effective date." *Id.* (quoting *State ex rel. Meyer v. Cobb*, 467 S.W.2d 854, 856 (Mo. 1971)) (cleaned up). "Retroactivity is a matter of statutory construction." *Id.* at 775. "[S]tatutes are presumed to operate prospectively," *id.*, 661 S.W.3d at 774, and "[t]he applicable statute is typically the one in effect when the petition was filed." *R.M.A.*, 568 S.W.3d at 425 n.3 (citing *Mehra v. Mehra*, 819 S.W.2d 351, 353 (Mo. banc 1991)). Retrospectivity, on the other hand, "is a substantive limitation on the General Assembly's authority to enact laws," imposed by the Missouri Constitution. *Cedar Cnty. Comm'n*, 661 S.W.3d at 774. "A law is retrospective in operation if it takes away or impairs vested or substantial rights acquired under existing laws or imposes new obligations, duties, or disabilities with respect to past transactions." *Id.* (cleaned up) (quoting *Hess v. Chase Manhattan Bank*, 220 S.W.3d 758, 769 (Mo. banc 2007)).

First, for a statute to apply retroactively, "retroactive application must be compelled by or necessarily inferred from the language of the statute." *Id.* (citing *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 872 (Mo. banc 1993)). This Court will construe a statute to apply only prospectively "unless a different intent is evident beyond reasonable question." *State v. Merritt*, 467 S.W.3d 808, 812 (Mo. banc 2015) (quoting *State ex rel. Scott v. Dircks*, 111 S.W. 1, 3 (Mo. banc 1908)). Here, Clinton does not point to any

evidence that would overcome the statutory presumption against retroactivity. The Court may dispense with Clinton's MCLPA argument on that basis alone.

Second, even if Clinton had adduced evidence to clear the high bar necessary to show the legislature intended for the MCLPA's immunity provisions to apply to claims based on injuries that predated the law's enactment, applying the law retroactively would violate the constitutional bar on retrospectivity. Article I, section 13, of the Missouri Constitution specifies that "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, … can be enacted." This provision, which "has been 'part of Missouri law since this State adopted its first Constitution in 1820,'" "reflects 'the underlying repugnance to the retrospective application of laws.'" *Klotz v. St. Anthony's Med. Ctr*, 311 S.W.3d 752, 760 (Mo. banc 2010) (quoting *Doe v. Phillips*, 194 S.W.3d 833, 850 (Mo. banc 2006), and *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1974)).

In determining whether a law that applies to claims arising out of conduct prior to the law's enactment is impermissibly retrospective, this Court has held that statutes that are "remedial" or "procedural" may apply retroactively without running afoul of the Constitution, whereas statutes that are "substantive" cannot. *See City of Aurora v. Spectra Commc'ns Grp.*, 592 S.W.3d 764, 800 (Mo. banc 2019); *Hess*, 220 S.W.3d at 769. "The distinction is that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit." *Hess*, 220 S.W.3d at 769 (quoting *State v. Jaco*, 156 S.W.3d 775, 781 (Mo. banc 2005)). "[I]t is settled law in Missouri that the legislature cannot change the substantive law for a category of

damages after a cause of action has accrued." *Klotz*, 311 S.W.3d at 760 (Mo. banc 2010); *see also Gervich v. Condaire, Inc.*, 370 S.W.3d 617, 623 (Mo. banc 2012). The core question is whether the statute "gives to something already done a different effect from that which it had when it transpired." *Accident Fund Ins. Co. v. Casey*, 550 S.W.3d 76, 81 (Mo. 2018) (internal marks omitted) (quoting *State ex rel. Schottel v. Harman*, 208 S.W.3d 889, 892 (Mo. banc 2006)).

Clinton does not dispute that the application of the MCLPA here would be retrospective. *See, e.g.*, Relator Br. 33 (asserting "the MCLPA is to be given retrospective application"). A law that, like the MCLPA, provides immunity from suits for negligence where no such immunity previously existed is substantive in nature, as it "gives to something already done" (tortious conduct) "a different effect from that which it had when it transpired." *Accident Fund Ins.*, 550 S.W.3d at 81. At the time Ms. Yarnell's cause of action accrued, Clinton did not have any immunity pursuant to the not-yet-enacted MCLPA, and a negligence standard governed her claim. Ms. Yarnell's right to sue for a violation of that standard was a substantive right, and thus could not be abrogated by a later legislative conferral of immunity. *Cf. Benton v. City of Rolla*, 872 S.W.2d 882, 886 (Mo. Ct. App. 1994) (holding application of legislative expansion of sovereign immunity to claims arising out of conduct that preceded the statutory amendment violated Missouri Constitution); *see also Resurgens*, 2023 WL 7011731, at *2 (noting analogous Georgia COVID-19 immunity statute did not apply to bar claim "where the alleged malpractice occurred prior to [its] enactment"); *Ruth v. Elderwood at Amherst*, 209 A.D.3d 1281, 1284–86 (N.Y. App. Div. 2022) (holding that *repeal* of New York's COVID-19 immunity

statute could not be applied retroactively because it would alter substantive rights as to transactions already completed).

Nonetheless, Clinton contends that the constitutional prohibition on retrospective laws does not apply to exercises of the State's "police powers." *See, e.g.*, Relator Br. 32. This proposition has no support in this Court's case law. To the contrary, this Court has expressly held that the State's "police power is limited by … the rights guaranteed by the Constitution." *President Riverboat Casino-Mo., Inc. v. Mo. Gaming Comm'n*, 13 S.W.3d 635, 641 (Mo. banc 2000); *see also State ex rel. Barker v. Merchants' Exch. of St. Louis*, 190 S.W. 903, 904 (Mo. banc 1916) (recognizing that "the legislative power under the police powers of the state are very broad" but still subject to "the express limitations in the state and federal Constitutions"). The sole case Clinton cites to support its theory, *Temple Building v. Building Code Board of Appeals of City of Kansas City*, 567 S.W.2d 406, 409 (Mo. Ct. App. 1978), is inapposite. There, the Court of Appeals upheld a municipal order requiring a building to install a safety mechanism in its existing elevators. In so doing, the court rejected an argument that the order was outside the scope of the city's police powers to the extent it applied to existing elevators, as opposed to newly built ones. The court did not address the constitutional prohibition on retrospective laws, and with good reason: the order at issue was not retrospective. Although it required the installation of safety mechanisms to existing elevators after its effective date, it did not penalize anyone for failing to install such mechanisms earlier. In other words, the law did not "give[] to

something already done a different effect from that which it had when it transpired." *Accident Fund Ins.*, 550 S.W.3d at 81.[16]

Cases where this Court *has* addressed retrospective laws make clear that there is no carve-out from the constitutional provision for laws that, as Clinton suggests, "are manifestations of the police powers of the State." Relator Br. 31. In *Doe v. Phillips*, for example, this Court held that imposing a registration requirement on previously convicted sex offenders violated the constitutional bar on retrospective laws. 194 S.W.3d at 849–52. And in *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 336 (Mo. banc 1993), this Court held that the state's childhood sexual abuse statute was constitutionally barred to the extent that it revived claims barred by the preexisting statute of limitations. These statutes no less implicated the state's police powers than the MCLPA. To the extent that Clinton suggests that the fact that the MCLPA was an exercise of police powers enacted during the COVID-19 emergency somehow abrogates the state Constitution, that is inconsistent with this Court's recognition that, regardless of the effects of the COVID-19 pandemic, "the Missouri Constitution [is not] entitled to take 'sick days.'" *J.A.T. v. Jackson Cnty. Juvenile Off.*, 637 S.W.3d 1, 10 (Mo. banc 2022).

[16] None of the other authorities invoked by Clinton in its brief, at 32–33, support its suggestion that the constitutional bar on retrospective laws does not apply where the state is exercising its police powers. *See* 16A Am. Jur. 2d Constitutional Law § 399 (citing *Jenkins v. Jenkins*, 242 S.W.2d 124 (Ark. 1951), where the Arkansas Supreme Court held that a statute *was* impermissibly retrospective); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 264 (1994) (noting reasons why the legislature might want to make statute retroactive, while nonetheless applying a presumption against retroactivity); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (addressing the scope of powers reserved to the States by the U.S. Constitution).

B. Ms. Yarnell has adequately alleged recklessness or willful misconduct.

If the MCLPA could permissibly apply retrospectively, Ms. Yarnell's allegations would meet its standard. The relevant provisions of the MCLPA bar recovery in "any COVID-19 exposure action" or "any COVID-19 medical liability action," as defined by § 537.1000(4) & (5), RSMo., respectively, unless the plaintiff can prove (1) recklessness or willful misconduct by the defendant, and (2) that the recklessness or willful misconduct caused the plaintiff's injury. §§ 537.1005, 1010, RSMo. The statute defines "recklessness" as "a conscious, voluntary act or omission in reckless disregard of [] [a] legal duty; and [] the consequences to another party." § 537.1000(15), RSMo.

Ms. Yarnell has alleged that that Clinton's action and inaction, including its placement of Mary Gray in a double room contrary to an express contract, and its relocation of Ms. Gray to a hospital contrary to her advanced directives and without notifying her family, "showed a complete indifference to and conscious disregard for the safety of others." Ex. A, A3–4 ¶¶ 17, 19. Clinton makes no argument as to why these allegations are insufficient to state a claim, simply asserting in its Points Relied On that the allegations in this case are "indisputably" not for reckless or willful misconduct. Relator Br. 7–8 (Points Relied On 4). Because Clinton "fails to support [its] contention with relevant authority or argument beyond conclusions, the point [should be] considered abandoned." *City of*

Harrisonville v. McCall Serv. Stations, 495 S.W.3d 738, 746 (Mo. banc 2016) (quoting *Beatty v. State Tax Comm'n*, 912 S.W.2d 492, 498–99 (Mo. banc 1995)).[17]

As to the merits, "to survive a motion to dismiss, one need only plead facts a jury must find to award relief, not evidentiary facts." *Schlafly v. Cori*, 647 S.W.3d 570, 576 (Mo. banc 2022). Accepting Ms. Yarnell's allegations as true and construing them in her favor, as is required at the motion to dismiss stage, *Schlafly*, 647 S.W.3d at 573, Ms. Yarnell has adequately alleged facts necessary to avoid the MCLPA's bar, should it be deemed to apply to Ms. Yarnell's claims.

CONCLUSION

For the foregoing reasons, as well as those stated in Respondent's Answer to the Petition and the Suggestions in Opposition, the Court should deny Relator's Petition and quash the Preliminary Writ of Mandamus.

[17] Clinton incorrectly suggests that Ms. Yarnell's Answer did not address the applicability of MCLPA beyond "retroactivity grounds." Relator Br. 30. In fact, the Answer averred both that the MCLPA "has no application to this case" and that, "even if it did, Plaintiff's allegations are sufficient to satisfy [the MCLPA's] standard at the motion to dismiss stage." Answer ¶ 31.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on November 14, 2023, I electronically filed the foregoing brief with the Clerk of the Court using the Court's electronic filing system, which will serve the brief on all counsel of record.

I further certify that this brief complies with the limitations contained in Rule 84.06(b). According to my word-processing program, Microsoft Word, the brief contains 10,851 words.

Additionally, I certify that I have signed the original version of the brief.

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