No. 86P24 EIGHTEENTH DISTRICT

****

SUPREME COURT OF NORTH CAROLINA

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

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BRIEF OF *AMICI CURIAE* REP. NEAL JACKSON *ET AL.* (MEMBERS OF THE NORTH CAROLINA GENERAL ASSEMBLY) IN SUPPORT OF PLAINTIFFS-APPELLANTS' NOTICE OF APPEAL AND PETITION FOR DISCRETIONARY REVIEW[†]

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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.

INDEX

Table of Authorities iii

Nature of the Interest of the *Amici Curiae* 2

Issues to be Addressed 3

Argument 4

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) 5

A. This Case Presents A Major Question Regarding Preemption Of State Constitutional Protections For Parents' Fundamental Liberty Interests 5

B. Defendants-Appellees Are Alleged To Have Violated The Constitutional Liberty Interests Of Parents, And The North Carolina Constitution Provides A Means For Redress 7

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

D. The Lower Courts' Decisions Permit The Federal Government To

Unconstitutionally Commandeer Local Governments 13

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 21

A. The Subject Matter Of The Appeal Has Significant Public Interest 21

B. This Appeal Involves Legal Principles Of Major Significance To The Jurisprudence Of The State 24

Conclusion 25

Identification of Counsel 26

Certificate of Compliance 27

Certificate of Service 28

Appendix: Identification of *Amici Curiae* 29

TABLE OF AUTHORITIES

Cases:

Altria Group, Inc. v. Good, 555 U.S. 70 (2008) 19

Arizona v. Mayorkas, 143 S. Ct. 1312 (2023) (Gorsuch, J., dissenting).. 21-22

Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) 15

Bond v. United States, 572 U.S. 844 (2014) 19

California Div. of Labor Standards Enforc. v. Dillingham Const., N.A., Inc., 519 U.S. 316 (1997)..................... 10, 13

Community Success Initiative v. Moore, 384 N.C. 194, 886 S.E.2d 16 (2023)... 23

Corum v. University of North Carolina, 330 N.C. 761, 413 S.E.2d 276 (1992).. 8

Ewart v. Jones, 116 N.C. 570, 21 S.E. 787 (1895)..... 23

FERC v. Mississippi, 456 U.S. 742 (1982)................ 15

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (Powell, J., dissenting) 15

Gregory v. Ashcroft, 501 U.S. 452 (1991) 14

Happel v. Guilford Cnty. Bd. of Educ., Case No. COA23-487, ___ S.E.2d ___, 2024 WL 925471 (Mar. 5, 2024) ..... *passim*

Hodel v. Va. Surface Min. and Reclamation Ass'n, Inc., 452 U.S. 264 (1981) 15

Hoke v. Henderson, 15 N.C. (4 Dev.) 1 (1833) (Ruffin, C.J.)

.... 23

In re E.B., 375 N.C. 310, 847 S.E.2d 666 (2020) 6-7

In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984) 7

In re Murphy, 105 N.C. App. 651, 414 S.E.2d 396 (1992) 7

May v. Anderson, 345 U.S. 528 (1953)...................... 6

Medellín v. Texas, 552 U.S. 491 (2008).................... 15

Meyer v. Nebraska, 262 U.S. 390 (1923) 6

Mial v. Ellington, 134 N.C. 131, 46 S.E. 961 (1903) .. 23

New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 9-10, 13, 24

New York v. United States, 505 U.S. 144 (1992)....... 15-16

Owenby v. Young, 357 N.C. 142, 579 S.E.2d 264 (2003) 7

Petersen v. Rodgers, 337 N.C. 397, 445 S.E.2d 901 (1994) 6

Price v. Howard, 346 N.C. 68, 484 S.E.2d 528 (1997) 6

Prince v. Massachusetts, 321 U.S. 158 (1944) 6

Printz v. United States, 521 U.S. 898 (1997) 15-19

Rose v. Rose, 481 U.S. 619 (1987) 11

Row v. Row, 185 N.C. App. 450, 650 S.E.2d 1 (2007) 11

Skinner v. Oklahoma, 316 U.S. 535 (1942) 6

Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001)................................. 19

Sosna v. Iowa, 419 U.S. 393 (1975)........................... 10-11

Stanley v. Illinois, 405 U.S. 645 (1972) 6

State ex rel. Martin v. Preston, 325 N.C. 438, 385 S.E.2d 473 (1989)... 22-23

State v. Colson, 274 N.C. 295, 163 S.E.2d 376 (1968) 20

State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940) 22

Troxel v. Granville, 530 U.S. 57 (2000) 7

United States v. Lopez, 514 U.S. 549 (1995) 14

Washington v. Cline, Case No. 148PA14-2, __ S.E.2d __, 2024 WL 1222548 (Mar. 22, 2024) 8

Wyeth v. Levine, 555 U.S. 555 (2009) 10

Statutes, Rules, and Constitutional Provisions:

42 U.S.C. § 247d-6d 5

42 U.S.C. § 247d-6d(a)(1) 9

42 U.S.C. § 247d-6d(a)(2)(A)................................. 11-12

42 U.S.C. § 247d-6d(a)(2)(B) 12

N.C. Const., art. I, § 1 6

N.C. Const., art. 1, § 2 23

N.C. Const., art. 1, § 6 23

N.C. Const., art. I, § 13 6

N.C. Const., art. I, § 19 6

N.C. Gen. Stat. § 7A-30(1) 3, 5

N.C. Gen. Stat. § 7A-31(c)(1) & (2) 4, 21, 22

N.C. Gen. Stat. § 90-21.5(a1) .... *passim*

N.C. R. Civ. P. 12(b)(6) 7

U.S. Const., art. IV, § 4 24

U.S. Const. amend. IX 6

U.S. Const. amend. X. 14

U.S. Const. amend. XIV 5-6

Other Authorities:

Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) 12

John V. Orth & Chief Justice Paul Martin Newby, THE NORTH CAROLINA CONSTITUTION (2d ed., 2013) .. 23-24

The Federalist No. 45 (C. Rossiter ed. 1961)............ 14

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BRIEF OF *AMICI CURIAE* REP. NEAL JACKSON *ET AL.*
(MEMBERS OF THE NORTH CAROLINA GENERAL ASSEMBLY)
IN SUPPORT OF PLAINTIFFS-APPELLANTS' NOTICE OF APPEAL
AND PETITION FOR DISCRETIONARY REVIEW

****

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.

[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.

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)?

(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

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

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***,' *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 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

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

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.

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***." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers, Ins.*, 514 U.S. 645,

[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.

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

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***,

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

[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).

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

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(a1) (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

by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State 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) (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 program," *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981).

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'

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(a1) 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 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 (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." *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

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

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").

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.

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 (a1). 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."

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

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.

Indeed, as it stands, significant doubt has now been cast on the scope and validity of N.C. Gen. Stat. § 90-21.5(a1), 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.

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

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing brief complies with the requirements of the requirements of the North Carolina Rules of Appellate Procedure, including font and formatting requirements.

Date: April 12, 2024

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, in accordance with the North Carolina Rules of Appellate Procedure, including N.C. R. App. P. 26, the foregoing brief has been served this 12 April 2024 by e-mail, on counsel for all parties, addressed as follows:

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APPENDIX
Identification of *Amici Curiae*

Pursuant to Rule 28.1(d), the following is a list of all *Amici Curiae* submitting this brief to the Court:

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