IN THE COURT OF APPEALS

FOR THE STATE OF ARIZONA

Case No. 22-0508

ROBIN ROEBUCK,

Plaintiff-Appellant,

v.

MAYO CLINIC OF ARIZONA, et al.

Defendants-Appellees.

On Appeal from the Maricopa County Superior Court
For the State of Arizona
Civil Action No. CV2021-090429
The Honorable Rodrick Coffey

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. THE TRIAL COURT WRONGLY HELD DEFENDANTS ARE IMMUNE FROM CIVIL LIABILITY

A. A.R.S. § 12-516 Is Ambiguous and the Court Failed to Address the Legislative Intent of the Statute

Appellees cite to A.R.S. § 12-516(A) and (B) in support of their argument that the statute grants immunity to Defendants from civil liability. (Ans. Br., at pp. 17-18.) The statute provides in relevant part:

> "…a health professional or health care institution that acts in good faith is not liable for damages in any civil action for an injury or death that is alleged to be caused by the health professional's or health care institution's action or omission while providing health care services **in support of this state's response to the state of emergency** declared by the governor unless it is proven by clear and convincing evidence that the health professional or health care institution failed to act or acted and the failure to act or action was due to that health professional's or health care institution's wilful misconduct or gross negligence."

A.R.S. 12-516(A)(emphasis added.)

> Subsection A of this section applies to any action or omission that is alleged to have occurred during a person's screening, assessment, diagnosis or treatment and that **is related to the public health pandemic** that is the subject of the state of emergency

A.R.S. 12-516(B)(emphasis added.)

Relying on the statute's language, Appellees argue that the arterial blood gas ("ABG") procedure that was ordered by Dr. Ashraf "was undisputedly ordered for

and related to Plaintiff's COVID-19" and thus Defendants are immune from civil action. (Ans. Br., at p. 20.) In so concluding, and without ever reconciling their conclusion with the Arizona Rules of Civil Procedure or with Arizona case law that summary judgment is appropriate only when "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law", Appellees wrest the testimony of Dr. Ashraf to reach the unwarranted conclusion that it doesn't matter "why Dr. Ashraf ordered [the ABG procedure] for Plaintiff" but rather what was "the result of the echocardiogram" that prompted Dr. Ashraf to order the ABG procedure. *Id*., at p. 21; Ariz. R. Civ. P. Rule 56(a); *Orme School v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

In so reaching, Appellees ignore the very language of the statute upon which they rely. As stated in A.R.S. § 12-516(B), the language of A.R.S. § 12-516(A) applies to any action or omission that occurred during a person's screening, assessment, diagnosis or treatment that "**is related to the public health pandemic**." Appellees do not attempt to address the legislative meaning of the term "related" – indeed, the lower Court did not engage in this necessary component of statutory interpretation and it would be improper for Appellees to assume the province of the Court and insert their own interpretation. It is not enough for Appellees to argue, as they do, that Plaintiff was diagnosed with COVID-19 while he was hospitalized (in addition to several other serious and *unrelated* chronic conditions), or that there was

an extant public epidemic, or that public health officials and agencies were concerned about the spread of COVID-19. The very crux of the issue, as it relates to the instant matter, is whether the Arizona legislature intended for potential plaintiffs to be denied the otherwise constitutional right to seek a remedy for an injury if their injury occurred during the screening, assessment, diagnosis or treatment of a condition that related to a public health pandemic. *See, e.g*., *Hazine v. Montgomery Elevator Co.,* 176 Ariz. 340, 342, 861 P.2d 625, 627 (1993); *Boswell v. Phoenix Newspapers, Inc.,* 152 Ariz. 9, 730 P.2d 186 (1986), *cert. denied,* 481 U.S. 1029, 107 S.Ct. 1954, 95 L.Ed.2d 527 (1987), citing Ariz. Const. art. 18, § 6 ("The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.")

Arizona courts are much more exacting in their interpretation of statutory language than Appellees are. Recently, the Arizona Court of Appeals reiterated its role in interpreting a statute:

> "We interpret statutory language in view of the entire text, considering the context and related statutes on the same subject. **A cardinal principle of statutory interpretation is to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous**." *Deal v. Deal,* 503 P.3d 838, 841 (Ariz.App. 1st Div. 2021), review denied (April 5, 2022), citing *Nicaise v. Sundaram*, 245 Ariz. 566, 568, 432 P.3d 925, 927 (2019)(emphasis added.)

Here, it is undisputed that Plaintiff had a chronic heart condition that is unrelated to and which pre-existed his diagnosis of COVID-19 in April 2020. It is also undisputed that Dr. Ashraf was a member of Plaintiff's heart transplant team when Plaintiff was admitted to Mayo Clinic in April 2020, and that he was concerned about the condition of Plaintiff's heart function in light of the heart transplant procedure that Plaintiff had undergone at Mayo Clinic in April 2017. Indeed, the echocardiogram "results", on which Appellees base their argument, showed that Plaintiff's heart had reduced right ventricular function and a possible echogenicity in the right atrium. (R.14 ¶ 11.)(Ans. Br., at p. 21.) Moreover, because the echocardiogram showed decreased heart function, Dr. Ashraf ordered that Plaintiff undergo an ABG procedure. (R.14 ¶ 11.) It is noteworthy that neither Plaintiff's medical records nor the testimony of Dr. Ashraf or Dr. Scott suggest, let alone establish, that Plaintiff's reduced right ventricular function was caused by, or related to, COVID-19.

Given the above, and for purposes of interpreting the meaning and intent of A.R.S. § 12-516, the ultimate question becomes: Was Defendants' administration of the ABG procedure to Plaintiff related to the COVID-19 pandemic? To answer this question, the Court must determine what the legislature meant by the word "related", an exercise not undertaken by the lower Court but which is paramount to answering this question. Because the interpretation of A.R.S. § 12-516 is a matter of first

impression for any Arizona court, it is yet unclear what the term "related" means or what the legislature intended it to mean.

Seemingly acknowledging that A.R.S. § 12-516 may indeed be ambiguous, Appellees argue that "[e]ven if the statute is ambiguous, that does not mean it would not apply." (Ans. Br., at p. 24.) Appellees go on to address this problem, urging that which Appellant likewise urges herein, i.e., this Court "may resolve doubt by resorting to statutory interpretation" in order to "determine and give effect to the legislature's intent." *Id.,* at pp. 24-25. Of course, implicit in Appellee's urging is the acknowledgement that the Court of Appeals undertake that which the lower Court failed to do.

B. Plaintiff Was Denied a Reasonable Alternative to Pursue His Claim

Appellees argue that the legislature did not abrogate Plaintiff's ability to pursue redress for his claims in enacting A.R.S. § 12-516, but only regulated this ability in light of the COVID-19 pandemic, and that Arizona case law permitted them to do so. (Ans. Br., at pp. 26-27), citing *Cronin v. Sheldon,* 195 Ariz. 531, 540-41 (1999). While true in part, Arizona courts also recognize the significance and irrevocability of Arizona's anti-abrogation clause, i.e., the legislature may "regulate the cause of action for negligence **so long as it leaves a claimant reasonable alternatives or choices which will enable him or her to bring the action**." *Barrio*

v. San Manuel Div. Hosp. for Magma Copper Co., 143 Ariz. 101, 106, 692 P.2d 280, 285 (1984)(emphasis added.)

The so-called "reasonable alternative" in Plaintiff's case per the lower Court's Order – although Appellants never address it as such – is that Plaintiff may still pursue his claim if he is able to educe evidence of willful misconduct or gross negligence. (R.43, at pp. 4-5.) Yet, Plaintiff was specifically denied the ability to meet this heightened burden of proof owing to the Court's direction that the parties engage in only limited discovery on the purpose of the ABG procedure. The lower Court's Order granting summary judgment effectively held that Plaintiff could pursue his claim for medical negligence if he proved willful misconduct or gross negligence, but Plaintiff had failed to do so (because he wasn't allowed to engage in the level of discovery necessary to evince such evidence), and therefore summary judgment is proper. The Court's injunction on limited discovery not only deprived Plaintiff of a reasonable alternative but it was inherently untenable.

Ultimately, if the precepts of Arizona's anti-abrogation clause are to be upheld, then Plaintiff should be afforded the full scope of discovery, *and not less*, that the Rules of Civil Procedure secure. Otherwise, persons, including Plaintiff, seeking to make out claims of medical negligence in cases involving COVID-19 not only have no reasonable alternative, they effectively have no alternative whatsoever.

C. Only Full Access to Discovery Would Allow Plaintiff to Comply With Ariz. R. Civ. P. 11

Appellees make the curious argument that the lower Court authorized Plaintiff to amend his complaint to allege willful misconduct or gross negligence "if such claims can satisfy the requirements of Rule 11 of the Arizona Rules of Civil Procedure." (Ans. Br., at p. 29, citing R.43, at p. 6.) This argument ignores the very basis for parties complying with Rule 11, i.e., that the factual contentions made in a pleading "have evidentiary support" or "will likely have evidentiary support after a *reasonable opportunity for further investigation or discovery*." Ariz. R. Civ. P. 11(b)(3)(emphasis added.) Ironically, it is *because of* the strict language of Rule 11 and the Court's direction limiting discovery that Plaintiff was unable to file an amended complaint. In other words, Plaintiff could not possibly allege in an amended complaint the very facts that he was prevented from obtaining per the Court's order, and to do otherwise Plaintiff would certainly run afoul of Rule 11 and expose himself and counsel to sanctions.

Appellees make the incredulous argument that Plaintiff's claim "is not a gross negligence case", and therefore must be rejected, because Plaintiff has not provided any evidence to show how an ABG procedure could be performed in a grossly negligent manner "such that *any amount of discovery* would uncover such facts." (Ans. Br., at p. 31.)(emphasis added.) In so arguing, Appellees unwittingly adopt the very reason which Plaintiff has urged herein and in its opening brief for rejecting the

lower Court's ruling, i.e., that Plaintiff (and other would-be plaintiffs) cannot pursue a claim for medical negligence because the heightened burdened of proof set forth in A.R.S. § 12-516 is simply unattainable, thus operating as an effective bar against plaintiffs seeking to plead or sustain a claim of medical negligence, and which outcome was predetermined here by the Court's order depriving Plaintiff of the very discovery tools he required to ever meet this burden of proof.

D. A.R.S. § 12-516 Disturbs Plaintiff's Vested Rights

In arguing that A.R.S. § 12-516 "applies to Plaintiff's suit" (ostensibly arguing that A.R.S. § 12-516 is retroactive), Appellees confuse *when* the statute becomes effective with *what* the statute means and *whether* the legislative intent was meant to extend to the specific facts of Plaintiff's lawsuit. (Ans. Br., at p. 31.) A.R.S. § 12-516(E) provides in relevant part:

> "This section applies to all claims that are filed before or after September 29, 2021 for an act or omission by a person that occurred on or after March 11, 2020 and that relates to a public health pandemic…"

Appellees construe this language to mean that A.R.S. § 12-516 applies retroactively to Plaintiff's lawsuit. *Id.,* at p. 32. However, as determined by the Arizona Supreme Court, a statute may not "attach[ ] new legal consequences to events completed before its enactment." *San Carlos Apache Tribe v. Superior Court,* 972 P.2d 179, 189 (1999), *citing Landgraf v. USI Film Prods.,* 511 U.S. 244, 270, 114 S.Ct. 1483, 1499, 128 L.Ed.2d 229 (1994). In other words, legislation may not

disturb vested substantive rights by retroactively changing the law that applies to completed events. *Hall v. A.N.R. Freight Sys.,* 149 Ariz. 130, 139, 717 P.2d 434, 443 (1986). A vested right "is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Id.,* 149 Ariz. at 140, 717 P.2d at 444. Thus, while the language of A.R.S. § 12-516(E) tells when A.R.S. § 12-516(A) and (B) are effective, it does not speak to what the legislative intent was, nor does it determine whether the statute may disturb Plaintiff's vested substantive rights. Indeed, the Arizona Supreme Court has held that no statute may disturb vested substantive rights.

What is not in dispute, and which Appellees fail to address in their briefing, is that modifying the burden of proof in a medical negligence action from a preponderance of evidence to the burden of clear and convincing evidence fundamentally changes both the pleading burden on plaintiffs as well as the burden to educe evidence during the time allotted by the Rules of Civil Procedure for discovery in order to make out a claim for willful misconduct or gross negligence. Thus, the question becomes not when A.R.S. § 12-516 became effective but whether it disturbed Plaintiff's vested substantive rights. If this Court determines that increasing the burden of proof on Plaintiff after he filed his lawsuit disturbed his vested rights, then A.R.S. § 12-516 does not apply to Plaintiff.

II. THE TRIAL COURT CORRECTLY HELD THAT THE PREP ACT DOES NOT BAR PLAINTIFF'S LAWSUIT

Appellees argue that Defendants are immune from Plaintiff's lawsuit based on the immunity provided under the Public Readiness and Emergency Preparedness Act (the "PREP Act"), 42 U.S.C. § 247d-6d, 247d-6e (West 2020). (R.9.) (Ans. Br., at p. 33.) Defendants reiterate in their briefing the same arguments they made in United States District Court and again in Superior Court claiming that the PREP Act grants Defendants immunity, which both Courts denied.

A. Defendants Are Not Immune From Suit Under the PREP Act

In support of their argument, Appellees rely on a Declaration by the Secretary of HHS (the "Declaration") "providing liability immunity for 'recommended activities' including the distribution, administration and use of covered countermeasures against COVID-19" and a subsequent Advisory Opinion by HHS. (Ans. Br., at p. 34, citing 85 Fed. Reg. 15198 (Mar. 17, 2020.)). Addressing the applicability of the Declaration and Advisory Opinion to the issue of federal subject matter jurisdiction, a District Court in California recently held that "[n]either document confers subject matter jurisdiction" in the pending medical malpractice action that defendants had sought to remove from state to federal court. *Martin v. Serrano Post Acute, LLC*, CV 21-187 DSF (SKX), 2021 WL 1146380, at *1 (C.D. Cal. Mar. 25, 2021)(remanding the case to state court and holding that neither the Declaration or Advisory Opinion confer federal subject matter jurisdiction). In *Martin,* the Court noted that the jurisdictional question does not hinge

on whether the PREP Act "applies" to Plaintiffs' claims, and "[e]ven if it does, federal question jurisdiction is available only if the PREP Act has such an extraordinary preemptive force that it 'converts' state law claims related to the COVID-19 response into federal claims, *City of Oakland v. BP PLC*, 969 F.3d 895, 905 (9th Cir. 2020), or if the state law claim meets the high standard articulated in *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005) and further clarified in *Gunn v. Minton*, 568 U.S. 251, 258 (2013)."

The Court in *Martin* further rejected both the Secretary's claim that the PREP Act satisfies the *Grable* standard and the Advisory Opinion's position that the PREP Act should be considered a statute that completely preempts state law claims for the purposes of federal question jurisdiction. *Martin,* at *2 (holding neither the Declaration nor the Advisory Opinion is binding on this Court because there is no indication that HHS has been delegated any authority to interpret the somewhat esoteric federal jurisdiction doctrines at issue), citing *Smith v. Berryhill*, 139 S. Ct. 1765, 1778–79 (2019) ("agency may not bootstrap itself into an area in which it has no jurisdiction" such as "the scope of the judicial power vested by the statute"). Finally, *Martin* held that neither the Declaration nor Advisory Opinion are persuasive "because they are completely conclusory; they simply set out the relevant legal standard and state that the PREP Act satisfies it." *Martin,* at *2.

1. Defendants Are Not "Covered Persons" Under the PREP Act

Appellees recite in their briefing the statutory definition of a "covered person" under the PREP Act:

> [A] person or entity that is (i) a manufacturer of such *countermeasure*; (ii) a distributor of such *countermeasure*; (iii) a program planner of such *countermeasure*; (iv) a qualified person who prescribed, administered, or dispensed such *countermeasure*; (v) an official, agent, or employee of a person or entity described in clause (i), (ii), (iii), or (iv).

42 U.S.C.A. § 247d-6d(i)(2)(B)(emphasis added); Ans. Br., at p. 39.

Clearly, the determination of whether a medical provider qualifies as a "covered person" under the PREP Act depends on whether such provider is manufacturing, distributing, planning, prescribing, administering, or dispensing a "countermeasure." More specifically, the PREP Act requires that such countermeasure be what the Act describes as a "covered countermeasure." 42 U.S.C. § 247d-6d(i)(1).

2. Plaintiff's Injuries Were Not Causally Related to the Administration of a "Covered Countermeasure"

Appellees conflate two separate issues – (1) Plaintiff's allegation of injuries caused by the ABG procedure; and (2) Plaintiff's diagnosis of COVID-19 – (while ignoring a third consisting of Dr. Ashraf's testimony and medical records documenting Plaintiff suffered from reduced right ventricular function, renal failure and metabolic acidosis at the time of his admission in April 2020) and conclude that Plaintiff's injuries were causally related to the administration of a "covered countermeasure" under the

PREP Act. (Ans. Br., at pp. 40-42.) Plaintiff's First Amended Complaint ("FAC") alleges no such connection, and no such connection is warranted given the existing evidence. Appellees' attempt to conflate these two issues, while ignoring the third, is a thinly veiled attempt to deny Plaintiff his constitutional right to seek redress for his damages.

Appellees' argument that the ABG procedure constitutes a covered countermeasure demonstrates a fundamental misunderstanding of the enabling language contained in the Declaration. Under Section VI of the Declaration, entitled "Covered Countermeasures", the Declaration states as follows:

> The PREP Act states that a ''Covered Countermeasure'' must be a ''qualified pandemic or epidemic product,'' or a ''security countermeasure,'' as described immediately below; or a drug, biological product or device authorized for emergency use in accordance with Sections 564, 564A, or 564B of the FD&C Act.

Defining what the PREP Act means when referring to a "qualified pandemic or epidemic product", the Declaration further states:

> **A qualified pandemic or epidemic product means a drug or device, as defined in the FD&C Act or a biological product, as defined in the PHS Act** that is (i) manufactured, used, designed, developed, modified, licensed or procured to diagnose, mitigate, prevent, treat, or cure a pandemic or epidemic or limit the harm such a pandemic or epidemic might otherwise cause; (ii) manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure a serious or life- threatening disease or condition caused by such a drug, biological product,

> or device; (iii) or a product or technology intended to enhance the use or effect of such a drug, biological product, or device.

Next, addressing what a security countermeasure is, the Declaration states:

> **A security countermeasure is a drug or device, as defined in the FD&C Act or a biological product, as defined in the PHS Act** that (i)(a) The Secretary determines to be a priority to diagnose, mitigate, prevent, or treat harm from any biological, chemical, radiological, or nuclear agent identified as a material threat by the Secretary of Homeland Security, or (b) to diagnose, mitigate, prevent, or treat harm from a condition that may result in adverse health consequences or death and may be caused by administering a drug, biological product, or device against such an agent; and (ii) is determined by the Secretary of Health and Human Services to be a necessary countermeasure to protect public health.

Finally, the Declaration gives further qualifying language about what constitutes a Covered Countermeasure, as follows:

> To be a Covered Countermeasure, qualified pandemic or epidemic products or security countermeasures also **must be approved or cleared under the FD&C Act; licensed under the PHS Act; or authorized for emergency use under Sections 564, 564A, or 564B of the FD&C Act**.

85 Fed. Reg. 15198 (emphasis added.)

Appellees provide no evidence – because there is none – demonstrating that the ABG procedure is a "drug" or "device" as defined in the Federal Food, Drug & Cosmetic Act (the "FD&C Act"), 29 U.S.C. chapter 9 § 301 *et seq*. Neither do Appellees provide any evidence – because there is none – demonstrating that the ABG procedure is a

"security countermeasure", i.e., drug or device, as defined in the FD&C Act or in the Public Health Service Act (the "PHS Act"), 42 U.S.C. chapter 6A § 201 *et seq.*

Defendants further cite to an Advisory Opinion issued by the Office of the Secretary of Health and Human Services (the "Advisory Opinion") which summarizes the definition of a "qualified pandemic or epidemic product", explaining that for immunity to attach, the "drug", "biological product", or "device":

> (1) **must be used for COVID-19**; and
> (2) must be:
> a. approved, licensed, or cleared by the FDA;
> b. authorized under an EUA [Emergency Use Authorization];
> c. described in an EUI [Emergency Use Instruction]; or
> d. used under either an Investigational New Drug (IND) application or an Investigational Device Exemption (IDE).

(Ans. Br., at pp. 41-42.)(emphasis added.)

As an initial matter, the ABG procedure does not satisfy the first prong of the Advisory Opinion – that it "must be used for COVID-19" – an unassailable fact given that the ABG procedure had been in existence for many years prior to Plaintiff's hospitalization at the Mayo Clinic in April 2020 and was, in fact, administered to Plaintiff in April 2017 in order to assess Plaintiff's heart condition incidental to his heart transplant surgery, several years *before* COVID-19 appeared. It is noteworthy that it was a member of Plaintiff's heart transplant team, Dr. Ashraf, and not a physician who treated Plaintiff's COVID-19, who ordered the ABG procedure in April 2020. Consequently, there is no evidence in this case establishing that the ABG procedure

"must be used for COVID-19", and any argument suggesting this would be both a *non sequitur* and nonsensical. Finally, it is beyond dispute that the ABG procedure is not a drug and is not a "biologic product" as defined in the PREP Act.[1] Additionally, the ABG procedure is not a device as defined in the PREP Act.[2]

Quite simply, the ABG procedure is just that: a medical procedure used to draw blood from an artery. Here, per Dr. Ashraf's testimony, the ABG procedure was used, either in whole or in part, to assess Plaintiff's heart function in consequence of Plaintiff's prior heart transplant surgery and after an echocardiogram ordered by Dr. Ashraf *the day before the ABG procedure* showed Plaintiff had decreased right ventricular function. Thus, Appellee's claim that Defendants were "covered persons" employing "covered countermeasures" neither comports with the PREP Act nor with the evidence presently available. As a matter of law, Appellees' argument should be denied.

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[1] A **biological product** means a virus, therapeutic serum, toxin, antitoxin, vaccine, blood, blood component or derivative, allergenic or analogous product, arsphenamine or its derivative (or any other trivalent organic arsenic compound) applicable to the prevention, treatment, or cure of a disease or condition of human beings. PREP Act, 42 U.S.C. 247d-6d *et seq.* "Glossary of Terms."

[2] A **device** includes an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals or intended to affect the structure or function of the body of man or other animals which does not achieve its primary intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of its primary intended purposes. PREP Act, 42 U.S.C. 247d-6d *et seq.* "Glossary of Terms."

3. Plaintiff Was Not Required to Exhaust Administrative Remedies

Appellees argue that Plaintiff was required to exhaust his administrative remedies provided under the PREP Act before filing his lawsuit, and that his sole recourse "in certain very limited circumstances" was to file a federal cause of action "for death or serious physical injury proximately caused by willful misconduct." (Ans. Br., at pp. 43-44.) Having allegedly failed to comply with the PREP Act, Appellees argue that summary judgment is warranted and that dismissal of Plaintiff's lawsuit pursuant to Rule 12(b)(1) is appropriate. *Id.*, at pp. 44-45.

Without specifically stating it (possibly because Appellees' argument under the PREP Act was rejected by both the District Court and Superior Court), Appellees are arguing that the PREP Act preempts Plaintiff's state law claim of medical negligence and that Plaintiff's remedies are limited to those provided under the PREP Act. The District Court considered and rejected these arguments when it issued an Order remanding this case to Superior Court. Concerning whether the PREP Act preempted state law claims of negligence, the District Court held:

> "…the Court joins the growing consensus finding that the PREP Act is not a complete preemption statute. The PREP Act does not satisfy the Ninth Circuit's complete preemption test because it does not completely replace state law claims related to COVID-19 and does not provide a substitute cause of action for Mr. Roebuck's medical negligence claim."

(R.43, at p. 5.)

Although COVID-19 is of relatively recent origin and there is not yet a well-developed body of federal case law adjudicating the removal of state law claims to federal court pursuant to the PREP Act, there are a sufficient number of rulings in which District Courts have addressed the issue of complete preemption. Almost every federal court that has addressed the issue of complete preemption following removal of state claims relating to COVID-19 has held that the PREP Act does not trigger complete preemption. *See, e.g., Lyons v. Cucumber Holdings, LLC*, No. CV 20-10571-JFW(JPRx), 2021 WL 364640, at *5 (C.D. Cal. Feb. 3, 2021) (remanding negligence and wrongful death claims arising from the COVID-19 death of a skilled nursing facility resident because "the Court concludes that the PREP Act does not satisfy the Ninth Circuit's two-pronged complete preemption test") (citing *City of Oakland*, 969 F.3d at 905); *Dupervil v. All. Health Operations, LLC*, —— F. Supp. 3d ——, No. 20-CV-4042 (PKC) (PK), 2021 WL 355137, at *11 (E.D.N.Y. Feb. 2, 2021) (remanding negligence and other claims arising from the COVID-19 death of a nursing home resident and finding that "[i]n sum, Defendants cite no authority that compels the conclusion that the PREP Act completely preempts state-law claims within its scope such that those claims are really federal-law claims that are removable to federal court"); *Anson v. HCP Prairie Vill. KS OPCO LLC, et al.*, No. 20-2346-DDC-JPO, 2021 WL 308156, at *13 (D. Kan. Jan. 29, 2021) (remanding negligence and wrongful death claims arising from COVID-19 death of an assisted living facility resident, and holding that "[t]he doctrine

of 'complete preemption' does not apply"; "Plaintiff's claims thus do not arise under federal law"; and "since no other basis for subject matter jurisdiction presents itself, the court must remand the case to state court"); *Smith v. Bristol at Tampa Rehab. and Nursing Ctr., LLC*, No. 8:20-cv-2798-T-60SPF, 2021 WL 100376, at *2 (M.D. Fla. Jan. 12, 2021) (remanding negligence claims arising from COVID-19 death of a nursing home resident and noting that "[t]he Court's ruling is in line with decisions of other federal courts" and "[h]aving reviewed the relevant case law, the Court notes that although these and similar arguments concerning the COVID-19 pandemic and the PREP Act have been brought before the federal courts, the Court has been unable to find even one case permitting removal") (citations omitted); *Est. of Maglioli v. Andover Subacute Rehab. Ctr.*, 478 F. Supp. 3d 518, 529 (2020) (remanding negligence, wrongful death, and medical malpractice claims arising from COVID-19 deaths of nursing home residents and noting that "[n]othing in the language of the [PREP] Act suggests that it was intended to more broadly displace state-law causes of action for, e.g., malpractice or substandard care—even if proper care possibly *would* have entailed administration of [covered] countermeasures"); *Martin*, 2020 WL 5422949, at *2 (remanding negligence claims arising from COVID-19 death of a nursing home resident and "declin[ing] to find that Congress has completely occupied the field of actions or inactions related to COVID-19 spread and treatment to such a degree that all state law claims related to that topic are subject to removal").

Ultimately, as stated by the Ninth Circuit, complete preemption is "rare." *Hansen v. Grp. Health Coop.,* 902 F.3d 1051, 1057 (9th Cir. 2018); *see also Lyons*, 2021 WL 364640, at *5)(the PREP Act is not the "rare" statute where complete preemption applies). Indeed, the Supreme Court has found complete preemption applicable to only three federal statutes. *See City of Oakland v. BP PLC*, 969 F.3d 895, 905 (9th Cir. 2020) (noting that complete preemption applies only to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, § 502(a) of the Employee Retirement Income Security Act of 1974, and §§ 85 and 86 of the National Bank Act). While discussing the limited nature of the doctrine, the Ninth Circuit held that "complete preemption for purposes of federal jurisdiction under Section 1331 exists when Congress: (1) intended to displace a state-law cause of action, and (2) provided a substitute cause of action." *City of Oakland*, 969 F.3d at 906 (*citing Hansen*, 902 F.3d at 1057). Thus, before complete preemption can apply to a plaintiff's state law claims, the "the claims at issue must fall within the scope of the relevant federal statute." *Jackson v. Big Blue Healthcare, Inc.*, 2020 WL 4815099, at *3–4 (D. Kan. Aug. 19, 2020) (*citing Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003)).

Based on the strong leaning by district courts, including Arizona District Court, that the PREP Act does not completely preempt state law claims, and that Congress has not carved out any such extraordinary standing for the PREP Act as afforded the only

three federal statutes that do provide complete preemption, the lower Court properly held that "Plaintiff's state law claims are not barred by the PREP Act." (R.43, at p. 5.)

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court holding that Appellant's lawsuit is barred by A.R.S. § 12-516 and granting Appellees' motion for summary judgment should be vacated and the case remanded to the Superior Court for further proceedings. Moreover, the judgment of the Superior Court holding that Plaintiff's claims were not barred by the PREP Act should be sustained.

CERTIFICATE OF COMPLIANCE

Pursuant to the Arizona Rules of Civil Appellate Procedure, Rule 14, I certify that the attached Response uses the proportionately spaced type of 14 points or more, is double-spaced using a Times New Roman font and contains 5,804 words.

DATED this 10th day of March, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2023, I served the foregoing Reply Brief of Plaintiffs-Appellants upon the following counsel by filing through the ECF system:

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