

IN THE SUPREME COURT OF MISSOURI

No. SC98517

ELIZABETH BUTALA, *et al.*,

Plaintiffs/Appellants,

v.

THE CURATORS OF THE UNIVERSITY OF MISSOURI,

Defendant/Respondent.

**Consolidated Appeal from the Circuit Court of Boone County
Hon. J. Hasbrouck Jacobs**

SUBSTITUTE BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

This appeal threatens the longstanding sovereign immunity of The Curators of the University of Missouri (the “University”) and other public entities in Missouri by urging this Court to hold that sovereign immunity violates the open courts provision of the Missouri Constitution. Sovereign immunity predates Missouri’s statehood and has been repeatedly reaffirmed by the Legislature and the Courts. It serves a critical purpose in protecting the assets of the State. The open courts provision ensures that procedural barriers do not block citizens from bringing suit. It does not govern the scope of liability created by the Legislature or at common law. This constitutional issue was not preserved below and, if considered now, should be rejected as contrary to the constitutional text and long-standing precedent.

The appellants, plaintiffs below (“Plaintiffs”), are surgical patients who have filed medical negligence claims against the University’s surgical staff. Those claims remain pending in the trial court. As to the University, Plaintiffs attempted to allege claims for violations of the Missouri Merchandising Practices Act (“MMPA”) and for negligent misrepresentation, contending that the University made unspecified misrepresentations about the risks and benefits of the surgical procedures at issue. The trial court dismissed all counts as to the University, which gave rise to these interlocutory appeals. The trial court’s ruling was correct. The University’s sovereign immunity bars Plaintiffs from pursuing any tort claims against the University. Also, the University is not a “person” who may be sued under the MMPA.

After consolidation, the Court of Appeals dismissed Plaintiffs' appeals for lack of jurisdiction under Rule 74.01(b), finding the dismissed claims against the University too interrelated to the remaining claims against the individual defendants to constitute an appealable judgment. The University had not requested that dismissal and did not take a position on appellate jurisdiction in the lower court. The University believes that an intervening holding of this Court indicates that the dismissal of all counts asserted against a single defendant will satisfy the requirements of Rule 74.01(b), meaning that this Court likely has jurisdiction over Plaintiffs' appeals.

The University recognizes the critical importance of jurisdiction to the Court, but far more concerning is Plaintiffs' attempt to eliminate sovereign immunity by judicial fiat. In Point II, Plaintiffs ask this Court to expand the Missouri Constitution's open courts provision to overturn two centuries of sovereign immunity. Plaintiffs failed to preserve this point before the trial court. Even if they had, the open courts provision does not eliminate sovereign immunity, much less guarantee Plaintiffs any cause of action against the University. Rather, the open courts provision prohibits the creation of arbitrary and unreasonable *procedural* barriers to the pursuit of existing causes of action. There is no open courts violation because Plaintiffs do not have an existing cause of action against the University; sovereign immunity is not a procedural barrier; and sovereign immunity is neither arbitrary nor unreasonable. Moreover, although the open courts provision does not guarantee a remedy for every perceived injury, Plaintiffs' contention that, because of sovereign immunity, they lack "any" remedy is not well-

taken. Plaintiffs can pursue, and *have* pursued, the same tort claims against the surgical staff, alongside their claims for medical negligence.

In Point III, Plaintiffs contend that the University waived its sovereign immunity by purchasing a Data Protection Liability Insurance Policy. On the contrary, the University's insurance policy takes pains to preserve—and expressly protects against the waiver of—sovereign immunity. The insurance coverage at issue simultaneously preserves the University's sovereign immunity against all claims while furnishing coverage for certain claims asserted against the University's employees, who are not protected by sovereign immunity. The policy also provides coverage for claims outside the scope of Missouri law in cases where non-Missouri courts may not recognize the University's sovereign immunity.

Point IV should be denied because the University's sovereign immunity is not subject to a common-law exception for “proprietary” activities. That exception applies only to municipalities. The University is not a municipality, but rather a unique public corporation created under R.S. Mo. § 172.020 and art. IX, § 9(a) of the Missouri Constitution. Plaintiffs wrongly ask this Court to manufacture this new exception to the University's sovereign immunity despite an explicit legislative command that fixes the boundaries of common-law sovereign immunity as they existed in 1977.

Point V fails because sovereign immunity applies to MMPA claims, like all other torts. A claim under the MMPA is a statutory tort that supplements common-law fraud for certain consumer transactions. Missouri law recognizes no special category or

exception to sovereign immunity for MMPA claims or any other statutory tort. The Court should reject Plaintiffs' invitation to create one.

Point VI should be denied because the MMPA does not apply to the University. The MMPA furnishes an exhaustive list of the "persons" who may be sued under that statute. Neither the University, nor public corporations in general, are on that list. Therefore, the University is simply not a "person" who may be sued under the MMPA. Allowing an MMPA suit to proceed against the University would rewrite the statute and violate the requirement that suits are not allowed against a state entity absent a "clearly manifest" right for members of the public to sue that entity. That is a task for the Legislature, not the courts.

Finally, Point VII appeals the trial court's denial of leave to amend to assert negligent misrepresentation claims against the University. These are torts. Amendment is futile.

Therefore, the Court should affirm the trial court's dismissal of Plaintiffs' claims against the University and the trial court's denial of leave to amend.

STATEMENT OF FACTS

Unless otherwise noted, the University presents the following facts as pleaded in the operative petitions of Plaintiffs/Appellants Ken Browne, Elizabeth Butala, Mike Butterfield, Cal Clark, Christopher Cummings, Daniel Draper, Raymond Hackler, Ronda Higginbotham, John Jaggie, Monica Palmer, and Amanda Reinsch (collectively, “Plaintiffs”).¹

I. The Parties

The Curators of the University of Missouri is the public corporation that serves as the governing body of the University of Missouri. (*Butala*, D2, ¶9; *Butterfield*, D18, ¶4; *Draper*, D52, ¶5; *Reinsch*, D2, ¶5; *Browne*, D20, ¶5; *Jaggie*, D2, ¶5; *Higginbotham*, D2, ¶5; *Cummings*, D2, ¶5). See also R.S. Mo. § 172.020.

The Mizzou BioJoint Center is affiliated with the University, and each of the individual defendants is affiliated with the Mizzou BioJoint Center. (*Butala*, D2, ¶51; *Butterfield*, D18, ¶47; *Draper*, D52, ¶47; *Reinsch*, D2, ¶48; *Browne*, D20, ¶48; *Jaggie*, D2, ¶48; *Higginbotham*, D2, ¶48; *Cummings*, D2, ¶48). Co-defendant James Stannard, M.D. is an orthopedic surgeon who also serves as the Medical Director of the Mizzou BioJoint Center. (*Butala*, D2, ¶¶7, 52; *Butterfield*, D18, ¶¶2, 48; *Draper*, D52, ¶¶3, 49; *Reinsch*, D2, ¶¶3, 49; *Browne*, D20, ¶3, 49; *Jaggie*, D2, ¶¶3, 49; *Cummings*, D2, ¶¶3, 49).

¹ A motion to dismiss is “solely a test of the adequacy of the plaintiff’s petition.” *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993). Plaintiffs flout this controlling standard by injecting facts that are not pleaded in the operative petitions or attached as exhibits, such as certain facts relating to the Missouri Osteochondral Allograft Preservation System or “MOPS” (Substitute Br. 21, 24), exhibits they first attached to their Appendix in the Court of Appeals (*id.* at 75-76, 85, 103), and their own counsel’s argument (*id.* at 21-22).

Co-defendant Mauricio Kfuri, M.D. is also an orthopedic surgeon at the Mizzou BioJoint Center. (*Higginbotham*, D2, ¶¶3, 49). Co-defendant James Cook, DVM, OTSC, Ph.D., is the Director of Operations and Scientific Director at the Mizzou BioJoint Center. (*Butala*, D2, ¶¶8, 53; *Butterfield*, D18, ¶¶3, 49; *Draper*, D52, ¶¶4, 50; *Reinsch*, D2, ¶¶4, 50; *Browne*, D20, ¶¶4, 50; *Jaggie*, D2, ¶¶4, 50; *Higginbotham*, D2, ¶¶4, 50; *Cummings*, D2, ¶¶4, 50).

Plaintiffs are various medical patients who allege that the defendants market and perform a surgical procedure to replace the surfaces of knee joints involving the use of osteochondral allografts, which are a combination of bone and cartilage from a deceased donor. (*Butala*, D2, ¶¶40, 54, 56; *Butterfield*, D18, ¶¶36, 50, 52; *Draper*, D52, ¶¶37, 51, 53; *Reinsch*, D2, ¶¶37, 51, 53; *Browne*, D20, ¶¶37, 51, 53; *Jaggie*, D2, ¶¶37, 51, 53; *Higginbotham*, D2, ¶¶37, 51, 53; *Cummings*, D2, ¶¶37, 51, 53). Plaintiffs assert that, while surgeons have historically used osteochondral allografts to fix small areas of cartilage damage, the defendants have expanded their use by implanting them into multiple compartments and opposing surfaces of the knee. (*Butala*, D2, ¶¶47, 55-56; *Butterfield*, D18, ¶¶43, 51-52; *Draper*, D52, ¶¶44, 52-53; *Reinsch*, D2, ¶¶44, 52-53; *Browne*, D20, ¶¶44, 52-53; *Jaggie*, D2, ¶¶44, 52-53; *Higginbotham*, D2, ¶¶44, 52-53; *Cummings*, D2, ¶¶44, 52-53).

II. Plaintiffs' Knee Surgeries

At various points between April 2015 and November 2017, Plaintiffs individually underwent surgery to repair knee injuries using osteochondral allografts. (*Butala*, D2, ¶¶83-85, 114-15, 152-53, 179-81; *Butterfield*, D18, ¶¶74, 76; *Draper*, D52, ¶¶82-84, 110-

12; *Reinsch*, D2, ¶¶88-90; *Browne*, D20, ¶¶79-80, 91-93; *Jaggie*, D2, ¶¶80-82; *Higginbotham*, D2, ¶¶77-78; *Cummings*, D2, ¶¶79-80, 103-04). In each Plaintiff's surgery either Dr. Stannard or Dr. Kfuri was the primary surgeon, and Dr. Cook also participated in most surgeries.² (*Butala*, D2, ¶¶88-89, 118-19, 156-57, 184-85; *Butterfield*, D18, ¶¶80-82; *Draper* 82812, D52, ¶¶86-87, 114-15; *Reinsch*, D2, ¶¶92-93; *Browne*, D20, ¶¶81, 94; *Jaggie*, D2, ¶¶86-87; *Higginbotham*, D2, ¶79; *Cummings*, D2, ¶¶83-84, 107-08). As alleged, each Plaintiff's surgery ultimately proved unsuccessful. (*Butala*, D2, ¶¶92-103, 122-40, 160-67, 188-205; *Butterfield*, D18, ¶¶84-93; *Draper*, D52, ¶¶90-106, 117-46; *Reinsch*, D2, ¶¶96-141; *Browne*, D20, ¶¶98-128; *Jaggie*, D2, ¶¶90-115; *Higginbotham*, D2, ¶¶80-93; *Cummings*, D2, ¶¶87-101).

Plaintiffs have brought counts for medical negligence and loss of chance of recovery against Drs. Stannard, Kufri, and Cook, and their spouses (where applicable)³ have also brought loss of consortium counts against Drs. Stannard, Kfuri, and Cook. (*Butala*, D2, ¶¶207-29; *Butterfield*, D18, ¶¶94-111; *Draper*, D52, ¶¶147-67; *Reinsch*, D2,

² Plaintiffs imply wrongdoing based upon Dr. Cook's participation in surgeries in light of his veterinary medicine degree, but as they admit in the very caption of their case, he is also a surgery-certified orthopedic technologist ("OTSC") and therefore permitted to participate in surgery with the supervision of Dr. Stannard and other medical doctors. He is also qualified in the performance of medical research, holding a Ph.D., as well as an endowed chair in the department of orthopedic surgery at the University's medical school.

³ The spouses are plaintiffs in the court below, but are not appellants here because they have not asserted counts against the University.

¶¶142-62; *Browne*, D20, ¶¶129-20 [sic]⁴; *Jaggie*, D2, ¶¶116-36; *Higginbotham*, D2, ¶¶94-115; *Cummings*, D2, ¶¶111-04 [sic]).

Plaintiffs have also sued all the defendants, including the University, under the MMPA. (*Butala*, D2, ¶¶230-49; *Butterfield*, D18, ¶¶112-31; *Draper*, D52, ¶¶168-87; *Reinsch*, D2, ¶¶163-82; *Browne*, D20, ¶¶121-40; *Jaggie*, D2, ¶¶137-56; *Higginbotham*, D2, ¶¶116-35; *Cummings*, D2, ¶¶115-34). Butala, Clark, Hackler, and Palmer, whose claims were filed after the University first raised questions about whether the University was a proper defendant under the MMPA, also sued all the defendants, including the University, for negligent misrepresentation. (*Butala*, D2, ¶¶250-55).

In each instance, Plaintiffs contend that all defendants—without differentiating among them—advertised the surgery in a deceptive and misleading manner. (*Butala*, D2, ¶¶243; *Butterfield*, D18, ¶¶125; *Draper*, D52, ¶¶181; *Reinsch*, D2, ¶¶176; *Browne*, D20, ¶¶134; *Jaggie*, D2, ¶¶150; *Higginbotham*, D2, ¶¶129; *Cummings*, D2, ¶¶128). Plaintiffs do not allege what was specifically represented to them about the surgeries, who made representations to them, when the representations were made, or the form of such representations (*i.e.*, written advertising or verbal discussions). Nevertheless, they contend that “the defendants” collectively failed to advise them about various matters, including that the surgery was allegedly “experimental” with insufficient data about its

⁴ The paragraph numbers in: (a) Browne’s First Amended Petition erroneously transition from Paragraph 135 to a second Paragraph 107, and then from 164 to 156 to 165; (b) Cummings’ First Amended Petition erroneously transition from Paragraph 114 to a second Paragraph 88, and then from the second Paragraph 104 to Paragraph 115; (c) Jaggie’s First Amended Petition erroneously transition from 128 to 138; and (d) Butala’s, Clark’s, Hackler’s, and Palmer’s Joint Petition jumps from Paragraph 279 to 121 to 280.

long-term success. (*Butala*, D2, ¶¶243(a), (b); *Butterfield*, D18, ¶¶125(a), (b); *Draper*, D52, ¶¶181(a), (b); *Reinsch*, D2, ¶¶176(a), (b); *Browne*, D20, ¶¶134(a), (b); *Jaggie*, D2, ¶¶150(a), (b); *Higginbotham*, D2, ¶¶129(a), (b); *Cummings*, D2, ¶¶128(a), (b)). Plaintiffs also assert that “the defendants” collectively misrepresented the efficacy and risks of the surgery. (*Butala*, D2, ¶¶243(h), (j); *Butterfield*, D18, ¶¶125(h), (j); *Draper*, D52, ¶¶181(h), (j); *Reinsch*, D2, ¶¶181(h), (j); *Browne*, D20, ¶¶134(h), (j); *Jaggie*, D2, ¶¶150(h), (j); *Higginbotham*, D2, ¶¶129 (h), (j); *Cummings*, D2, ¶¶128(h), (j)). In short, Plaintiffs allege the same underlying activities giving rise to their medical negligence and loss of chance of recovery counts against the individual defendants as their MMPA and negligent misrepresentation counts against all defendants.

Plaintiffs seek to recover their medical expenses for the surgery and their additional treatment, loss of income, punitive damages, and their attorney’s fees. (*Butala*, D2, ¶¶245-46; *Butterfield*, D18, ¶¶127-28; *Draper*, D52, ¶¶183-84; *Reinsch*, D2, ¶¶178-79; *Browne*, D20, ¶¶136-37; *Jaggie*, D2, ¶¶152-53; *Higginbotham*, D2, ¶¶131-32; *Cummings*, D2, ¶¶130-31).

III. The University’s Insurance Coverage and Exclusions

Among other theories, Plaintiffs allege that the University has waived sovereign immunity protections by the purchase of insurance. Specifically, Plaintiffs rely upon the University’s purchase of a Data Protection Liability Insurance Policy (the “Policy”). (*Butala*, D2, ¶¶16-34; *Butterfield*, D18, ¶¶11-30; *Draper*, D52, ¶¶12-31; *Reinsch*, D2, ¶¶12-31; *Browne*, D20, ¶¶12-31; *Jaggie*, D2, ¶¶12-31; *Higginbotham*, D2, ¶¶12-31;

Cummings, D2, ¶¶12-31). As explained below, that Policy contains an endorsement with an explicit preservation of the University’s sovereign immunity. (*Butala*, D3, p. 59).⁵

The Policy has nine separate coverages: Privacy Liability, Privacy Regulatory Liability, PCI DSS Liability, System Security Liability, Multimedia Liability, Breach Event Cost Reimbursement, Cyber Extortion Reimbursement, Digital Asset Loss Reimbursement, and Business Interruption Loss Reimbursement. (*Id.*, pp. 1-2, 12-15). Plaintiffs all contend that their claims fall within the University’s Multimedia Liability coverage and not within any other coverage. (*Butala*, D2, ¶¶20-21; *Butterfield*, D18, ¶¶15-16; *Draper*, D52, ¶¶16-17; *Reinsch*, D2, ¶¶16-17; *Browne*, D20, ¶¶16-17; *Jaggie*, D2, ¶¶16-17; *Higginbotham*, D2, ¶¶16-17; *Cummings*, D2, ¶¶16-17).

A. The Missouri Sovereign Immunity Endorsement

The Policy contains an endorsement entitled “**MISSOURI SOVEREIGN IMMUNITY**,” with an effective date of October 1, 2017. (*Butala*, D3, p. 59).⁶ The endorsement states as follows:

I. It is hereby understood and agreed that:

- 1) Certain **Assureds** are granted sovereign, governmental tort, official and/or governmental function immunity under the law of the State of Missouri and that such **Assureds** may be protected from certain **Claims** by virtue of such immunity.
- 2) The procurement of coverage afforded under this policy is not intended, nor shall it be construed, to waive any rights of sovereign,

⁵ To avoid cluttering the main text with duplicative citations to the Policy, which is attached in identical form as Exhibit A to each operative petition, the University’s brief will only cite to the record in *Butala*.

⁶ The University will retain bolding or underlining as it appears in the Policy.

governmental tort, official, governmental function or other immunity granted to any **Assured** under the laws of the State of Missouri.

- 3) Accordingly, it is agreed that, except for **Damages** or **Claims Expenses** subject to all other terms and conditions of the policy, the Underwriters shall not pay **Ultimate Net Loss** for **Claims** for which the **Assured** is granted immunity under the laws of the State of Missouri.

(*Id.*). The endorsement also adds the following definition: “**Ultimate Net Loss** means the difference between the actual Loss and the amount with which sovereign immunity provides.” (*Id.*). At the end of the endorsement, it states that “[a]ll other terms and conditions remain unchanged.” (*Id.*).

B. The Policy’s Definition of “Assured”

The coverage of the University’s policy extends beyond the University itself. Under the Policy, the terms “**Assured Organization**” and “**Named Assured**” both refer to the University as well as the University’s subsidiaries. (*Id.*, pp. 18, 28). The term “**Assured**” encompasses not only the University, but also past, present, and future employees, officers, directors, and, to a certain extent, even those individuals’ spouses and domestic partners, personal businesses, family trusts, and estates. (*Id.*, pp. 17-18). Specifically, the Policy term “**Assured**” means, in relevant part:

1. The **Assured Organization**;
2. Any present or future officer or director of the **Assured Organization**, but only with respect to the performance of his or her duties as such on behalf of the **Assured Organization**;
3. Any present or future **Employee**, but only for work done while acting within the scope of his or her employment and related to the conduct of the **Assured Organization’s** business;

...

5. Any natural person who previously qualified as an **Assured** under paragraphs 2, 3, ... above prior to the termination of their relationship with the **Assured Organization**, but only with respect to the performance of his or her duties on behalf of the **Assured Organization**;
6. The spouse or **Domestic Partner** of any natural person **Assured** set forth in the above provisions of this section, but only to the extent the spouse or **Domestic Partner** is a party to any **Claim** solely in the capacity as spouse or **Domestic Partner** of any such persons and only for the purposes of any **Claim** seeking to recover amounts from marital community property, property jointly held by any such person and the spouse or **Domestic Partner**, or property transferred from any such person to the spouse or **Domestic Partner**;
7. Any entity owned or operated by or for the benefit of any natural person **Assured** including but not limited to personal professional corporations, family offices, and trusts, but only to the extent the entity is a party to any **Claim** solely in the capacity as a party holding or having control over assets in which a natural person **Assured** has an interest and only for the purposes of any **Claim** seeking to recover those assets; and
8. The estate, heirs, executors, administrators, assigns and legal representatives of any **Assured** set forth in the above provisions of this section in the event of any **Assured's** death, incapacity, insolvency or bankruptcy, but only to the extent that such **Assured** would otherwise be provided coverage under this policy.

(*Id.*).

C. The Multimedia Liability Coverage and the Policy's Definition of "Damages"

Plaintiffs allege that their claims fall within the Policy's Multimedia Liability coverage—specifically, the definition of "**Multimedia Wrongful Act**":

Multimedia Wrongful Act means any act, error, omission, misstatement or misleading statement in connection with the gathering, collection, broadcasting, creation, distribution, exhibition, performance, preparation,

printing, publication, release, display, research, or serialization of **Material**⁷ that results in:

- ...
3. false advertising, including an alleged violation of Section 43(a) of the Lanham Act or any similar federal state, local or foreign statutes;
 - ...
 7. negligence regarding the content of any **Material**;
 - ...
 10. unfair competition or trade practices, including but not limited to dilution, confusion, deceptive trade practices or unfair trade practices, civil actions for consumer fraud, false, disruptive or misleading advertising or misrepresentation in advertising, but only if alleged in conjunction with any of the acts listed in paragraphs 1 through 9 above.

(*Id.*, pp. 27-28; *see also Butala*, D2, ¶22; *Butterfield*, D18, ¶17; *Draper*, D52, ¶18; *Reinsch*, D2, ¶18; *Browne*, D20, ¶18; *Jaggie*, D2, ¶18; *Higginbotham*, D2, ¶18; *Cummings*, D2, ¶18). The Multimedia Liability coverage provides:

The Underwriters shall pay on behalf of the **Assured** those amounts, in excess of the applicable retention and up to the applicable **Sublimit of Liability**, that:

1. the **Assured** is *legally obligated to pay* as **Damages** or **Claims Expenses**; and that
2. arise from a **Claim** first made against any **Assured** during the **Policy Period** or **Extended Reporting Period**; and that
3. arise out of an actual or alleged **Multimedia Wrongful Act** by the **Assured** or parties for whom the **Assured** is **Vicariously Liable**; and

⁷ “**Material** means media content in any form, including without limitation, advertising and written, printed, video, electronic, digital or digitized content.” (*Butala*, D3, p. 27).

4. provided such **Multimedia Wrongful Act** takes place on or after the **Retroactive Date** set forth in Item 6 of the Declarations.

(*Butala*, D3, p. 14) (italics added). Although the term “**Damages**” means, among other things, a monetary judgment, award or settlement, pre-judgment interest, post-judgment interest, and, where applicable, punitive and exemplary damages (*Id.*, p. 24), “[t]he definition of **Damages** shall not include or mean: ... Any amount which the **Assured** is *not financially or legally obligated to pay.*” (*Id.*) (italics added).

D. Global Data Privacy Issues in State, Federal, and Foreign Jurisdictions Other Than Missouri.

The Policy’s nine coverages address issues that range beyond Missouri law, and involve a host of state, federal, and even “worldwide” data privacy issues with respect to “**Private Information**,” “**Privacy Laws**,” and “**Privacy Breaches**.” (*Id.*, pp. 29-31).

Thus:

Private Information means:

1. proprietary or confidential information owned by a third party that is in the care, custody or control of the **Assured** or is used by the **Assured** with the consent of such third party;
2. **Personally Identifiable Information**⁸; and
3. any information that is linked or linkable to a specific individual and that is subject to any **Privacy Law**.

(*Butala*, D3, p. 31). In turn, the Policy defines “Privacy Laws” as follows:

Privacy Laws means statutes, rules, regulations, and other laws associated with the confidentiality, access, control, or use of **Private Information**, including but not limited to:

⁸ “**Personally Identifiable Information** means information that can be used to determine, distinguish or trace an individual’s identity, either alone or when combined with other information that is linked or linkable to a specific individual.” (*Id.*, p. 29).

1. Health Insurance Portability and Accountability Act of 1996 (Public Law 104-191), known as HIPAA, including Title II that requires protection of confidentiality and security of protected health information and the rules and regulations promulgated thereunder as they currently exist and as amended, including related or similar state medical privacy laws as they currently exist and as amended;
2. The Health Information Technology for Economic and Clinical Health Act (The HITECH Act) and its implementing regulations, including related or similar state medical privacy laws as they currently exist and as amended;
3. Gramm-Leach-Bliley Act of 1999, also known as the Financial Services Modernization Act of 1999, including section concerning security protection and standards for customer records maintained by financial services companies, and the rules and regulations promulgated thereunder as they currently exist and as amended;
4. State Attorneys General and Federal Trade Commission enforcement actions regarding the security and privacy of consumer information;
5. Governmental privacy protection regulations or laws, including but not limited to the California Database Protection Act of 2003 (previously called (SB 1386), as they currently exist now or in the future, associated with the control and use of personal information, including but not limited to requirements to post privacy policies, adopt specific privacy controls, or inform customers of actual or suspected breaches of security that has or may impact their personal information;
6. Privacy provisions of consumer protection laws, including but not limited to the Fair Credit Reporting Act (FCRA) and the California Consumer Credit Reporting Agencies Act (CCCRAA);
7. Children's Online Privacy Protection Act or similar laws as they exist now or in the future;
8. Governmental statutes, rules, regulations or other laws requiring the development of an identity theft prevention program and adoption of necessary actions to prevent identity theft including but not limited to Sections 114 and 315 of the Fair and Accurate Credit Transactions Act of 2003; and

9. EU Data Protection Act, EU data protection directives, and other privacy and security statutes, rules, regulations and other laws worldwide as they exist now or in the future.

(*Id.*, p. 30).

The Privacy Regulatory Liability Coverage provides applicable coverage for claims that “arise out of an actual or alleged **Privacy Breach** ... or the breach of **Privacy Laws**,” while the Privacy Liability Coverage provides applicable coverage for claims that “arise out of an actual or alleged **Privacy Liability Event**.” (*Id.*, pp. 12-13).

Privacy Breach means:

1. The unauthorized collection, disclosure, use, access, destruction or modification, or inability to access, or failure to provide **Private Information**;
2. theft of **Private Information**;
3. the surrender of **Private Information** as a result of false communications or social engineering techniques including but not limited to phishing, spear-phishing, and pharming;
- ...
6. failure to implement specific security practices with respect to **Private Information** required by *any statute, rule, regulation, or other law*;
7. an infringement or violation of any rights to privacy;
8. breach of a person’s right of publicity, false light, intrusion upon a person’s seclusion;
9. *failure to comply with any federal, state, local, or foreign statute, rule, regulation, or other law* pertaining to the **Assured’s** responsibilities with respect to **Private Information**, but only in connection with an act listed in paragraphs 1 through 8 above;
10. *failure to comply with any federal, state, foreign or other law* (including common law), statute or regulation prohibiting unfair

methods of competition, unfair or deceptive trade practices, or consumer fraud pertaining to the **Assured's** responsibilities with respect to **Private Information** but only in connection with an act listed in paragraphs 1 through 8 above[.]

(*Id.*, p. 29) (italics added). Furthermore,

Privacy Liability Event means:

1. A **Privacy Breach**;
2. A violation of **Privacy Laws**; or
3. A failure to disclose a **Privacy Breach** or a breach of **Privacy Laws**.

(*Id.*, pp. 30-31). In short, the Policy covers numerous global data privacy-related matters.

IV. Procedural History

A. Trial Court Proceedings

In 2018, the University moved to dismiss the original petitions in the first two cases, *Draper* and *Reinsch*, on the ground of sovereign immunity. After the trial court initially denied those motions, the University petitioned the Court of Appeals for writs of prohibition. The Court of Appeals consolidated the two cases and requested additional briefing concerning “whether the [University] is a ‘person’ who can be liable under the Missouri Merchandising Practices Act, given the statutory definition of ‘person’ at section 407.010(5).” *State ex rel. Curators of Univ. of Mo. v. Jacobs*, No. WD82113, Order dated Sept. 18, 2018. In their response to the Court’s order, *Draper* and *Reinsch* asked the court to deny the petition (petitions?) so that they could re-plead their claims to assert that the Policy served as a waiver of the University’s sovereign immunity. The

court summarily denied the petition. *State ex rel. Curators of Univ. of Mo. v. Jacobs*, No. WD82113, Order dated Oct. 15, 2018.

Draper, Reinsch, and subsequent additional Plaintiffs (Browne, Cummings, Higginbotham, and Jaggie) moved for leave to file amended petitions to cite the Policy, which leave was granted. Butterfield also filed suit in January 2019, citing the Policy in his original petition. These seven Plaintiffs continued to plead the MMPA as the sole count against the University. (*Butterfield*, D18, ¶¶112-31; *Draper*, D52, ¶¶168-87; *Reinsch*, D2, ¶¶163-82; *Browne*, D20, ¶¶121-40; *Jaggie*, D2, ¶¶137-56; *Higginbotham*, D2, ¶¶116-35; *Cummings*, D2, ¶¶115-34). When Butala, Clark, Hackler, and Palmer jointly filed suit in March 2019, they repeated the MMPA claims and added claims against the University for negligent misrepresentation. (*Butala*, D2, ¶¶230-55).

Plaintiffs contend that they properly preserved a constitutional challenge to the University's sovereign immunity in the operative petitions. (Substitute Br. 47-49). This assertion hangs exclusively on the following sentence fragment in a list of vaguely asserted purported constitutional violations:

In prohibiting causes of action against Defendant The Curators of the University of Missouri for the actions of the University and those of its employees and agents, § 537.600, et seq., violate the Missouri Constitution in the following respects:

...

f. Article I, §15 [sic], Open Courts provision.

(*Butala*, D2, ¶121[sic]; *Butterfield*, D18, ¶156; *Draper*, D52, ¶212; *Reinsch*, D2, ¶207; *Browne*, D20, ¶156[sic]; *Jaggie*, D2, ¶181; *Higginbotham*, D2, ¶160; *Cummings*, D2,

¶138[sic]). There is no other reference to the open courts provision and no pleading of facts or application of facts to law.

The University moved to dismiss each Plaintiff's operative petition, arguing that: (1) sovereign immunity bars the claims against the University; and (2) the University is not a "person" under the MMPA. (*Butala*, D8, pp. 6-14; *Butterfield*, D24, pp. 5-13; *Draper*, D60, pp. 5-13; *Reinsch*, D8, pp. 5-13; *Browne*, D26, pp. 5-13; *Jaggie*, D8, pp. 5-13; *Higginbotham*, D8, pp. 5-13; *Cummings*, D8, pp. 5-14). The University also argued that Plaintiffs' laundry list of constitutional challenges was deficient boilerplate. *Butala*, D8, pp. 12-13; *Butterfield*, D24, pp. 12-13; *Draper*, D60, pp. 12-13; *Reinsch*, D8, pp. 12-13; *Browne*, D26, pp. 12-13; *Jaggie*, D8, pp. 12-13; *Higginbotham*, D8, pp. 12-13; *Cummings*, D8, pp. 12-13).

In response to these motions, the Plaintiffs did not quote or analyze the Missouri Constitution's open court provision or set forth any of the substantive arguments found in Point II of their brief in this Court. (*Compare Butala*, D9, pp. 32-33, with Substitute Br. 50-62). Instead, Plaintiffs merely observed that two of this Court's cases, *Fisher v. State Hwy. Comm'n of Mo.*, 948 S.W.2d 607 (Mo. banc 1997), and *Richardson v. State Hwy. & Transp. Comm'n*, 863 S.W.2d 876 (Mo. banc 1993), were not unanimous decisions because Judge Holstein had written separate opinions contending that sovereign immunity violated Article I, §§ 2 and 14 of the Missouri Constitution. (*Butala*, D9, pp. 32-33). The phrase "open courts" does not even appear in Plaintiffs' trial court briefs. (*Butala*, D9).

In each instance, the same trial judge heard the University's motions to dismiss and granted the University's motions, certifying those orders for interlocutory appeal. (A1-A8).

Subsequently, Browne, Butterfield, Cummings, Draper, Higginbotham, Jaggie, and Reinsch moved for leave to amend to add counts against the University based on negligent misrepresentation, without raising new factual allegations. (*Butterfield*, D30; *Draper*, D68; *Reinsch*, D14; *Browne*, D32; *Jaggie*, D14; *Higginbotham*, D14; *Cummings*, D14). The trial court denied leave to amend and also certified all of those orders for interlocutory appeal. Butala, Clark, Hackler, and Palmer did not move for leave to amend, as they had already asserted claims for negligent misrepresentation in their dismissed petitions. (*Butala*, D2, ¶¶250-55).

At this time, the trial court has dismissed only the University as a defendant in the cases below. Drs. Stannard, Kfuri, and Cook remain defendants as to the medical negligence, loss of chance of recovery, MMPA, and negligent misrepresentation counts in the various trial court proceedings. Discovery and motion practice in those proceedings continues in earnest.

B. Court of Appeals Proceedings

The Court of Appeals consolidated Plaintiffs' interlocutory appeals. On appeal, Plaintiffs raised a variety of challenges to the University's sovereign immunity, albeit in a different order than in their substitute brief before this Court. The parties fully briefed what are now Points III, IV, V, VI, and VII. Plaintiffs did not, however, substantively brief their current arguments under art. I, § 14 of the Missouri Constitution, which is now

Point II, before the Court of Appeals. Instead, they focused on art. I, § 2, concerning the right to enjoyment of the gains of one's own industry. (See Appellants' Br. 70-71).

After the consolidated appeal was docketed for oral argument, the Court of Appeals transmitted a letter to the parties following this Court's then-recent decision in *Wilson v. City of St. Louis*, 600 S.W.3d 763 (Mo. banc 2020). The Court of Appeals directed the parties to prepare to discuss *Wilson* at oral argument and stated that "[c]ounsel are invited, though not required," to file a supplemental brief with the court on the jurisdictional issue. The University did not file a supplemental brief and did not take the position that the court lacked jurisdiction under *Wilson*.

The Court of Appeals dismissed Plaintiffs' appeal for lack of jurisdiction under Rule 74.01(b). The Court of Appeals concluded that, because "every set of facts that are relevant to any claim or claims against Curators are also relevant to the identical claim or claims that are made against the individual defendant doctors," the trial court's rulings had not "'fully resolved' at least one claim nor established 'all the rights and liabilities of the parties with respect to that claim'" in order to comply with Rule 74.01(b). Court of Appeals Opinion, p. 6 (quoting *Wilson*, 600 S.W.3d at 771).

RESPONSES TO POINTS RELIED ON

I. This Court Has Jurisdiction Over Plaintiffs' Appeal Under Rule 74.01(b) (Responding to Plaintiffs' Point I).

- *Sofia v. Dodson*, 601 S.W.3d 205 (Mo. banc 2020)
- Rule 74.01(b)

II. The Trial Court Correctly Granted the University's Motion to Dismiss Because Sovereign Immunity Does Not Violate the Open Courts Provision of the Missouri Constitution in That Plaintiffs Do Not Have a Cause of Action Against the University, § 537.600 Is Not a Procedural Restriction to Court Access, and § 537.600 Is Neither Arbitrary Nor Unreasonable (Responding to Plaintiffs' Point II).

- *Fisher v. State Hwy. Comm'n of Mo.*, 948 S.W.2d 607 (Mo. banc 1998)
- *Findley v. City of Kansas City*, 782 S.W.2d 393 (Mo. banc 1990)
- *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. banc 1989)
- *Todd v. Curators of Univ. of Mo.*, 147 S.W.2d 1063 (Mo. 1941)
- Mo. Const. art. I, § 14
- R.S. Mo. § 537.600

III. The Trial Court Correctly Granted the University's Motions to Dismiss Because Sovereign Immunity Applies to All Alleged Claims and the University Did Not Waive, But Rather Expressly Reserved, Its Sovereign Immunity When Purchasing Insurance (Responding to Plaintiffs' Point III).

- *State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368 (Mo. banc 2016)
- *Langley v. Curators of Univ. of Mo.*, 73 S.W.3d 808 (Mo. App. 2002)
- *Brennan by and through Brennan v. Curators of Univ. of Mo.*, 942 S.W.2d 432 (Mo. App. 1997)
- *Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646 (Mo. App. 1989)

IV. The Trial Court Correctly Granted the University’s Motions to Dismiss Because the Proprietary Exception to Sovereign Immunity Does Not Apply to the University, Which Is Not a Municipality (Responding to Plaintiffs’ Point IV).

- *State ex rel. Mo. Dep’t of Agric. v. McHenry*, 687 S.W.2d 178 (Mo. banc 1985)
- *State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571 (Mo. banc 2004)
- *Anderson v. State*, 709 S.W.2d 893 (Mo. App. 1986)
- Mo. Const. art. IX, §§ 9(a)-(b)
- R.S. Mo. § 172.020
- R.S. Mo. § 537.600

V. The Trial Court Correctly Granted the University’s Motions to Dismiss Because a Violation of the MMPA Is a Statutory Tort and Negligent Misrepresentation Is a Common-Law Tort (Responding to Plaintiffs’ Point V).

- *Bachtel v. Miller Cty. Nursing Home Dist.*, 110 S.W.3d 799 (Mo. banc 2003)
- *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82 (Mo. banc 2003)
- *Restatement (Second) of Torts* § 874A (1977)
- R.S. Mo. § 407.025

VI. The Trial Court Correctly Granted the University’s Motions to Dismiss Because the University Is Not a “Person” Under the MMPA (Responding to Plaintiffs’ Point VI).

- *Carpenter v. King*, 679 S.W.2d 866 (Mo. banc 1984)
- *Krasney v. Curators of the University of Missouri*, 765 S.W.2d 646 (Mo. App. 1989)
- R.S. Mo. § 407.010

VII. The Trial Court Correctly Denied Browne, Butterfield, Cummings, Draper, Higginbotham, Jaggie, and Reinsch Leave to Amend Because the Proposed Amendments to Add Counts of Negligent Misrepresentation Would Be Futile, and Plaintiffs Have Not Justified Their Failure to Include This Legal Theory in the Prior Petitions (Responding to Plaintiffs' Point VII).

- *World Wide Tech., Inc. v. Office of Admin.*, 572 S.W.3d 521 (Mo. App. 2019)
- *Eckel v. Eckel*, 540 S.W.3d 476 (Mo. App. 2018)

ARGUMENT

I. This Court Has Jurisdiction Over Plaintiffs’ Appeal Under Rule 74.01(b) (Responding to Plaintiffs’ Point I).

In Point I, Plaintiffs argue the threshold issue that the Court of Appeals erred in dismissing their interlocutory appeals for lack of jurisdiction under Rule 74.01(b). (Substitute Br. 36-46). The University thus finds itself in the unique posture of serving as the expected advocate for a legal argument that the University never advanced.

The University—as a matter of candor and in the interest of allowing this Court to resolve Points II through VII with the benefit of adversarial arguments—suggests that the Court has jurisdiction over Plaintiffs’ interlocutory appeals under existing precedent. Plaintiffs’ brief relies on *Wilson v. City of St. Louis*, 600 S.W.3d 763 (Mo. banc 2020). The answer to the jurisdictional riddle, however, is found in *Sofia v. Dodson*, 601 S.W.3d 205 (Mo. banc 2020), an intervening opinion. The Court of Appeals did not have the benefit of *Sofia* before dismissing Plaintiffs’ appeals.

Rule 74.01(b) provides, in relevant part:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may enter a judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay.

At the time of the dismissals, *Wilson* was this Court’s most recent opinion interpreting Rule 74.01(b). *Wilson* involved a complex procedural history over various parking-related disputes in the City of St. Louis. The plaintiffs asserted six counts against seven defendants, an intervenor asserted four similar counts and one additional count against

the same seven defendants, and the City asserted a cross-claim against the State. 600 S.W.3d at 766-67. The trial court entered partial summary judgment on the City's cross-claim against the State, and then entered two partial summary judgment orders with respect to one count apiece of the plaintiffs' and intervenor's respective petitions.

This Court determined that it lacked jurisdiction under Rule 74.01(b) and dismissed the appeal. *Id.* at 772-73. Individually and collectively, the trial court's rulings did not "resolve all claims by or against at least one party ... because Plaintiffs and Intervenor (as well as the defendants to the resolved claims) remain parties to claims still pending in the circuit court." *Id.* at 773. In addition, the rulings did not resolve a "judicial unit" of claims "in the sense that the claims resolved are sufficiently distinct from the claims still pending in the circuit court." *Id.* The Court concluded that "the validity of the parking statutes, the interplay between those statutes and the parking ordinances, and the various duties those statutes and ordinances impose on various city and county officials are the threads that run throughout both the claims resolved ... and many (if not all) of the claims that remain pending in the circuit court." *Id.*

In the present cases, the Court of Appeals was presented with a different scenario. Plaintiffs have asserted multiple counts against Drs. Stannard, Kfuri, and Cook for medical negligence, loss of chance of recovery, violation of the MMPA and, where applicable, negligent misrepresentation. Plaintiffs have also asserted their MMPA and, in some cases, negligent misrepresentation counts against the University. There are no other counts asserted against the University. There are no counterclaims or cross-claims.

As a result, the trial court's dismissal as to the University resulted in the elimination of all counts asserted against the University.

The Court of Appeals assembled principles from *Wilson* and other cases to determine whether it had jurisdiction. The court first observed that “a judgment is a legally enforceable judicial order that *fully resolves* at least one claim in a lawsuit and establishes *all the rights and liabilities of the parties with respect to that claim*.” Court of Appeals Opinion, p. 5 (quoting *State ex rel. Henderson v. Asel*, 566 S.W.3d 596, 598 (Mo. banc 2019)) (emphasis in original). Next, the Court of Appeals noted that “seeking *multiple* forms of relief with respect to *one* set of facts is still *one* claim.” *Id.* (citing *Wilson*, 600 S.W.3d at 768 n.6) (emphasis in original). The Court of Appeals then reasoned that, because “every set of facts that are relevant to any claim or claims against Curators are also relevant to the identical claim or claims that are made against the individual defendant doctors,” the trial court's order had not “‘fully resolved’ at least one claim nor established ‘all the rights and liabilities of the parties with respect to that claim.’” *Id.*, p. 6 (quoting *Wilson*, 600 S.W.3d at 771). Thus, the Court of Appeals apparently interpreted *Wilson* and other cases to mean that resolving a “claim” for purposes of Rule 74.01(b) is not specific to a particular defendant, and that “all the rights and liabilities of *the parties*” with respect to that claim meant *all* the parties to any counts asserted against multiple defendants: here, the University and Drs. Stannard, Kfuri, and Cook.

The Court of Appeals' legal analysis was neither clearly right nor clearly wrong because the facts of *Wilson* are distinguishable and do not speak directly to the procedural

history of this case. When the Court of Appeals provided the parties with the option to file supplemental briefs on this issue, the University sought instead to obtain a final resolution on the merits of its immunity from suit altogether, a position supported by the very purpose of sovereign immunity in avoiding defense of litigation.

Since then, this Court issued the *Sofia* opinion that appears to be inconsistent with the Court of Appeals' dismissal. In *Sofia*, a wrongful death case, the Court addressed its jurisdiction in a footnote and held that, "although the resolved claims are factually intertwined with the pending claims against Dr. Dodson and Mercy Clinic, the judgment was eligible for certification under Rule 74.01(b) because it resolved all claims in the lawsuit against Mercy Hospital." 601 S.W.3d at 208 n.3. In other words, *Sofia* seems to clarify that the term "claim," in the context of Rule 74.01(b), is specific to the allegations asserted by one party against another party.

Of course, the Court need not venture further than what follows from *Sofia*. Here, the trial court dismissed with prejudice all counts asserted by Plaintiffs as to the University, and there are no counterclaims or cross-claims. Thus, *Sofia* suggests that these dismissal rulings were *eligible* for certification as judgments under Rule 74.01(b).⁹ Whether certification will be *warranted* under the circumstances of any given case is a different matter altogether.

⁹ With respect to Point VII, however, it is not clear under *Sofia* that the trial court's additional orders denying Plaintiffs leave to amend are eligible for certification, given that there were no longer any "claims" against the University after the dismissals of the MMPA counts.

Having addressed this threshold jurisdictional issue, the University asks the Court to proceed to Points II, III, IV, V, VI, and VII. Resolving this appeal on the merits will prevent further encroachment on the University's immunity. Sovereign immunity is not merely immunity from liability but immunity from defending suits altogether. *See Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 921 (Mo. banc 2016) (sovereign immunity recognizes that the State is immune from suit and cannot be sued in its own courts). The University has already had to engage in extensive litigation before the trial court, pursue writs of prohibition, and brief and argue jurisdictional and substantive issues before the Court of Appeals and this Court. Even though Plaintiffs' arguments lack merit, they nevertheless warrant this Court's prompt attention to ensure that the University's immunity is preserved and it does not remain embroiled in further unwarranted litigation.

II. The Trial Court Correctly Granted the University's Motion to Dismiss Because Sovereign Immunity Does Not Violate the Open Courts Provision of the Missouri Constitution in That Plaintiffs Do Not Have a Cause of Action Against the University, § 537.600 Is Not a Procedural Restriction to Court Access, and § 537.600 Is Neither Arbitrary Nor Unreasonable (Responding to Plaintiffs' Point II).

In Point II, Plaintiffs make an extraordinary request. They ask the Court to void Missouri's doctrine of sovereign immunity, which precludes bringing suit against the government without its consent. *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 921 (Mo. banc 2016). In particular, Plaintiffs ask the Court to overturn R.S. Mo. § 537.600 as a purported violation of art. I, § 14 of the Missouri Constitution, the open courts provision. The impact of Plaintiffs' brazen, and

unpreserved, constitutional challenge is not limited to the University. The elimination of sovereign immunity would impact every public entity throughout the state. Plaintiffs thus wish to overturn, by judicial fiat, two centuries of legal immunity for the State and its agencies, public corporations, state universities, cities, towns, villages, counties, townships, school districts, sewer districts, fire protection districts, housing authorities, and even the courts.

Sovereign immunity is plainly constitutional. On two prior occasions, this Court has upheld the constitutionality of sovereign immunity under art. I, § 14. *Fisher v. State Hwy. Comm'n of Mo.*, 948 S.W.2d 607, 611 (Mo. banc 1997); *Findley v. City of Kansas City*, 782 S.W.2d 393, 395-96 (Mo. banc 1990). “An open courts violation is established upon a showing that: (1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.” *Snodgras v. Martin & Bayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006). Plaintiffs’ current challenge fails every aspect of this Court’s three-part test because (1) Plaintiffs do not have a cause of action against the University; (2) sovereign immunity is not a procedural restriction to court access; and (3) § 537.600 is neither arbitrary nor unreasonable as a legislative choice.

Sovereign immunity was woven into the fabric of Missouri law from the inception of statehood and has remained side-by-side with the open courts provision that supposedly renders it unconstitutional. Just in time for the State’s bicentennial of statehood, Plaintiffs seek to eliminate sovereign immunity from Missouri law in order to find deeper pockets beyond the surgical staff (and insurers) in their civil litigation. This

unravelling of important policy and settled expectations tramples the deeper interests at stake in how the State and local entities are structured and operate. The Court should decline Plaintiffs' ill-advised request for the Court to reshape not only Missouri *law*, but the way that State and local governments *function*. This is a decision for the Legislature or the polls, but not the courts.

A. Standard of Review for Plaintiffs' Open Court Challenge

The Court reviews a trial court's grant of a motion to dismiss *de novo*. *Metro. St. Louis Sewer Dist.*, 476 S.W.3d at 915. Because sovereign immunity is a legal immunity and not an affirmative defense, at the pleading stage, the burden rests with the plaintiff to overcome the defendant's immunity by pleading specific facts to support an exception to sovereign immunity. *State ex rel. City of Kansas City v. Harrell*, 575 S.W.3d 489, 492 (Mo. App. 2019); *Richardson v. City of St. Louis*, 293 S.W.3d 133, 137 (Mo. App. 2009); *see also State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368, 369 (Mo. banc 2016) ("Sovereign immunity is not a defense to suit, but, rather, it is immunity from tort liability altogether....").

Challenges to the constitutional validity of a state statute are subject to *de novo* review. *Hink v. Helfrich*, 545 S.W.3d 335, 338 (Mo. banc 2018). "A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly contravenes the constitution; it should be enforced by the courts unless it plainly and palpably affronts fundamental law embodied in the constitution." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991). The burden is upon the

party claiming the statute is unconstitutional to prove the statute is unconstitutional. *Id.* at 828-29.

B. Plaintiffs Failed to Present and Preserve Their Open Courts Challenge to Sovereign Immunity Before the Trial Court.

As a threshold matter, the Court need not reach Plaintiffs’ open courts challenge because they failed to preserve it before the trial court. “It is firmly established that a constitutional question must be presented at the earliest possible moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived.” *St. Louis Cty. v. Prestige Travel, Inc.*, 344 S.W.3d 708, 712 (Mo. banc 2011) (internal quotations omitted). To raise a constitutional question properly in a trial court, a plaintiff must: (1) raise the question at the first available opportunity; (2) specifically designate the constitutional provision that was allegedly violated; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review. *Id.*

Compliance with this Court’s basic requirements ensures that judicial resources will be devoted only to serious constitutional challenges. A trial court must have an opportunity to fairly consider a constitutional issue. *Mayes v. Saint Luke’s Hosp. of Kansas City*, 430 S.W.3d 260, 267 (Mo. banc 2014). “An attack on the constitutionality of a statute is of such dignity and importance that the record touching such issues should be fully developed and not raised as an afterthought in a post-trial motion or on appeal.” *Id.* at 268 (internal quotations omitted).

Plaintiffs did not properly raise their open courts challenge before the trial court. Their operative petitions contain a single conclusory allegation: “In prohibiting causes of action against Defendant The Curators of the University of Missouri for the actions of the University and those of its employees and agents, §537.600, et seq., violate the Missouri Constitution in the following respects: ... f. Article I, §15 [sic], Open Courts provision.” (*Butala*, D2, ¶121[sic]; *Butterfield*, D18, ¶156; *Draper*, D52, ¶212; *Reinsch*, D2, ¶207; *Browne*, D20, ¶156[sic]; *Jaggie*, D2, ¶181; *Higginbotham*, D2, ¶160; *Cummings*, D2, ¶138[sic]). This sentence fragment about the open courts provision appears within a lengthy but undeveloped list of other constitutional challenges. (*Butala*, D2, ¶121[sic](a)-(e); *Butterfield*, D18, ¶156(a)-(e); *Draper*, D52, ¶212(a)-(e); *Reinsch*, D2, ¶207(a)-(e); *Browne*, D20, ¶156[sic](a)-(e); *Jaggie*, D2, ¶181(a)-(e); *Higginbotham*, D2, ¶160(a)-(e); *Cummings*, D2, ¶138[sic](a)-(e)). Plaintiffs’ bare allegation is inconsistent with this Court’s requirement to state *the facts* showing the violation. See *Mayes*, 430 S.W.3d at 268 (constitutional challenge to statute was not preserved when “[t]he petition ... contained a multitude of constitutional challenges and only conclusory statements that various statutes were unconstitutional without any application to the facts of this case”).

Missouri is a fact-pleading state. *State ex rel. Harvey v. Wells*, 955 S.W.2d 546, 547 (Mo. banc 1997). “Fact pleading identifies, narrows and defines the issues so that the trial court and the parties know what issues are to be tried, what discovery is necessary, and what evidence may be admitted at trial.” *Id.* Furthermore, in a sovereign immunity case, Plaintiffs’ obligation to assert factual allegations carries increased importance. Because sovereign immunity is a legal immunity and not an affirmative

defense, the burden rests *with the plaintiff* to overcome the defendant's immunity by pleading *specific facts* in the petition. See *Harrell*, 575 S.W.3d at 492; *Richardson*, 293 S.W.3d at 137. Plaintiffs made no attempt in the operative petitions to satisfy this Court's three-part legal test for open courts challenges, such as alleging facts to demonstrate why sovereign immunity is arbitrary or unreasonable. See *Snodgras*, 204 S.W.3d at 640. Therefore, consistent with "good pleading and orderly procedure," *Prestige Travel*, 344 S.W.3d at 712, Plaintiffs must plead more than an unexplained assertion that a statute is unconstitutional.

When the University moved to dismiss, Plaintiffs failed to assert any substantive legal arguments in opposition; they merely quoted a brief passage from non-majority opinions in two cases without additional legal analysis except to insist they preserved the challenge. (See, e.g., *Butala*, D9, pp. 32-33).¹⁰ Plaintiffs also did not plead or argue their newfound position that this Court should discover, for the first time, a "substantive" component of Missouri's open courts provision. (See Substitute Br. 54-61). Finally, Plaintiffs did not seek to argue the bases for their open courts challenge during oral argument before the trial court. (See Tr. 37:20-38:10).

In short, Plaintiffs' open courts challenge was neither a well-pleaded nor legally articulated matter before the trial court—or the Court of Appeals, for that matter (see Appellants' Br. 70-71). Their constitutional challenge is therefore waived. Otherwise,

¹⁰ In *Richardson v. State Hwy. & Transp. Comm'n*, Judge Holstein wrote a concurrence instead of a dissent because "the argument I have noted based on the provisions of Missouri Constitution article I, §§ 2 and 14, were not adequately raised in the trial court or in the brief." 863 S.W.2d 876, 884 (Mo. banc 1993) (Holstein, J., concurring in result); see also Substitute Br. 54.

there is nothing to prevent all plaintiffs from doing precisely what Plaintiffs did here, which was to insert a laundry list of boilerplate constitutional challenges in the second-to-last paragraph of a petition and then raise allegations of trial court “error,” although the trial court never had an opportunity to consider the arguments presented to the appellate courts. Point II should be denied on this basis alone.

C. This Court Recognizes That Sovereign Immunity Does Not Violate the Missouri Constitution’s Open Courts Provision.

“Sovereign immunity existed when Missouri joined the Union.” *Fisher*, 948 S.W.2d at 610. Namely, sovereign immunity was part of “the common law adopted in Missouri when it came into the Union of states.” *Findley*, 782 S.W.2d at 395 (quoting *O’Dell v. Sch. Dist. of Indep.*, 521 S.W.2d 403, 407 (Mo. banc 1975)). As a result, “Missouri courts have recognized the common law rule of sovereign immunity since 1821.” *Metro. St. Louis Sewer Dist.*, 476 S.W.3d at 921 (citing *Southers v. City of Farmington*, 263 S.W.3d 603, 609 (Mo. banc 2008)).

The University is a public corporation, first established by an act of the Legislature in 1839. *Head v. Curators of State Univ.*, 47 Mo. 220, 224 (1871). Over the last 180 years, the University has grown into a permanent institution that now exists by constitutional mandate. See Mo. Const. art. IX, §§ 9(a)-(b). It is well-established that the University is protected by sovereign immunity. *E.g.*, *Todd v. Curators of Univ. of Mo.*, 147 S.W.2d 1063, 1064 (Mo. 1941); *Reed v. Curators of Univ. of Mo.*, 509 S.W.3d 816, 823 (Mo. App. 2016); *Kreutz v. Curators of Univ. of Mo.*, 363 S.W.3d 61, 65 (Mo. App. 2011); *Hendricks v. Curators of Univ. of Mo.*, 308 S.W.3d 740, 743 (Mo. App. 2010);

Langley v. Curators of Univ. of Mo., 73 S.W.3d 808, 811 (Mo. App. 2002); *Brennan by and through Brennan v. Curators of Univ. of Mo.*, 942 S.W.2d 432, 434 (Mo. App. 1997); *Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 649 (Mo. App. 1989).

Furthermore, throughout the history of the University, its sovereign immunity has coexisted with the Missouri Constitution's open courts provision. Namely, "[t]he language of art. I, § 14 is found first in art. XIII, § 7 of the 1820 Constitution." *Findley*, 782 S.W.2d at 395. "Each of the state's constitutions adopted since statehood has carried identical language." *Id.* That language also exists alongside the constitutional provisions that establish the "state university," and require that the General Assembly "adequately maintain the state university." Mo. Const. art. IX, § 9(b).

The University's sovereign immunity existed as a matter of common law, until September 12, 1977, when this Court prospectively abrogated sovereign immunity as a common law doctrine for *all* public entities, effective August 15, 1978. *See Jones v. State Hwy. Comm'n*, 557 S.W.2d 225 (Mo. banc 1977). "The delay was allowed, among other reasons, in order to permit the legislature to determine whether to reinstate immunity by statute." *Beiser v. Parkway Sch. Dist.*, 589 S.W.2d 277, 278 n.1 (Mo. banc 1979). The General Assembly promptly reinstated sovereign immunity for all public entities, including the University, before that holding ever took effect. *See R.S. Mo. § 537.600.*¹¹ Thus, when provided with the opportunity, the public's elected officials

¹¹ Today, § 537.600.1 provides that sovereign immunity "shall remain in full force and effect" as it "existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date." As the statute indicates, the General Assembly elected to freeze common-law sovereign

chose to protect the University and other public institutions instead of exposing them to suit and liability. As a result, the University's sovereign immunity has been in full force since 1839. See *Reed*, 509 S.W.3d at 823; *Kreutz*, 363 S.W.3d at 65; *Hendricks*, 308 S.W.3d at 743; *Langley*, 73 S.W.3d at 811; *Brennan*, 942 S.W.2d at 434; *Krasney*, 765 S.W.2d at 649.

Since *Jones*, the Court has twice confirmed that sovereign immunity is consistent with art. I, § 14. *Fisher*, 948 S.W.2d at 611; *Findley*, 782 S.W.2d at 395-96. As the Court explained:

[L]ong before this Court abrogated sovereign immunity in *Jones* ..., sovereign immunity stood side-by-side with the constitutional "certain remedy" provisions. There can be little doubt, therefore, that the framers of the constitution understood that sovereign immunity was part of the fabric of the common law when they adopted the constitutional language at issue here.

Findley, 782 S.W.2d at 395. The Court recognized, unambiguously, that "the legislature may constitutionally impose sovereign immunity by statute." *Id.* at 396. In short, Plaintiffs' challenge to § 537.600 has been twice rejected and this case provides no reason to revisit the issue.

D. Section 537.600 Satisfies the Three-Part Test for Open Courts Challenges.

The open courts provision states: "That the courts of justice shall be open to every person, and *certain remedy* afforded for every injury to person, property or character, and

immunity as it existed at a moment in time: the day prior to the *Jones* decision. Beyond the common-law framework, the General Assembly established only two narrow statutory exceptions, related to: (1) negligent acts or omissions related to motor vehicles, and (2) dangerous conditions on public property. R.S. Mo. § 537.600.1(1)-(2). Neither statutory exception applies to Plaintiffs' claims against the University.

that right and justice shall be administered without sale, denial or delay.” Mo. Const. art. I, § 14 (emphasis added). The thrust of Point II is that § 537.600, which confers sovereign immunity as it existed under the common law as of September 12, 1977, supposedly violates art. I, § 14 because sovereign immunity prohibits Plaintiffs from obtaining a judgment for damages against the University. (See Substitute Br. 49-61).

“It is all too easy to assume that this provision [in art. I, § 14] means that a plaintiff can always go to court and obtain a judgment on the claim asserted; it obviously does not mean this.” *Blaske*, 821 S.W.2d at 832. To the contrary, the “constitutional right to open courts does not entitle access to the courts for any and all grievances or concerns one might have.” *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. banc 2009); accord *State ex rel. Goldsworthy v. Kanatzar*, 543 S.W.3d 582, 588 (Mo. banc 2018). Rather, “the right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes.” *Id.*; accord *Fisher*, 948 S.W.2d at 611; *Findley*, 782 S.W.2d at 396. The “substantive law,” for purposes of the open courts provision, is the law created by the common law and by statute. *Blaske*, 821 S.W.2d at 833. Even so, the open courts provision “does not assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination.” *Wheeler v. Briggs*, 941 S.W.2d 512, 514 (Mo. banc 1997).

Thus, the open courts provision does *not* prohibit the legislature from barring a remedy to a plaintiff by allowing legal defenses or immunity. See, e.g., *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. banc 1989) (upholding legal immunity of health services corporation for medical negligence); *Blaske*, 821 S.W.2d at 832-34

(upholding statute of repose). It also does not preclude the elimination of *any* remedy at all. See, e.g., *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003) (upholding wrongful death statute despite the fact that it excludes certain individuals from maintaining the action). Instead, ““this Court draws an important distinction between a statute which creates a *condition precedent to the use of the courts* to enforce a valid cause of action (which violates the open courts provision) and a statute which simply changes the common law by eliminating a cause of action which has previously existed at common law or under some prior statute”” (which does not violate the open courts provision). *Goodrum v. Asplundh Tree Expert Co.*, 824 S.W.2d 6, 9 (Mo. banc 1992) (quoting *Blaske*, 821 S.W.2d at 832-33) (emphasis added); see also *Fisher*, 948 S.W.2d at 611. For example, it is an open courts violation to require a medical malpractice plaintiff to pursue a review of the merits of his or her claims from a specially convened medical review board as a precondition to filing a civil suit. See *State ex rel. Cardinal Glennon Mem’l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 110 (Mo. banc 1979); see also *Schumer By and Through Schumer v. City of Perryville*, 667 S.W.2d 414, 418 (Mo. banc 1984) (notice of claim statutes are generally constitutional, but not in cases of impossibility due to physical, mental, or legal incapacity to provide that notice).

Based on these basic principles, the Court has established a three-part test for open court challenges. See, e.g., *Weigand*, 296 S.W.3d at 461. Under this test, “[a]n open courts violation is established on a showing that: ‘(1) a party has a recognized cause of action; (2) that the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.’” *Id.* (quoting *Snodgras*, 204 S.W.3d at 640) (emphasis added). It is

noteworthy that, throughout their brief, Plaintiffs never mention this test, much less attempt to satisfy it. That is because Plaintiffs fail all three parts.

First, Plaintiffs do not have a recognized cause of action against the University for violation of the MMPA or for negligent misrepresentation. Plaintiffs' single conclusory allegation in their operative petitions concedes the absence of a cause of action, stating that sovereign immunity under § 537.600 "prohibit[s] causes of action against Defendant The Curators of the University of Missouri for the actions of the University and those of its employees and agents." (*Butala*, D2, ¶121[sic]; *Butterfield*, D18, ¶156; *Draper*, D52, ¶212; *Reinsch*, D2, ¶207; *Browne*, D20, ¶156[sic]; *Jaggie*, D2, ¶181; *Higginbotham*, D2, ¶160; *Cummings*, D2, ¶138[sic]).

In other words, sovereign immunity means that Plaintiffs have no recognized cause of action. At common law, there was no right to sue the University for tort damages. *Fisher*, 948 S.W.2d at 611; *Todd*, 147 S.W.2d at 1064. That remains true after the passage of § 537.600. *See, e.g., Krasney*, 765 S.W.2d at 651. Consistent with the wide mandate of the Legislature, as well as the constitutional obligation to "adequately maintain" the University, it was the prerogative of the General Assembly to preserve the University's (and other public entities') sovereign immunity. *See Winston v. Reorganized Sch. Dist. R-2, Lawrence Ct.*, 636 S.W.2d 324, 328 (Mo. banc 1982). Thus, § 537.600 "does not violate article I, § 14, of the Missouri Constitution because it does not bar the courts to a person with a valid cause of action; rather, it modifies the common law to provide that there is no such cause of action." *Blaske*, 821 S.W.2d at 833. Although the University's sovereign immunity never lapsed, the General Assembly

properly preserved sovereign immunity by providing that Plaintiffs have no cause of action in tort against the University.

Second, any alleged “restriction” under § 537.600 is not the type of procedural restriction contemplated by the open courts provision. “Under the open courts provision, only those statutes that impose procedural bars to access of the courts are unconstitutional.” *Wheeler*, 941 S.W.2d at 514; *see, e.g., Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 910 (Mo. banc 2015) (“Artificial barriers, such as the requirement that one appear before a medical review board prior to filing suit, violate this provision for they bar a plaintiff from bringing a valid and recognized claim.”). Sovereign immunity is nothing like the “preconditions” to filing suit that this Court has rejected. Section 537.600 does not establish a procedural bar to access; it modifies Missouri’s substantive law to eliminate the ability to sue, or obtain a remedy from, the University. That was the reasoning of *Fisher*, 948 S.W.2d at 611, which held that § 537.610 “does not bar access” by capping damages for tort claims against the State when sovereign immunity is waived.

Finally, § 537.600 is neither arbitrary nor unreasonable. Again, the challenge must relate to an arbitrary or unreasonable *procedure* or “condition precedent,” not an arbitrary or unreasonable decision to modify the substantive law. *See Snodgras*, 204 S.W.3d at 640 (“Whether the Act arbitrarily eliminates a cause of action is not relevant to the open courts analysis.”). In any event, sovereign immunity is a longstanding doctrine in English and American law. As a result, the General Assembly’s decision to step in and

restore sovereign immunity under § 537.600 was a reasonable and non-arbitrary legislative choice. As this Court has explained:

[W]e can only say our General Assembly had a rational basis to fear that full monetary responsibility for any and all tort claims entails the risk of insolvency or intolerable tax burdens. Our legislature must have the power to preserve public funds and insure that the State provides its citizenry appropriate services. Though public funds must be available for essential governmental services, taxes must be held at reasonable levels, and limiting recovery to certain enumerated governmental torts allows for fiscal and actuarial planning consonant with orderly stewardship of governmental funds, while permitting victims of specified torts to recover for losses within the limits prescribed by s 537.610.

* * *

It appears rationally desirable to refrain from opening the floodgates to tort claims arising from any and all governmental functions, most of which are deemed by our legislature as requiring the cloak of immunity.... It is not unreasonable to blanket governmental agencies with sovereign immunity yet carve statutory exceptions as to specified governmental functions, especially when the statute, through its clarity, avoids most questions as to the type of actions that may be maintained, freeing the governmental unit of expending resources in litigating a variety of procedural issues. Additionally, while insurance may or may not be available at a reasonable cost to protect from other risks, the governmental unit is better able to plan and shelter itself from liability stemming from the [two] statutorily delineated exceptions.

Winston, 636 S.W.2d at 328-29 (internal citation omitted); *see also Richardson*, 863 S.W.2d at 879.

Thus, sovereign immunity satisfies every aspect of this Court's open courts test. Plaintiffs fail to carry their burden to meet all three parts of the test, and their constitutional challenge fails.

E. There Is No “Substantive” Component to the Open Courts Provision.

Instead of taking the position that sovereign immunity is unconstitutional based on established principles, Plaintiffs ask the Court to rewrite its constitutional jurisprudence. Plaintiffs propose the creation of a strange cousin of substantive due process that would authorize the courts to fashion new causes of action to allow lawsuits for “every” claimed injury, in derogation of the rights established under Missouri common law and statutory law. The Court should decline this invitation for multiple reasons.

To begin, there is no precedent for this argument. In fact, this Court has held, specifically in the context of a similar sovereign immunity challenge, that there is no substantive component to the open courts provision. *Findley*, 782 S.W.2d at 396. The Court wrote:

This Court has not, nor does it now, read art. I, § 14 as containing any substantive rights. The right to seek redress for governmental torts exists not by virtue of constitutional edict but by governmental permission.... “[W]ithin constitutional limits, a sovereign may prescribe the terms and conditions under which it may be sued, and the decision to waive immunity, and to what extent it is waived, lies within the legislature’s purview.”

Id. (quoting *Winston*, 636 S.W.2d at 328); see also *Etling*, 92 S.W.3d at 774 (“To strike the statute because it does not allow Appellants a mode of remedy would amount to the judicial creation of a cause of action, an act not contemplated by this provision.”).

Findley’s rejection of a substantive component to the open courts provision is a matter of longstanding precedent. See *State ex rel. Nat’l Ref. Co. v. Seehorn*, 127 S.W.2d 418, 424 (Mo. 1939) (“We do not believe Sec. 10, Art. 2, of the constitution [of 1875, now art. I, § 14] was intended to create, of its own vigor, any new rights or remedies

which were not in existence or recognized at the time of its adoption. We think it was designed to protect the citizen in the use of the courts to enforce such rights and remedies as were recognized by the law at the time of its adoption and as might thereafter be created by law.”). More recently, the Court has repeated that “Article I, [section] 14 does not create rights, but is meant to protect the enforcement of rights already acknowledged by law.” *State ex rel. Tri-Cty. Elec. Co-op. Ass’n v. Dial*, 192 S.W.3d 708, 711 (Mo. banc 2006).

Second, Plaintiffs appear to forget entirely that sovereign immunity is not about eliminating *all* remedies, but rather eliminating the availability of a cause of action *against a public entity*. Public entities do not commit torts; people do. *See Southers*, 263 S.W.3d at 609. Sovereign immunity simply declares that public entities will not be held financially liable for the acts of their agents under the principle of *respondeat superior*. *See id.*; *Harrell*, 781 S.W.2d at 62 (“Section 354.125, furthermore, does not deny the plaintiff a remedy for the wrong done to her. She has her right of action against the negligent surgeon. The statute simply limits her access to an additional pocket.”).

In this respect, Plaintiffs describe their inability to sue the University in alarmist language as if they have no remedy “at all.” (*See, e.g.*, Substitute Br. 58 (“[T]he statute takes away the possibility of *any judicial remedy at all*, effectively slamming the courthouse door in the face of such person. It denies, in wholesale fashion, *any legal remedy whatsoever* to a person who has the misfortune of suffering injury at the hands of a public entity... It declares to such injured person: ‘you *have no legal remedy against the tortfeasor that caused your injury*; the courts are not open to you.’”)). This is not

true. On the contrary, Plaintiffs continue to pursue claims against Drs. Stannard, Kfuri, and Cook based on the same factual allegations—subject, of course, to those defendants’ own defenses under governing law.

Finally, Plaintiffs create a false analogy between substantive due process and an illusory “substantive” component of the open courts provision. In making this argument, Plaintiffs rely primarily on a dissenting opinion in a non-sovereign immunity case by the late Judge Teitelman, which was not joined by any other member of the Court. (Substitute Br. 57 (citing *Mo. Alliance for Retired Americans v. Dep’t of Labor & Indus. Relations*, 277 S.W.3d 670, 682-83 (Mo. banc 2009) (Teitelman, J, dissenting))). Plaintiffs’ argument is confusing; they first suggest the two clauses mean the same thing (Substitute Br. 56), and then shift to contending that the open courts provision “creates” a substantive due process right (*id.* at 57). Either way, the analysis is unfounded.

Substantive due process rights are few and far between and, more importantly, are based on highly specific fundamental rights. *See Doe v. Phillips*, 194 S.W.3d 833, 843 (Mo. banc 2006) (“Claimed violations of a right to personal privacy, to procreate, and similar rights not specifically set out in the constitution but inherent in the concept of ordered liberty are analyzed under substantive due process principles.”). “[T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.” *Id.* at 842. Such a right must also be “deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty.” *Id.* Sovereign immunity, by contrast, has existed for the entirety of Missouri history and “is the rule, not the exception.” *Metro. St.*

Louis Sewer Dist., 476 S.W.3d at 914. The University’s sovereign immunity, not Plaintiffs’ wandering argument, is more firmly rooted in Missouri’s history.

Substantive due process does not require recognition of claims for every routine personal injury, only exceptional ones. *See Doe*, 194 S.W.3d at 842. Plaintiffs’ conception of a “substantive” open courts provision is the opposite. A “substantive” open courts provision does not serve to protect narrow rights, but to require Missouri courts to fashion their own remedies on the fly in derogation of legislative choices with respect to any conceivable injury. Such a doctrine would swallow existing law whole.

For these reasons, § 537.600 does not violate the open courts provision.

F. There Are Deep Reliance Interests at Stake in Preserving Sovereign Immunity.

This Court should adhere to precedents upholding the constitutionality of sovereign immunity and the absence of a “substantive” component of art. I, § 14. Under the doctrine of *stare decisis*, “a decision of this [C]ourt should not be lightly overruled, particularly where ... the opinion has remained unchanged for many years.” *First Bank v. Fischer & Frichtel, Inc.*, 364 S.W.3d 216, 224 (Mo. banc 2012) (alterations in original); *see also Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (“*Stare decisis* ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’”) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

Plaintiffs’ request to overturn sovereign immunity lacks foresight. There are overwhelming reliance interests at stake in terms of what near- and long-term activities

the government has chosen to undertake, from building roads and bridges to running hospitals to social services.¹² For the University, the elimination of sovereign immunity is not limited to its ability to provide healthcare services, but also the University's core educational mission, as well as the broad range of related activities, ranging from athletics to campus events.

The availability of sovereign immunity likewise impacts how public entities choose to gainfully employ countless Missouri citizens. Overturning § 537.600 is not limited to exposing the State, its agencies, and unique public corporations like the University to tort liability, but also every city, town, and local school districts. Budgets and government-backed activities would be reassessed wholesale both statewide and locally. This includes the economic impact on the procurement and structuring of insurance, including how, and the extent to which, public entities choose to protect employees, such as the surgical staff in this case. *See, e.g., State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368, 370 (Mo. banc 2016) (discussing purchase of insurance for government employees). Today the Legislature allows public entities to purchase insurance only up to a certain cap. *See* R.S. Mo. § 537.610. Public entities would suddenly find themselves exposed far beyond their ability to insure. Moreover,

¹² A comprehensive list of State agencies, departments, boards, and commissions is available at mo.gov/search-results?mode-state_agencies, listing hundreds of entities ranging from the Board of Accountancy to the Division of Youth Services, mixed in with subdivisions like the Amusement Ride Safety Board, the Safe Drinking Water Commission, and the Seismic Safety Commission. Many of these entities would not exist without sovereign immunity.

the insurance companies that have contracted with public entities to provide insurance would suddenly have greater liability than they had bargained for.

Plaintiffs' comparison to private industry is inapt. (See Substitute Br. 59). Plaintiffs' allegations involve innovative surgical procedures and biomedical research. This sniper shot at sovereign immunity fails to acknowledge the broader scope of activities that the State and its political subdivisions undertake. Even the largest multinational corporation's activities encompass only a sliver of the diverse subject matters that the State must handle every day. Corporations have the luxury of deciding their own mandates and determining what activities are most profitable. The State, by contrast, exists for the benefit of the public, not a group of shareholders. To serve the greater good, the State engages in many activities that are not profitable and which may never be profitable. It was reasonable for the Legislature not to expose every cash-strapped public entity to liability, including MMPA claims for punitive damages.

Plaintiffs propose injecting some sort of "proprietary activity" rule into the Court's open courts analysis (Substitute Br. 59), which has no basis in the language of art. I, § 14 or this Court's case law. This suggestion is an improper blending of legal concepts, as the "proprietary-governmental" test is a common-law exception to the sovereign immunity doctrine for municipalities, not a recognized constitutional doctrine applied to state actors. See Section IV, *infra* (discussing how this rule does not apply to the University). Plaintiffs' argument is not only unpreserved, but ill-advised. It is not difficult to understand why the General Assembly and other government officials would

encourage State entities to defray public tax burdens by earning certain non-tax revenue. Subjecting those activities to liability is the prerogative of the Legislature.

Plaintiffs also argue that sovereign immunity creates “perverse incentives.” (Substitute Br. 59). History does not bear this out. Next year, Missouri celebrates its bicentennial. So far, Missouri has retained sovereign immunity without interruption and without descending into chaos. The reality is that sovereign immunity is more critical than ever because modern life is more complex than ever before. The continuation of sovereign immunity provides flexibility for the University and the State to adapt, consistent with the expectations and desires of the public.

In any event, Plaintiffs’ arguments are “more properly directed to the General Assembly, which can balance the level of compensation of tort victims with the need to protect public funds.” *Richardson*, 863 S.W.2d at 879. Plaintiffs’ arguments are reminiscent of the open courts challenge to legal immunity for medical negligence in *Harrell*, where the Court responded:

Statutes are presumed to be constitutional; one claiming otherwise has a heavy burden. The plaintiff has not overcome that presumption. The statute operates in an area in which the legislature may balance competing interests. Her arguments reduce to the suggestion that the statute is unwise or unfair. This argument must be addressed to the legislature.

781 S.W.2d at 63-64.

Overtaking sovereign immunity is a decision that would appear rash, and its wisdom doubtful. But no matter what, after *Jones*, any such decision no longer rests with the judiciary. The University’s sovereign immunity is constitutional. Point II should be denied.

III. The Trial Court Correctly Granted the University's Motions to Dismiss Because Sovereign Immunity Applies to All Alleged Claims and the University Did Not Waive, But Rather Expressly Reserved, Its Sovereign Immunity When Purchasing Insurance (Responding to Plaintiffs' Point III).

Among the narrow statutory exceptions to sovereign immunity, § 537.610 “permits political subdivisions of the state to purchase insurance and thus waive sovereign immunity,” as long as the plaintiff’s claim falls within that waiver. *State ex rel. Bd. of Trs. of City of N. Kansas City Mem’l Hosp. v. Russell*, 843 S.W.2d 353, 360 (Mo. banc 1992). The waiver must be clear and unequivocal. *See Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 246 (Mo. banc 2013). Any waiver that exists must also be construed narrowly. *State ex rel. Reg’l Justice Info. Serv. Comm’n v. Saitz*, 798 S.W.2d 705, 707 (Mo. banc 1990). The plaintiff bears the burden of establishing the University’s waiver of sovereign immunity. *State ex rel. Blue Springs Sch. Dist. v. Grate*, 576 S.W.3d 262, 265 n.5 (Mo. App. 2019).

The University’s Data Protection Liability Insurance Policy (the “Policy”) does not contain a clear and unequivocal waiver of sovereign immunity protections. To the contrary, the Policy takes pains to state, in express terms, that the University’s purchase of the Policy does *not* amount to a waiver. The Policy provides insurance coverage to the University, its employees, and others for a broad range of claims, while preserving the University’s sovereign immunity when it applies.

In fact, the Policy contains an endorsement which states, in unequivocal terms: “The procurement of coverage afforded under this policy is not intended, nor shall it be construed, to waive *any* rights of sovereign ... immunity granted to *any* **Assured** under

the laws of the State of Missouri.” (*Butala*, D3, p. 59) (italics added). As this explicit preservation of all sovereign immunity rights makes clear, the University’s purchase of the Policy does not waive the University’s sovereign immunity. At the same time, the Policy covers the liability of individuals such as University employees—who are covered “**Assureds**” *not* protected by sovereign immunity under Missouri law—as well as any instances in which sovereign immunity may not protect the University. Plaintiffs ask the Court to ignore this explicit preservation of the University’s sovereign immunity by misinterpreting a single word to fashion a broad waiver of sovereign immunity that would subject the University to liability in a variety of contexts, not merely the claims in this case. The Policy contains no clear and no unequivocal evidence of waiver (and indeed, no evidence at all that the University intended to waive immunity with the purchase of coverage), and the trial court correctly granted the University’s motions to dismiss.

A. Standard of Review

The Court reviews a trial court’s grant of a motion to dismiss *de novo*. *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 915 (Mo. banc 2016). Because sovereign immunity is a legal immunity and not an affirmative defense, at the pleading stage, the burden rests with the plaintiff to overcome the defendant’s immunity by pleading specific facts to support an exception to sovereign immunity. *State ex rel. City of Kansas City v. Harrell*, 575 S.W.3d 489, 492 (Mo. App. 2019); *Richardson v. City of St. Louis*, 293 S.W.3d 133, 137 (Mo. App. 2009). When a waiver of sovereign immunity purportedly rests on the purchase of insurance, the plaintiff must plead and

prove both the existence of the insurance policy, and that the terms of the policy cover the plaintiff's claims. *Blue Springs*, 576 S.W.3d at 269.

B. The Policy Expressly Disclaims Any Waiver of the University's Sovereign Immunity Protection Under Missouri Law.

For decades, Missouri courts have held that “[t]he Curators of the University of Missouri ‘is “a public entity with the status of a governmental body and, as such, is immune from suit for liability in tort in the absence of an express statutory provision.”’” *Langley v. Curators of Univ. of Mo.*, 73 S.W.3d 808, 811 (Mo. App. 2002) (quoting *Brennan by and through Brennan v. Curators of Univ. of Mo.*, 942 S.W.2d 432, 434 (Mo. App. 1997) (quoting *Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 649 (Mo. App. 1989))). “Under § 537.610, when a public entity purchases liability insurance or duly adopts a self-insurance plan for tort claims, sovereign immunity is waived to the extent of the amount provided and for the specific purposes set forth in the insurance plan.” *Langley*, 73 S.W.3d at 811; *see also Brennan*, 942 S.W.2d at 434. At the same time, “[a] public entity does *not* waive its sovereign immunity by maintaining an insurance policy where that policy includes a provision stating that the policy is not meant to constitute a waiver of sovereign immunity.” *Langley*, 73 S.W.3d at 811 (emphasis added); *see also Hendricks v. Curators of Univ. of Mo.*, 308 S.W.3d 740, 744 (Mo. App. 2010) (“[A]n express non-waiver provision in a liability insurance policy purchased by a governmental entity defeats any waiver of sovereign immunity under § 537.610.1.”).

Here, the identified Policy contains an endorsement entitled “**MISSOURI SOVEREIGN IMMUNITY**.” (*Butala*, D3, p. 59). The endorsement first recognizes that “[c]ertain **Assureds** are granted sovereign, governmental, tort, official and/or governmental function immunity under the law of the State of Missouri and that *such Assureds* may be protected from certain **Claims** by virtue of such immunity.” (*Id.*) (emphasis added). The University is one of these “certain” Assureds. Next, the Policy states: “The procurement of coverage afforded under this policy is not intended, nor shall it be construed, to waive *any* rights of sovereign, governmental, tort, official, governmental function or other immunity granted to *any Assured* under the laws of the State of Missouri.” (*Id.*) (emphasis added).

“The cardinal principle for contract interpretation is to ascertain the intention of the parties and to give effect to that intent.” *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. banc 1995). Here, the Policy states that intention unequivocally, which is that the parties do *not* intend to waive the University’s sovereign immunity and, to the contrary, instructs that the Policy shall *not* be construed to waive *any* right of sovereign immunity. *Russell, Hendricks, Langley, and Brennan* hold that such a non-waiver provision preserves—and protects the University against any waiver of—sovereign immunity. *See Russell*, 843 S.W.2d at 360 (“Nothing contained in this policy (or this endorsement thereto) shall constitute any waiver of whatever kind of these defenses of sovereign immunity or offical [sic] immunity for any monetary amount whatsoever.”) (converted from upper case to lower case) (alteration in original); *Hendricks*, 308 S.W.3d at 744 (“Nothing in the Plan shall be construed as a waiver of any

governmental immunity of the Employer, the Board of Curators of the University of Missouri nor any of its employees in the course of their official duties.”); *Langley*, 73 S.W.3d at 811 (same as *Hendricks*); *Brennan*, 942 S.W.2d at 435 (same as *Hendricks* and *Langley*); see also *State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368, 370 (Mo. banc 2016) (“This policy and any coverages associated therewith does not constitute, nor reflect an intent by you, to waive or forego any defenses of sovereign and governmental immunity available to any Insured....”).

The Policy’s disclaimer is dispositive. Under controlling precedent, there is no waiver of sovereign immunity under the Policy.

C. The Definition of “Damages” in the Policy Does Not Waive the University’s Sovereign Immunity.

In an attempt to avoid this explicit disclaimer, Plaintiffs argue that a single word in the endorsement is a hidden waiver of sovereign immunity, which writes out of existence the explicit non-waiver language cited above. Plaintiffs’ argument ignores the clear words and instructions of this non-waiver provision and violates the canons of contract interpretation.

Plaintiffs’ argument rests upon the fact that the endorsement, after forswearing any waiver of sovereign immunity, then states: “*Accordingly, it is agreed that, except for **Damages** or **Claims Expenses** subject to all other terms and conditions of the policy, the Underwriters shall not pay **Ultimate Net Loss** for **Claims** for which the **Assured** is granted immunity under the laws of the state of Missouri.*” (*Butala*, D3, p. 59) (italics added). Plaintiffs assert that this use of the word “**Damages**” in Paragraph 3 of the

endorsement somehow operates as a backdoor waiver of the immunity expressly preserved in Paragraph 2 of the endorsement, which, again, states that coverage “is not intended, nor shall it be construed, to waive *any* rights of sovereign ... immunity.” (*Id.*) (italics added). This assertion runs squarely against a plain reading of the endorsement and violates the canons of contract interpretation.

“[A]ll provisions of an insurance policy should be given effect, and a reasonable construction must be given in the light of the specific situation with which the parties are dealing.” *MFA Mut. Ins. Co. v. Dunlap*, 525 S.W.2d 766, 769 (Mo. App. 1975); *see also* *Foremost Signature Ins. Co. v. Montgomery*, 266 S.W.3d 868, 871 (Mo. App. 2008) (courts must interpret insurance policies “consistent with the reasonable expectations, objectives, and intent of the parties”). Consistent with this principle, and against the backdrop of § 537.610, which makes any waiver of sovereign immunity entirely optional, the Policy’s explicit instruction that the Policy shall not be construed to waive any rights of sovereign immunity granted to the University must guide the analysis of the employment of the word “**Damages**.”

First, Plaintiffs’ argument fails to recognize the full definition of the term “**Damages**.” Plaintiffs assert that the Policy language somehow operates as an agreement by the University to pay all monetary judgments, as well as pre- and post-judgment interest, for claims under the policy. (Substitute Br. 70-72). Their argument, however, ignores the complete definition of “**Damages**,” which expressly excludes “[a]ny amount which the **Assured** is not financially or legally obligated to pay.” (*Butala*, D3, p. 24) (italics added). The Policy’s definitions thus take pains to preserve the University’s

immunity by providing coverage only for amounts the University is “legally obligated to pay,” in addition to elsewhere proclaiming the University’s intention not to waive sovereign immunity protections. This express limitation within the definition of “**Damages**” is reinforced by each of the individual coverages, including the Multimedia Liability coverage, which provides that “[t]he Underwriters shall pay on behalf of the **Assured** those amounts ... that: 1. The **Assured** is *legally obligated to pay* as **Damages** or **Claims Expenses**....” (*Id.*, p. 14) (italics added). The “legally obligated to pay” language must be read in harmony with the endorsement’s explicit preservation of sovereign immunity. *See, e.g., State ex rel. Cass Med. Ctr. v. Mason*, 796 S.W.2d 621, 623 (Mo. banc 1990) (“The Center was never ‘legally obligated to pay’ because its liability falls under the sovereign immunity of section 537.600.1.”).¹³

Next, in addition to the Policy definition of “**Damages**” itself, the endorsement’s exception for “**Damages**” is “*subject to all other terms and conditions of the policy.*” (*Butala*, D3, p. 59). In this respect, the definition of another central term, “**Assured**,” explains how certain “**Damages**” remain covered under the Policy notwithstanding the University’s preservation of its own sovereign immunity. The “**Assured**” is not solely

¹³ In *Amick v. Pattonville-Bridgeton Terrace Fire Prot. Dist.*, 91 S.W.3d 603, 605 (Mo. banc 2002), the Court overruled several Court of Appeals opinions that had concluded that use of the limiting phrase “legally obligated to pay,” *by itself*, was sufficient to preserve sovereign immunity in the absence of an endorsement disclaiming any waiver of sovereign immunity. Notably, *Amick* relied on—but did *not* overrule—*Cass Medical Center*. *Cass Medical Center* considered a limitation of coverage to amounts the insured was “legally obligated to pay” *accompanied by* an endorsement confining the coverage to dangerous conditions, operation of a motor vehicle, and claims not covered by official immunity. 796 S.W.2d at 622-33; *see* R.S. Mo. § 537.600. The same is true here. In fact, the Policy language is even stronger because the endorsement explicitly mentions and preserves sovereign immunity.

the University, but rather includes “[a]ny present or future **Employee**,” as well as other individuals. (*Id.*, p. 17). As a result, the Multimedia Liability coverage addresses amounts that “**Assured[s]**” who have no sovereign immunity protections (*e.g.*, employees) are “legally obligated to pay as **Damages** or **Claims Expenses....**” (*Id.*, p. 14). See *City of Grandview*, 490 S.W.3d at 370 (observing that “[t]he plain language of the policy allows coverage to not only the City but also to employees of the City ... as ‘Insureds’”).

The purpose behind this coverage is straightforward. “It is often possible to sue a public official or an employee on a claim against which the public agency is protected by sovereign immunity, and one can well understand why a [public entity] might want to protect its functionaries against individual liability.” *Blue Springs*, 576 S.W.3d at 271 (quoting *Moses v. Cty. of Jefferson*, 910 S.W.2d 735, 737 (Mo. App. 1995)). Thus, the Policy covers “**Damages**” attributable to employees and other Assureds without waiving the University’s own sovereign immunity. This is the purpose of covering “**Damages** ... subject to all other terms and conditions of the policy.” (*Butala*, D3, p. 59).

Finally, the Policy explicitly encompasses claims that do not arise under Missouri tort law. Therefore, the Policy must both preserve immunity and provide coverage when immunity may not apply. *Cf. Blue Springs*, 576 S.W.3d at 270 (upholding sovereign immunity for policy granting “[c]overage for Member Agency for claims on causes of action other than those established by Missouri Law”); see also *Moses*, 910 S.W.2d at 736. The sovereign immunity endorsement is not limited to the narrow Multimedia Liability coverage provisions cited by Plaintiffs, but rather applies to the entire Policy,

which provides coverage for other claims that may not be protected by the sovereign immunity established under Missouri law.

For example, the Policy contemplates claims arising from “**Privacy Breach** ... or the breach of **Privacy Laws** by the **Assured**.” (*Butala*, D3, pp. 12-13). Rather than limit the Policy’s coverage to violations of Missouri law, the term “**Privacy Breach**” includes “failure to comply with any federal, state, local, or foreign statute, rule, regulation, or other law pertaining to the **Assured**’s responsibilities with respect to **Private Information**,” and “failure to comply with any federal, state, foreign or other law (including common law), statute or regulation prohibiting unfair methods of competition, unfair or deceptive trade practices, or consumer fraud pertaining to the **Assured**’s responsibilities with respect to **Private Information**.” (*Id.*, p. 29). Likewise, the enumerated “**Privacy Laws**” include a grab-bag of non-Missouri laws.¹⁴ (*Id.*, p. 30). Even the definition of “**Multimedia Wrongful Act**”—the provision identified by Plaintiffs—specifically includes “an alleged violation of Section 43(a) of the Lanham Act or any similar federal, state, local or foreign statutes.” (*Id.*, p. 27).

At the time the Policy was issued, the University’s sovereign immunity was not constitutionally guaranteed in state courts outside of Missouri. Former U.S. Supreme Court precedent held that states could be sued in the courts of another state without their

¹⁴ Just to name a few, these laws include: the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Health Information Technology for Economic and Clinical Health Act (HITECH Act), the Gramm-Leach-Bliley Act of 1999, “State Attorneys General and Federal Trade Commission enforcement actions,” the California Database Protection Act of 2003, the Fair Credit Reporting Act, the California Consumer Credit Reporting Agencies Act, and even the European Union Data Protection Act. (*Butala*, D3, p. 30).

consent. See *Nevada v. Hall*, 440 U.S. 410 (1979).¹⁵ The U.S. Supreme Court did not overrule that precedent until May 2019, when the Court held that states retain their sovereign immunity in every other state court. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019). This prior gap in federal constitutional law provides the backdrop against which the Policy language was drafted. If the University had been sued in state court outside of Missouri, the University's sovereign immunity was not necessarily guaranteed, even if the University would be "granted immunity under the laws of the State of Missouri" for an identical cause of action brought in this State. (*Butala*, D3, p. 59). In those instances, the University might require insurance or else risk subjecting Missouri taxpayers to exposure.

Plaintiffs also rely upon another insurance policy involving the University. (Substitute Br. 72). Plaintiffs attempt to distinguish the language of the two policies, which were drafted by two different insurance companies, as if the University's obtaining different coverages under different policies from different companies covering different risks were somehow controlling on the interpretation of *this* Policy. It is not. This Data Protection Liability Insurance Policy impacts different employees than the Health Care Umbrella Liability Policy. In this Policy the University has insured employees for various types of "Data Protection"-related liability arising out of claims for which the University is protected by sovereign immunity. In the other policy, the University has

¹⁵ *Blue Springs* quotes *Moses* for the notion that public entities may seek protection for claims concerning "injuries occurring in another state pursuant to *California v. Nevada*, 447 U.S. 125, 100 S. Ct. 2064, 65 L.Ed.2d 1 (1980)." *Blue Springs*, 576 S.W.3d at 270 (quoting *Moses*, 910 S.W.2d at 736). The *Moses* court, however, likely meant to cite *Nevada v. Hall*, because *California v. Nevada* involved a territorial dispute.

only insured its employees for “defense costs” instead. The absence of liability coverage is unsurprising for a Health Care Umbrella Liability Policy, in which the employees (*i.e.*, physicians) can not only afford their own insurance, but may be required to maintain medical malpractice insurance as a matter of law. *See, e.g.*, R.S. Mo. § 383.500.

Although the individual defendants in this case are also physicians, that fact only reflects that Plaintiffs have sought to utilize the Multimedia Liability coverage under the Data Protection Liability Insurance Policy in an unconventional way by alleging that liability coverage should exist in a medical negligence case based on allegedly tortious misrepresentations and omissions. Plaintiffs were not involved in the procurement of the University’s insurance. The University, by contrast, was the party who procured this insurance and understands the purpose behind procuring the policy. If the University had intended to waive its sovereign immunity, which it had the option to do under § 537.610 if it desired, the University would say so.

In sum, the endorsement’s reference to “**Damages**” is not a waiver of the University’s expressly preserved sovereign immunity. The endorsement explicitly disclaims any intent to waive sovereign immunity and instructs that it shall not be construed to waive “any rights” of sovereign immunity. Plaintiffs may not misread a single word in this straightforward provision as a wholesale waiver of sovereign immunity that negates a wide swath of the policy. That is inconsistent with the plain language of the endorsement, as well as established principles of contract interpretation and sovereign immunity. Plaintiffs have not met their burden to show clear and

unequivocal waiver. *See Zweig*, 412 S.W.3d at 246. Therefore, the trial court correctly granted the University's motions to dismiss.

D. The Endorsement Is Effective.

Plaintiffs next argue that the endorsement's non-waiver provision is unenforceable because the endorsement is dated one month after the issue date of the Policy, despite the endorsement's express effective date that coincides with the effective date of the Policy. (Substitute Br. 74-76).

As an initial matter, Plaintiffs did not properly plead or preserve this argument because it relies upon some terms of the University of Missouri System's Collected Rules and Regulations, the identified section of which was not recited verbatim in, or attached to, the petitions. *See* Rule 55.22(a); *see also Harrell*, 575 S.W.3d at 492 (plaintiffs have the burden of pleading exception to sovereign immunity with specificity). Plaintiffs have improperly attempted to add an excerpt of the Collected Rules and Regulations to the Appendix for the first time on appeal. (*See* Substitute Br. 75-76).¹⁶

Plaintiffs' attempt to void the endorsement also fails as a matter of insurance law. Endorsements are routine. *See, e.g., Hendricks*, 308 S.W.3d at 745-46 (interpreting endorsement to University insurance policy and upholding sovereign immunity);

¹⁶ In addition to the fact that Plaintiffs did not properly preserve this argument, they have also identified the wrong section of the Collected Rules and Regulations. The University's purchasing of insurance is primarily governed by Section 80.030 (aptly titled "Insurance") and not Section 70.010 ("General Execution of Corporate or Board Instruments"). Plaintiffs' allegations and arguments wholly overlook Section 80.030, whose terms further reinforce that the University preserves its sovereign immunity protection when purchasing insurance and that University agents are expressly denied authority to procure insurance that waives sovereign immunity protections.

Langley, 73 S.W.3d at 812-13 (same). “An endorsement is designed to amend the form policy to suit the needs of the insured or the insurer or to satisfy particular state requirements.” *Warden v. Shelter Mut. Ins. Co.*, 480 S.W.3d 403, 410 (Mo. App. 2015) (internal quotations omitted). “If the language of the endorsement and the general provisions of the policy conflict, the endorsement will prevail.” *Casey v. Chung*, 989 S.W.2d 592, 594 (Mo. App. 1998).

Endorsements issued subsequent to the issuance of a policy are effective. *See, e.g., Tate v. One Beacon Ins. Co.*, 328 S.W.3d 262, 264-65 (Mo. App. 2010). Here, the Policy provides: “The terms of this insurance shall not be changed *except by endorsement issued to form a part of this policy signed by the Underwriters.*” (*Butala*, D3, p. 51) (emphasis added). Thus, the University already agreed to modification by endorsement without needing any further signature by the University, a procedure which is hardly subject to dispute considering that the endorsement benefits the University.

Plaintiffs do not dispute that the endorsement language, if effective, prevails over the rest of the Policy terms. But they try to squeeze themselves into the holding of *Newsome v. Kansas City, Mo. Sch. Dist.*, 520 S.W.3d 769 (Mo. banc 2017), and argue that the endorsement is not effective. *Newsome* is readily distinguishable. There, the Court held that a school district’s insurance policy contained an after-the-fact endorsement that “was not subscribed to by any authorized and appointed agent of the District,” in violation of a specific statute requiring the same: R.S. Mo. § 432.070. *Newsome*, 520 S.W.3d at 776. The court wrote that “[t]he requirements of the statute are

mandatory, not directory, and a contract not so made is void.”” *Id.* (quoting *Burger v. City of Springfield*, 323 S.W.2d 777, 782 (Mo. 1959) (interpreting § 432.070)).

The University does not fall within the scope of § 432.070, which, by its express terms, is limited to counties, cities, towns, villages, school townships, local school districts, and municipal corporations. The University is none of these. *See State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571, 572 (Mo. banc 2004); *see also* Section IV.B-C, *infra*.

Indeed, Plaintiffs rely upon the University’s own Collected Rules and Regulations, not § 432.070. Only the statute has the force of law. Even if this argument had been properly preserved (which it was not), the University’s alleged non-compliance with its own internal regulations and procedures does not carry the same legal effect as the “mandatory” requirements imposed by the Legislature on other state entities. *See, e.g., Lucero v. Curators of Univ. of Mo.*, 400 S.W.3d 1, 8-9 (Mo. App. 2013) (refusing to address non-compliance with the University’s internal regulations because “courts should not embroil themselves in overseeing the day-to-day operations of schools”).

In any event, Plaintiffs’ “signature” argument is inconsistent with their theory that the University waived sovereign immunity by purchasing the underlying Policy. There is no allegation or evidence that the University’s procurement of the endorsement was handled any differently than the procurement of the Policy itself. That is, consistent with the standard practice of purchasing insurance, there is no University signature on the Policy either. (*See generally Butala*, D3). Thus, even if Plaintiffs were correct that the endorsement is ineffective based on the lack of a University signature (which they are

not), this would also mean that the University did not actually enter into the original insurance policy upon which Plaintiffs' waiver argument rests. There is either coverage for claims subject to the endorsement that expressly preserves sovereign immunity or no insurance coverage at all. But neither of these options results in a waiver of sovereign immunity protection.

Finally, Plaintiffs, who are neither third-party beneficiaries of the Collected Rules and Regulations nor the Policy itself, have no standing to raise this issue. *See, e.g., Shelter Mut. Ins. Co. v. Bedell*, 459 S.W.3d 524, 527 (Mo. App. 2015) ("Because Bedell is neither a party to nor a third-party beneficiary of the State Farm contract, she lacks standing to litigate the validity of that contract.").

For all these reasons, Point III should be denied.

IV. The Trial Court Correctly Granted the University's Motions to Dismiss Because the Proprietary Exception to Sovereign Immunity Does Not Apply to the University, Which Is Not a Municipality (Responding to Plaintiffs' Point IV).

Plaintiffs next misapply the common law of sovereign immunity by urging the Court to adopt a proprietary-governmental-function test to the University's right to immunity. This argument is a confusion of categories. Plaintiffs cite no case applying any such test to the University or any arm of the State. The test only applies to municipalities. The Court should reject Plaintiffs' attempt to re-categorize the legal status of the University and to craft a new exception to the University's sovereign immunity, which is barred by § 537.600.

A. Standard of Review

The Court reviews a trial court's grant of a motion to dismiss de novo. *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 915 (Mo. banc 2016). Because sovereign immunity is a legal immunity and not an affirmative defense, at the pleading stage, the burden rests with the plaintiff to overcome the defendant's immunity by pleading specific facts to support an exception to sovereign immunity. *State ex rel. City of Kansas City v. Harrell*, 575 S.W.3d 489, 492 (Mo. App. 2019); *Richardson v. City of St. Louis*, 293 S.W.3d 133, 137 (Mo. App. 2009).

B. The Proprietary-Governmental Test Does Not Apply to the University, Which Is a Public Corporation and Agency of the State, Not a Municipality.

"Full common law sovereign immunity belongs only to state entities." *Southers v. City of Farmington*, 263 S.W.3d 603, 609 (Mo. banc 2008). In contrast to state entities, "municipalities are not provided immunity for proprietary functions ... but are immune for governmental functions." *Id.*

This dichotomy, however, applies *only* to municipalities. *State ex rel. Reg'l Justice Info. Serv. Comm'n v. Saitz (REJIS)*, 798 S.W.2d 705, 707 (Mo. banc 1990); *State ex rel. New Liberty Hosp. Dist. v. Pratt*, 687 S.W.2d 184, 187 (Mo. banc 1985); *State ex rel. Mo. Dep't of Agric. v. McHenry*, 687 S.W.2d 178, 181-82 (Mo. banc 1985) (emphasis added).¹⁷ Over time, some confusion has arisen because "a partially protected

¹⁷ Although *Pratt* and *McHenry* were issued on the same day, the Court used the term "municipality" in *Pratt* and the broader term "municipal corporation" in *McHenry*. In *REJIS*, the Court subsequently clarified that the test only applies to "municipalities."

municipality is also a municipal corporation, but not all municipal corporations are municipalities for sovereign immunity purposes.” *REJIS*, 798 S.W.2d at 707.

“[B]y the legislature’s enactment of § 537.600, the Court is constrained to define” this term “narrowly.” *Id.* Therefore, “[i]n the context of sovereign immunity analysis, ‘municipalities’ include *only* cities, towns or villages that are incorporated, but not ‘municipal corporations’ in the broader sense of sewer districts or hospital districts, for example, which are entitled to the *full* protection of sovereign immunity.” *Id.* at 707 (first emphasis added).

The University is not a “municipality” because it is not a city, town, or village. *See, e.g.*, Mo. Const. art. VI, §§ 19-22 (charter cities); R.S. Mo. ch. 77 (third class cities); ch. 79 (fourth class cities); ch. 80 (towns and villages); ch. 81 (special charter cities and towns); ch. 82 (constitutional charter cities). Nor is the University a municipal corporation. *See State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571, 572 (Mo. banc 2004); *State ex rel. Milham v. Rickhoff*, 633 S.W.2d 733, 736 (Mo. banc 1982). Rather, the University is “an ‘agency or arm of the State.’” *Milham*, 633 S.W.2d at 735 (quoting *Todd v. Curators of Univ. of Mo.*, 147 S.W.2d 1063, 1064 (Mo. 1941)). It is “a unique form of public corporation created by section 172.020 and article IX, section 9(a) of the Missouri Constitution.” *Ormerod*, 130 S.W.3d at 572. As a result, “it is clear that the proprietary-governmental dichotomy does not apply to the University since it is not a municipality.” *Anderson v. State*, 709 S.W.2d 893, 896 (Mo. App. 1986) (upholding

798 S.W.2d at 707. In this case, the technical distinction does not matter; the University is neither.

sovereign immunity of Central Missouri State University), *overruled in part on other grounds by Wilkes v. Mo. Hwy. & Transp. Comm’n*, 762 S.W.2d 27, 29 (Mo. banc 1988). Therefore, the University is entitled to the full measure of sovereign immunity available to other state entities under Missouri law. *Southers*, 263 S.W.3d at 609. This is dispositive.

Plaintiffs never mention *REJIS*’s definition of “municipality.” Plaintiffs also neither mention nor attempt to distinguish *Anderson*, in which the court affirmed the sovereign immunity of Central Missouri State University, a regional educational institution established under § 174.020. The University is a statewide educational institution established under § 172.020, whose permanent benefit to the state is ensconced in the Missouri Constitution (*see* Mo. Const. art. IX, § 9(b) (“The general assembly shall adequately maintain the state university and such other educational institutions as it may deem necessary.”)). Regional statewide institutions like Central Missouri State University exist at the prerogative of the legislature, but still receive broad sovereign immunity protection. This Court wrote as follows nearly 150 years ago:

The State established an institution of its own, and provided for its control and government, through its own agents and appointees. The act creating the institution, in its first section, declares that a “university is hereby instituted in this State, the government whereof shall be vested in a board of curators.” The university is then (§ 2) declared a “corporation and body politic” and invested with certain powers. These powers are given into the hands of a board which was made subject to the pleasure of the Legislature.... By establishing the university the State created an agency of its own, through which it proposed to accomplish certain educational objects. In fine, it created a public corporation for educational purposes – a State university.

Head v. Curators of State Univ., 47 Mo. 220, 224-25 (1871), *aff’d*, 86 U.S. 526 (1873).

Plaintiffs try, but fail, to distinguish *McHenry* on the purported basis that the defendant in that case, the Missouri Department of Agriculture, was an “agency of the State.” (Substitute Br. 80). But this Court also categorizes the University as an “agency or arm of the State.” See *Milham*, 633 S.W.2d at 735 (quoting *Todd*, 147 S.W.2d at 1064); *Head*, 47 Mo. at 225 (“an agency of its own”).

Plaintiffs cite no case in Missouri history that subjected the University’s sovereign immunity to a proprietary-governmental function test. We are aware of none. Point IV should be denied.

C. The Court Should Reject Plaintiffs’ Attempt to Classify the University as a “Municipality” for Purposes of Sovereign Immunity.

Plaintiffs also cite no case—let alone in the area of sovereign immunity—that describes the University as a “municipality” or a “municipal corporation.” Nevertheless, Plaintiffs seek to exploit the fact that courts sometimes use the terms “municipality” and “municipal corporations” differently in different contexts, including in cases unrelated to sovereign immunity. These word games do not extend the proprietary-governmental function test to the University.

As an initial matter, Plaintiffs did not plead any facts in the Second Amended Petition to support their position that the University is a municipal corporation or a municipality. (See *Butala*, D2, ¶9; *Butterfield*, D18, ¶4; *Draper*, D52, ¶5; *Reinsch*, D2, ¶5; *Browne*, D20, ¶5; *Jaggie*, D2, ¶5; *Higginbotham*, D2, ¶5; *Cummings*, D2, ¶5). The burden, however, rests with Plaintiffs to overcome the University’s sovereign immunity by pleading *specific facts* to support an exception to sovereign immunity. *Harrell*, 575

S.W.3d at 492. Plaintiffs have not met this burden, and their contention fails for this reason alone.

Furthermore, Plaintiffs’ argument that the University is a “municipal corporation” (see Substitute Br. 80-86) is a nonstarter. The Court has confirmed that the University is not a “municipal corporation,” albeit in other contexts. *Ormerod*, 130 S.W.3d at 572; *Milham*, 633 S.W.2d at 736. But even if the University were a municipal corporation for purposes of sovereign immunity (which it is not), it would not matter. The proprietary-governmental function test does not apply to municipal corporations. *REJIS*, 798 S.W.2d at 707. Plaintiffs cannot change the law by using these terms interchangeably. (See Substitute Br. 81-82).

Plaintiffs try to re-categorize the University as a “municipal corporation” or “municipality” through misplaced reliance on *St. Louis Housing Authority v. City of St. Louis*, 239 S.W.2d 289, 294 (Mo. banc 1951), which was not a sovereign immunity case. (See Substitute Br. 81-82). In fact, the analysis set forth in that case has been specifically rejected by this Court in the context of sovereign immunity.

In *State ex rel. St. Louis Housing Authority v. Gaertner*, 695 S.W.2d 460 (Mo. banc 1985), the Court first noted that “the term ‘municipality’ may have different meanings in different contexts.” *Id.* at 462. The *Gaertner* Court acknowledged that it previously “held the Housing Authority to be a municipality for municipal cooperation agreements” in *St. Louis Housing Authority v. City of St. Louis*. *Id.* But the Court then explained that, “[w]hile in the context of cooperation agreements, it is used in its broader sense as synonymous with municipal corporations, [] *St. Louis Housing Authority v. City*

of *St. Louis*, *supra*, in sovereign immunity contexts *its meaning is narrower*.” *Id.* at 462-63 (citing *Beiser v. Parkway Sch. Dist.*, 589 S.W.2d 277 (Mo. banc 1979)) (emphasis added); *see also Beiser*, 589 S.W.2d at 279-80 (stating that *St. Louis Housing Authority v. City of St. Louis* is “not persuasive authority for the contention that school districts are ‘municipalities’ for the purposes of s. 71.185”).

Bound by the canon of strict construction, *Gaertner* held that the St. Louis Housing Authority was *not* a “municipality” for purposes of sovereign immunity, including under R.S. Mo. § 71.185, which concerns the waiver of sovereign immunity when municipalities purchase insurance for the exercise of governmental functions. *Gaertner*, 695 S.W.2d at 463. The Court reached this holding despite the fact that the local housing authority was created as a “municipal corporation” under R.S. Mo. § 99.080.1. *Id.* at 462; *see also REJIS*, 798 S.W.2d at 707 (joint commission created by the City of St. Louis and St. Louis County was not a municipality); *Pratt*, 687 S.W.2d at 185-87 (hospital district was not a municipality); *see also Page v. Metro. St. Louis Sewer Dist.*, 377 S.W.2d 348, 352 (Mo. 1964) (“While in the broadest sense of the term a metropolitan sewer district is a municipal corporation it is not a municipal corporation in the restricted sense in which cities, towns and villages are so considered.”). *A fortiori*, the same reasoning is more persuasive for the University, which is *not* defined by statute as a “municipal corporation,” *see* R.S. Mo. § 172.020, but rather is a public corporation created for the benefit of the entire state. *Todd*, 147 S.W.2d at 1064; *Harris v. William R. Compton Bond & Mortg. Co.*, 149 S.W. 603, 610 (Mo. 1912); *Head*, 47 Mo. at 224.

Following *Gaertner*, Missouri courts have reaffirmed at least four times that the University's ability to purchase liability insurance does *not* derive from § 71.185, which applies to "municipalit[ies]," but rather derives from § 537.610, which applies to "political subdivision[s] of this state." See *Hendricks v. Curators of Univ. of Mo.*, 308 S.W.3d 740, 743-44 (Mo. App. 2010); *Langley v. Curators of Univ. of Mo.*, 73 S.W.3d 808, 811 (Mo. App. 2002); *Brennan ex rel. Brennan v. Curators of Univ. of Mo.*, 942 S.W.2d 432, 436 (Mo. App. 1997); *Fields v. Curators of Univ. of Mo.*, 848 S.W.2d 589, 591-93 (Mo. App. 1993) (superseded in part by statute on other grounds). Plaintiffs' request for the Court to treat the University as a "municipality" for purposes of the governmental-proprietary function test, but not the statute codifying that exception for purposes of insurance coverage, would disrupt and contradict the legislative scheme.

The University also has even less "local" character than the city housing authority at issue in *Gaertner*, the joint city-county commission in *REJIS*, the hospital district in *Pratt*, or the sewer district in *Page*. Although there are variations in what qualifies as a "municipal corporation," "[t]he common factor is that the municipal corporation has a local nature." *Milham*, 633 S.W.2d at 735. The University, however, does not have a "local" nature. "The interests of the Board of Curators and the University are distinctly different from those of such public corporations as cities, sewer districts, or local school boards. The primary difference is the statewide character and interest of the University as contrasted with the local focus of the other organizations." *Id.* at 735-36; see also *Head*, 47 Mo. at 224-25. The Curators' authority depends on no local official or charter.

They are appointed by the governor with the advice and consent of the Senate. Mo. Const. art. IX, § 9(a).

Plaintiffs argue that, by statute, the University may “sue and be sued,” like a town or a city. (Substitute Br. 84). *Gaertner*, however, rejected this argument, stating that “the legislature’s intent in using such language was to empower creditors and other proper claimants to sue for debts legitimately incurred, and not to authorize a tort suit against the governmental entity.” 695 S.W.2d at 462; *accord Pratt*, 687 S.W.2d at 187; *see also Todd*, 147 S.W.2d at 1064 (“A statutory provision that such a public corporation ‘may sue and be sued’ does not authorize a suit against it for negligence.”).

Plaintiffs’ attempt to place the label of either “municipality” or “municipal corporation” on the University, a statewide institution, is groundless. Plaintiffs cannot reassign the University to the same category as villages, towns, and cities, which have a permanently defined territory and constituency. While the University necessarily has a brick-and-mortar presence at various locations throughout the State, including the Mizzou BioJoint Center, that is because the University is a public corporation that serves Missouri citizens in every corner of the State, including those citizens who travel for medical services that are unavailable within their own local communities. And it conducts research and teaching that serve all citizens of the State and beyond. In short, the University is statewide in character and not a “municipality.”

D. Missouri Courts May Not Impose New Limitations on the University's Sovereign Immunity, Including by Limiting the University's Protection for "Proprietary" Activities.

As the preceding discussion demonstrates, existing rules of sovereign immunity do not subject the University to a proprietary-governmental-function test. Thus, Plaintiffs are not arguing for an application of existing law but rather for this Court to rewrite it. (See Substitute Br. 79 (arguing that "it is high time for Missouri law" to subject public entities to tort liability for "engaging in non-governmental activities")). In any appeal, this would be a tall request. In this appeal, the request cannot be granted because the General Assembly has expressly forbidden Missouri courts from imposing new exceptions to public entities' sovereign immunity.

When the legislature adopted R.S. Mo. § 537.600, it "mandated the restoration of sovereign immunity as it existed prior to [the] decision in *Jones v. State Highway Commission*, 557 S.W.2d 225 (Mo. banc 1977)." *McHenry*, 687 S.W.2d at 182. More specifically, § 537.600 provides:

Such sovereign or governmental tort immunity as existed at common law in this state prior to September 12, 1977, except to the extent waived, abrogated or modified by statutes in effect prior to that date, shall remain in full force and effect; except that, the immunity of the public entity from liability and suit for compensatory damages for negligent acts or omissions is hereby expressly waived in the following instances:

R.S. Mo. § 537.600.1 (emphasis added). (None of those instances is relevant here.)

Therefore, Missouri courts are "precluded" from "making extensions" to the common-law rules in existence before September 12, 1977. *McHenry*, 687 S.W.2d at 182.

“[B]ased upon the legislative history, this statute protects ‘public entities’ that were protected under the sovereign immunity cases prior to September 12, 1977.” *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911, 917 (Mo. banc 1992). There is no room for dispute that the University was protected by sovereign immunity at that time. *Todd*, 147 S.W.2d at 1064. But consistent with the restoration of pre-1977 common law, no case applied the proprietary-governmental-function test to the University or other state entities before September 12, 1977. That is because, before *Jones*, the proprietary-governmental-function test applied *only* to “municipal corporations (in the strict and proper sense), such as cities, towns and villages,” —not even to counties and townships, *Wood v. Jackson Cty.*, 463 S.W.2d 834, 835 (Mo. 1971) (quoting *Cullor v. Jackson Twp., Putnam Cty.*, 249 S.W.2d 393, 395 (Mo. 1952)), and certainly not to the University.

In *Pratt* and *McHenry*, the Court cited cases holding that the governmental-proprietary distinction does not apply to counties, hospital districts, and school districts. *Pratt*, 687 S.W.2d at 186; *McHenry*, 687 S.W.2d at 182 n.5. Plaintiffs rely on easily distinguishable intermediate appellate court cases that followed the passage of § 537.600 but which predate the Court’s *en banc* 1985 decisions in *Pratt* and *McHenry* and the Court of Appeals’ 1986 decision in *Anderson*. Moreover, Plaintiffs’ cited cases question only whether the proprietary-governmental distinction does in fact apply to local *school districts*, without resolving the issue. See *State ex rel. Bd. of Trs. of City of N. Kansas City Mem’l Hosp. v. Russell*, 843 S.W.2d 353, 358 n.8 (Mo. banc 1992) (“It may be that prior to September 12, 1977, the distinction applied to school districts also.”); *Beiser*, 589 S.W.2d at 279-80 (holding that a school district is *not* a “municipality” for purposes of

the sovereign immunity in the context of § 71.185); *State ex rel. Allen v. Barker*, 581 S.W.2d 818, 825 (Mo. banc 1979) (remanding case for plaintiff to re-plead allegations against school district); *Rennie v. Belleview Sch. Dist.*, 521 S.W.2d 423, 424 (Mo. banc 1975) (“It would serve no useful purpose in this case, involving a school district and not a municipality, to enter the maze of the ‘governmental-proprietary’ dichotomy.”); *Johnson v. Carthell*, 631 S.W.2d 923, 926 (Mo. App. 1982) (relying on *Allen* for proposition that “[p]roprietary functions of school districts form one exception” without mentioning *Beiser*); *Allen v. Salina Broad., Inc.*, 630 S.W.2d 225 (Mo. App. 1982) (remand from *Allen*); *Joske Corp. v. Kirkwood Sch. Dist. R-7*, 903 F.2d 1199, 1201 (8th Cir. 1990) (“With regard to the present case, it is not necessary to delve into the less than empirical governmental/proprietary distinction test” because the school district’s actions were governmental). The scope of immunity for local school districts is an issue for another case; the University is undisputedly not a local school district. See *Ormerod*, 130 S.W.3d at 572; *Milham*, 633 S.W.2d at 735.

Plaintiffs cite *Todd* for the truism that the University is not liable in negligence while “performing governmental functions.” (Substitute Br. 85). The *Todd* opinion, however, never mentioned “proprietary” functions, much less applied a proprietary-governmental test to the University’s actions to hold that the University was unprotected for proprietary functions. 147 S.W.2d at 1064-65. Under § 537.600.1, this Court is precluded from extending that exception to the University or other public entities. *McHenry*, 687 S.W.2d at 182.

E. The University Was Not Engaged in a Proprietary Function.

Finally, although the University's sovereign immunity is not limited by a governmental-proprietary exception, Plaintiffs' argument fails because the University's functions at issue were governmental in nature.

"In Missouri, governmental functions are those performed ... as an agent of the state, meaning that they are for the benefit of the general public, or the common good of all, such as keeping the peace, enforcing laws and ordinances, and preserving the public health." *Crouch v. City of Kansas City*, 444 S.W.3d 517, 523 (Mo. App. 2014) (internal citations and quotations omitted). "Missouri courts ... have long held that 'preserving public health' is one of the 'duties within the province of a municipality as a governmental agency and upon which the municipality acts without liability.'" *Richardson*, 293 S.W.3d at 137 (quoting *Parish v. Novus Equities Co.*, 231 S.W.3d 236, 242 (Mo. App. 2007)). Plaintiffs necessarily concede that providing healthcare is governmental in nature. (Substitute Br. 79).

Likewise, advancing the state of medical research and medical education is another core governmental function of the University. *See, e.g.*, R.S. Mo. § 172.792 (the University "shall award funds to investigators for research projects that promote an advancement of knowledge in the area of specified disease processes or injuries"); *id.* § 172.273.1 (the University "may establish research, development and office park projects, in order to promote cooperative relationships and to provide for shared resources between private individuals, companies and corporations, and the University of Missouri, for the advancement of the university in carrying out its educational mission

and such projects are declared to be in furtherance of the purposes of the university.”); *see also id.* § 173.051 (coordinating board for higher education may seek appropriations for programs or service that “fulfills a state manpower or research need that is not available in Missouri’s public universities”). Such activities are consistent with the “broad[] governmental mandate of facilitating the higher education of the state’s citizenry.” *Parish*, 231 S.W.3d at 243

The test for “deciding whether a particular function is governmental or proprietary” turns on “the nature of the activity performed, not the nature of the tort.” *Crouch*, 444 S.W.3d at 523 (internal citations and quotations omitted). “[T]he nature of the particular defendant’s conduct is often less important than the generic nature of the activity.” *Russell*, 843 S.W.2d at 359. Thus, “[w]hen assessing whether an action is governmental or proprietary we do not assess the particular performance of a specific event but rather the general nature of the activity being performed.” *State ex rel. City of Lee’s Summit v. Garrett*, 568 S.W.3d 515, 521 (Mo. App. 2019).

This dispute surrounds an innovative surgical procedure and allegations about medical research. The advancement of medical knowledge is a core function of the University as a state educational institution. *See* R.S. Mo. §§ 172.273.1, 172.792. In this respect, Plaintiffs’ surgeries represent a blend of the University’s educational and public health functions. A contrary result would stifle the University’s ability to serve as an incubator for the advancement of medical knowledge in this State. Medicine is an applied science. Although Plaintiffs dispute the effectiveness of the surgical procedures

they underwent, that does not change the governmental character of the University's participation in the development of innovative forms of healthcare.

Furthermore, payment for services does not change the governmental character of the activity. *Russell*, 843 S.W.2d at 359; *see also Crouch*, 444 S.W.3d at 524 (“[F]unctions that are otherwise governmental are not transformed into proprietary functions merely because they generate a profit or are accompanied by a fee.”). Indeed, *Russell* held that a city hospital was not engaged in proprietary activity although the hospital had “a substantial advertising budget designed to attract private patients, that the hospital ha[d] a surplus of revenue over expenses, and that the hospital ha[d] assets of \$133 million compared to liabilities of only \$9 million.” 843 S.W.2d at 359. This Court stated: “Even if the sole motivation of the city government were profit, the hospital would still be governmental.” *Id.*

The same rule controls here. What matters is that the University, as part of its core educational mission, was providing Plaintiffs with healthcare services, not that it previously advertised those healthcare services. *See id.* Even though Plaintiffs frame the grievance against the University as a profit-making venture (and therefore, in their opinion, “proprietary”), some form of compensation is part of the University's daily operations, whether through its receipt of payment for healthcare services or its receipt of payment for tuition. There is no reason to consider healthcare “governmental” to the extent the State advertises and supports pediatrics, otolaryngology, and emergency surgery but “proprietary” to the extent the State advertises and supports orthopedic surgery. The point is the advancement of public health and knowledge.

Point IV should be denied.

V. The Trial Court Correctly Granted the University’s Motions to Dismiss Because a Violation of the MMPA Is a Statutory Tort and Negligent Misrepresentation Is a Common-Law Tort (Responding to Plaintiffs’ Point V).

There is no dispute that tort claims against the University are barred because of the University’s sovereign immunity. (Substitute Br. 92). Plaintiffs’ claims against the University began as an attempt to repackage medical negligence allegations as violations of the MMPA, seeking punitive damages (among other things). This is telling as to whether these claims sound in tort. It is equally telling that Plaintiffs then relied upon the very same factual allegations that supposedly supported the MMPA claims to expand their legal theories into negligent misrepresentation, which is also a tort.

Resorting to sophistry, Plaintiffs have tried to refashion the MMPA as lying outside all possible classification, deeming it a “*sui generis*” cause of action. (Substitute Br. 95). In other words, according to Plaintiffs, the MMPA is neither fish nor fowl. This argument fails because the statutory cause of action under the MMPA is a tort under well-settled legal principles.

A. Standard of Review

The Court reviews a trial court’s grant of a motion to dismiss *de novo*. *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 915 (Mo. banc 2016).

B. The MMPA Creates a Statutory Tort.

“A tort is defined to be a civil or private wrong or injury.” *Merrill v. City of St. Louis*, 83 Mo. 244, 255 (1884). A tort claim consists of “an action for recovery of money ... and involve[s] issues of fact, ‘whether the right or liability is one at common law or is one created by statute.’” *State ex rel. Diehl v. O’Malley*, 95 S.W.3d 82, 87 (Mo. banc 2003) (quoting *Briggs v. St. Louis & S.F. Ry. Co.*, 20 S.W. 32, 33 (Mo. 1892)).

“[A] legislative body having the authority to create, modify or abolish civil rights or remedies may pass legislation expressly doing this for tort rights or remedies.” *Restatement (Second) of Torts* § 874A, cmt. b (1977). “Examples of legislative provisions creating new tort rights are civil rights acts, dramshop laws and dog-bite statutes.” *Id.*; see, e.g., *Bachtel v. Miller Cty. Nursing Home Dist.*, 110 S.W.3d 799, 803 (Mo. banc 2003) (“This Court agrees ... that a private right of action *in tort* for employees of private nursing homes who are retaliated against for reporting violations of the Act is impliedly created by the language of section 198.070.10.”) (emphasis added).

The purpose of the MMPA is to “expand[] the common law definition of fraud ‘to preserve fundamental honesty, fair play and right dealings in public transactions.’” *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 414 (Mo. banc 2014) (quoting *State ex rel. Danforth v. Indep. Dodge, Inc.*, 494 S.W.2d 362, 368 (Mo. App. 1973)); see also *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 176 (Mo. App. 1988) (“The traditional and foremost policy of the tort law is to deter harmful conduct and to ensure that innocent victims of that conduct will have redress.”). “The MMPA, as first adopted by the Legislature in 1967, protects consumers by expanding the common law definition of

fraud to preserve fundamental honesty, fair play and right dealings in public transactions.” *Watson v. Wells Fargo Home Mortg., Inc.*, 438 S.W.3d 404, 407 (Mo. banc 2014) (internal quotation omitted). As an expansion of common-law fraud, a tort, the MMPA clearly sounds in tort. *See, e.g.*, R.S. Mo. § 407.020.1 (referencing “deception,” “fraud,” “false pretense,” “false promise,” and “misrepresentation” and “omission” of material facts). In fact, in other contexts, Missouri court have described the MMPA as a “statutory tort.” *See Hope v. Nissan N. Am., Inc.*, 353 S.W.3d 68, 85 (Mo. App. 2011); *see also Heckadon v. CFS Enters., Inc.*, 400 S.W.3d 372, 378-79 (Mo. App. 2013) (describing violators of the MMPA as “tortfeasors”).

Plaintiffs argue that the MMPA is not a statutory tort because it is not coextensive with, or completely redundant of, common-law fraud. (Substitute Br. 95-96). Of course, there are many torts that are not identical to fraud, but the MMPA is acknowledged to “supplement the definitions of common law fraud.” *Chochorowski v. Home Depot U.S.A.*, 404 S.W.3d 220, 226 (Mo. banc 2013) (emphasis added). It does not create a previously unknown species of claim. Like any statute, the MMPA reflects the legislature’s decision to provide additional rights beyond the common law. The MMPA thus changes certain elements of a common-law fraud claim for certain consumer transactions, excludes business disputes by requiring that the disputed sales or advertisements be limited to goods or services for “personal, family, or household purposes,” eliminates the possibility of nominal or unfixed damages by requiring an “ascertainable loss,” and provides for specific remedies including punitive damages, if warranted. R.S. Mo. § 407.025. Nothing about these provisions places the MMPA into a category of its own.

For statutory torts,

[t]he remedies available are usually those appropriate to tort actions in general. Normally these include the award of damages and the granting of an injunction. Whether nominal damages or punitive damages are available depends upon whether they are suitable for the particular tort that has been adapted to cover the situation.

Restatement (Second) of Torts § 874A, cmt. j (1977). The MMPA is just such an example of a statutory tort, and it provides for an award of actual damages, injunctive relief, and punitive damages. R.S. Mo. § 407.025.1; *see also Krasney v. Curators of Univ. of Mo.*, 765 S.W.2d 646, 651 (Mo. App. 1989) (“The breach of [§ 290.140], which by explicit terms allows a recovery for compensatory, nominal and punitive damages for its breach, gives rise to a statutory action in tort.”) (upholding the University’s sovereign immunity). Indeed, Plaintiffs seek punitive damages here. Plaintiffs suggest that, for the MMPA to be a tort, a plaintiff must be eligible to receive compensation for non-economic damages. This is incorrect, just like their contention that the “benefit of the bargain” rule is exclusive to contract claims. *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. banc 1999) (“Damages for fraud and breach of contract are measured by the ‘benefit of the bargain’ rule.”).

Declaring a statutory cause of action as “*sui generis*” is neither how sovereign immunity operates, nor how Missouri courts designate new private rights of action for damages. *See, e.g., State ex inf. Ashcroft v. Kansas City Firefighters Local No. 42*, 672 S.W.2d 99, 112 (Mo. App. 1984) (“A civil remedy implied from a statute will be assimilated into the form of a traditional common law tort or, when such a similarity of category lacks, an entirely new unnamed tort will be fashioned to give effect to the

legislative policy.”) (citing *Restatement (Second) of Torts* § 874A (1977)). Plaintiffs’ attempt to define the MMPA as “*sui generis*” is an attempt to sow confusion into the law where there is none.

In short, Plaintiffs do nothing to distinguish violations of the MMPA from other statutory torts, which are necessarily different from common-law rights.

C. Negligent Misrepresentation Is a Common-Law Tort.

Unlike the other Plaintiffs, Butala, Clark, Hackler, and Palmer have also pleaded a claim for negligent misrepresentation. (*Butala*, D2, ¶¶250-55). There is no dispute that negligent misrepresentation is a tort. *See, e.g., Gen. Elec. Capital Corp. v. Rauch*, 970 S.W.2d 348, 354 (Mo. App. 1998) (“Missouri recognizes a cause of action based on the tort of negligent misrepresentation.”). Therefore, their negligent misrepresentation counts are barred by sovereign immunity. *See Halamicek Bros., Inc. v. St. Louis Cty.*, 883 S.W.2d 108, 109 (Mo. App. 1994). The fact that Plaintiffs have recast, or attempted to recast, their MMPA counts as negligent misrepresentation counts only underscores that their MMPA claims sound in tort.

Point V should be denied.

VI. The Trial Court Correctly Granted the University’s Motions to Dismiss Because the University Is Not a “Person” Under the MMPA (Responding to Plaintiffs’ Point VI).

Irrespective of sovereign immunity, the trial court was obligated to dismiss Plaintiffs’ MMPA claims because the University is not a “person” that can be sued under the MMPA. Plaintiffs’ efforts on appeal are a plea for this Court to rewrite the terms of the statute, which cannot be squared with controlling precedent.

A. Standard of Review

The Court reviews a trial court’s grant of a motion to dismiss de novo. *Metro. St. Louis Sewer Dist. v. City of Bellefontaine Neighbors*, 476 S.W.3d 913, 915 (Mo. banc 2016).

B. The University Is Not a “Person” Under the MMPA.

The MMPA’s “statutory framework permits an aggrieved party to seek relief from any ‘person.’” *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo. banc 2007); *see also* R.S. Mo. §§ 407.020, 407.025. The word “person” is defined in R.S. Mo. § 407.010, which furnishes an exhaustive list of individuals and entities who may be sued under the private right of action created under § 407.025. The University is not listed among these enumerated “persons,” and its exclusion from that list is dispositive.

Section 407.010 provides:

As used in sections 407.010 to 407.130, the following words and terms mean:

...

(5) “Person”, any natural person or his legal representative, partnership, firm, for-profit or not-for-profit corporation, whether domestic or foreign, company, foundation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof;

Public corporations like the University are not included in this exhaustive definition. It is “well-established ... that the state and its agencies are not to be considered within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest.” *Carpenter v. King*, 679 S.W.2d 866, 868 (Mo. banc 1984).

Section 407.010(5) does not reference “corporations” generally, but rather specifies only “for-profit” and “not-for-profit” corporations. See R.S. Mo. ch. 351 (General and Business Corporations), ch. 355 (Nonprofit Corporation Law). The University is neither a for-profit nor a not-for-profit corporation established under these chapters,¹⁸ but rather a *public* corporation created by § 172.020 and art. IX, § 9(a) of the Missouri Constitution. *State ex rel. Ormerod v. Hamilton*, 130 S.W.3d 571, 572 (Mo. banc 2004); *State ex rel. Milham v. Rickhoff*, 633 S.W.2d 733, 735 (Mo. banc 1982).

Furthermore, consistent with the canon set forth in *Carpenter*, “[u]nless otherwise specified, where the term ‘corporation’ is used in our statutes and Constitution it uniformly refers to private or business organizations, not to public corporations.” *Ormerod*, 130 S.W.3d at 572 (emphasis added). In *Krasney v. Curators of the University of Missouri*, 765 S.W.2d 646, 651 (Mo. App. 1989), for example, the court held that the University could not be held liable for violation of service letter requirements under § 290.140 because the University, “as a public entity with the status of a governmental

¹⁸ Plaintiffs argue for the first time on appeal that the University “established the University of Missouri Health System, which oversees the Missouri Orthopaedic Institution and the BioJoint Center, **as a nonprofit corporation**.” (Substitute Br. 103) (emphasis in original). This is a red herring. The defendant is The Curators of the University of Missouri. The purported entity Plaintiffs call “the University of Missouri Health System” is not even a party. In addition to the fact that the legal status of a non-party has no relevance to whether the Curators are a proper defendant here, Plaintiffs have wandered far afield of the allegations in their petitions and now seek to rely upon outside sources—namely, a 1997 filing with the Secretary of State. This argument must be disregarded for that reason alone. *Nazeri v. Mo. Valley Coll.*, 860 S.W.2d 303, 306 (Mo. banc 1993). Plaintiffs’ cursory allegation is also wrong. The entity was actually named “University of Missouri-Columbia Health System.” (A36). With additional digging, Plaintiffs would have learned that there is no registered entity in Missouri called “University of Missouri Health System” and that the other entity now goes by the name of “University of Missouri-Columbia Medical Alliance,” which is also not a party.

body, is not a ‘corporation doing business in this state,’ and hence not within § 290.140.” Here, the MMPA’s language inclusion of only “for-profit” and “not-for-profit” corporations in its definition of “person” is even more restrictive than the language in *Krasney* (i.e., “a corporation doing business in this state”).

Plaintiffs, by contrast, wrongly rely upon *Lockhart v. Kansas City*, 175 S.W.2d 814 (Mo. 1943), which interpreted the term “corporation” in a statute consistent with the proprietary-governmental-function exception to sovereign immunity that applied to the defendant city, a municipal corporation (and municipality). As described in Point IV, the University is not a “municipality” to which that test even applies.

The definition of “person” set forth in § 407.010(5) is adjacent to the private right of action created under § 407.025, and, by its terms, applies to all provisions between §§ 407.010 and 407.130. Plaintiffs nevertheless suggest that, instead of using the specially provided definition in § 407.010(5), *another* more general statute should control: § 1.020(12), which is the general “Definitions” provision within the Revised Statutes of Missouri. There are multiple flaws in this argument.

By its own terms, § 1.020(12) furnishes only a potential default definition of “person” for use in interpreting other sections, “unless otherwise specially provided.” The MMPA’s “specially provided” definition of “person” therefore supersedes the general definition in § 1.020(12). See R.S. Mo. § 407.010(5). The list within § 407.010(5) is also exhaustive, not merely suggestive. Section 407.010(5) states what the term “mean[s],” not what it “includes,” and therefore indicates a decision not to rely

upon a separate “default” definition.¹⁹ Moreover, if the Legislature intended to rely upon the definition of “person” in § 1.020, it did not have to enact § 407.010 at all.

Plaintiffs also misread the default definition of “person” within § 1.020 as mandatory rather than merely permissive. See R.S. Mo. § 1.020(12) (“The word ‘**person**’ *may* extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations[.]”) (emphasis added); see also *Mark Twain Cape Girardeau Bank v. State Banking Bd.*, 528 S.W.2d 443, 446 (Mo. App. 1975) (“We read the word ‘may’ as permissive.... Neither section 362.015 nor 1.020(7) [the prior version of § 1.020(12)] mandates the conclusion that the word ‘person’ includes a corporation.”). The definition of “person” is, in fact, the only definition in § 1.020 that utilizes the word “may,” further emphasizing that it is not mandatory. See, e.g., R.S. Mo. § 1.020(2) (“‘**County or circuit attorney**’ means prosecuting attorney.”); *id.* § 1.020(3) (“‘**Executor**’ includes administrator....”).

Plaintiffs’ attempt to transform § 1.020 into a waiver of the University’s sovereign immunity runs contrary to the canons of statutory interpretation applicable to state

¹⁹ Recently this Court held that the statutory definition of “person” under the Missouri Human Rights Act (“MHRA”) could include the state and political subdivisions. See *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 430 (Mo. banc 2019). Unlike § 407.010, however, the MHRA’s “definition of ‘person’ ... expressly states that it ‘*includes*’ the individuals and entities listed therein, not that it is limited to them.” *Id.* at 429 (emphasis in original). Furthermore, the court identified other statutory provisions solidifying that the “MHRA’s protections against discrimination in access to public accommodations *plainly* extend to accommodations owned by the state or its subdivisions,” and “*plainly* prohibit[] discrimination by the state or its subdivisions on the basis of sex.” *Id.* at 429-30 (citing R.S. Mo. §§ 213.010(15)(e), 213.070) (emphasis added). There are no comparable provisions within the MMPA demonstrating that it “plainly” extends to the University or any other State actor.

entities. The legislative intention to include a public corporation within the scope of a statute must be “clearly manifest.” *Carpenter*, 679 S.W.2d at 868. But there is no “clearly manifest” basis for viewing the University as a “person” when Plaintiffs’ interpretation forsakes the MMPA’s explicit, tailored definition of what “person” “mean[s]” in favor of a permissive general definition of “person” under § 1.020(12).

Plaintiffs also propose that the Court defer to the Attorney General’s definition of “person” as set forth in 15 C.S.R. § 60-7.010. (Substitute Br. 102). But the Attorney General’s definition says nothing about the University or “public corporations.” This regulation, which generally references “corporation[s]” and “any other legal entity” also does not illustrate the “clearly manifest” intention required by *Carpenter* to place the University, as an arm of the State, within the purview of the MMPA. *Cf. Krasney*, 765 S.W.2d at 651.

Critically, even if the Attorney General *had* intended to expand the statutory definition in this fashion, “it would be inappropriate for this Court to defer to an agency’s interpretation of a statute that expands, narrows, or is inconsistent with the plain and ordinary meaning of the words of the statute.” *Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 87 (Mo. App. 2011); *see also Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo.*, 912 S.W.2d 574, 576 (Mo. App. 1995) (“[I]n reviewing an agency’s interpretation, the courts must be vigilant in determining that the agency has not exceeded the authority delegated to it by the General Assembly and must not, in the name of deference, accede to an agency’s arbitrary action.”). In fact, the Attorney General’s regulation explicitly recognizes this limitation. *See* C.S.R. § 60-7.010 (the Attorney

General may only define terms “insofar as the definitions are not inconsistent with the Act”); *id.* at § 60-7.010(1) (providing definitions “[u]nless inconsistent with definitions provided in Chapter 407, R.S. Mo”).

There is no reason to create a conflict between the statute and the regulation. Rather, 15 C.S.R. § 60-7.010, which never mentions the University (or any other public entity), should be read consistent with R.S. Mo. § 407.010(5)—namely, neither provision encompasses the University.

Point VI should be denied.

VII. The Trial Court Correctly Denied Browne, Butterfield, Cummings, Draper, Higginbotham, Jaggie, and Reinsch Leave to Amend Because the Proposed Amendments to Add Counts of Negligent Misrepresentation Would Be Futile, and Plaintiffs Have Not Justified Their Failure to Include This Legal Theory in the Prior Petitions (Responding to Plaintiffs’ Point VII).

After the circuit court’s dismissal, Plaintiffs Browne, Butterfield, Cummings, Draper, Higginbotham, Jaggie, and Reinsch sought leave to amend their petitions to add counts based on common-law negligent misrepresentation without raising new factual allegations. (*Butterfield*, D30; *Draper*, D68; *Reinsch*, D14; *Browne*, D32; *Jaggie*, D14; *Higginbotham*, D14; *Cummings*, D14). The trial court denied their requests. (*Butterfield*, D37; *Draper*, D78; *Reinsch*, D21; *Browne*, D38; *Jaggie*, D21; *Higginbotham*, D21; *Cummings*, D21). As stated in Section I, *supra*, it is not clear under *Sofia* whether the Court has jurisdiction over these separate orders under Rule 74.01(b), but the University will discuss them for the sake of completeness.

This Court reviews a trial court’s denial of leave to amend for abuse of discretion. *Columbia Cas. Co. v. HIAR Holdings, L.L.C.*, 411 S.W.3d 258, 274 (Mo. banc 2013).

“An appellate court will not disturb a trial court’s denial of a motion to amend a pleading unless it is clearly erroneous.” *Bach v. Winfield-Foley Fire Prot. Dist.*, 257 S.W.3d 605, 611 (Mo. banc 2008). The trial court’s discretion is broad and is abused only “when the court’s ruling is clearly against the logic of the circumstances presented to the court and is so unreasonable and arbitrary that it shocks the sense of justice and indicates a lack of careful, deliberate consideration.” *World Wide Tech., Inc. v. Office of Admin.*, 572 S.W.3d 512, 521 (Mo. App. 2019) (quoting *Eckel v. Eckel*, 540 S.W.3d 476, 487-88 (Mo. App. 2018)).

In considering whether a trial court abused its discretion in denying a motion for leave to amend, courts consider the following factors: (1) hardship to the moving party if leave is denied; (2) the moving party’s reasons for omitting the matter from the original pleading; (3) the timeliness of the application; (4) whether inadequacy of the moving party’s pleading would be cured; and (5) injustice resulting to the nonmoving party if leave were granted. *Id.* The purpose of the rules regarding amendments “is to enable a party to present evidence that was overlooked or unknown at the time that the original pleading was filed without changing the original cause of action.” *Id.* (quoting *Eckel*, 540 S.W.3d at 488). “There is no abuse of discretion in denying the amended pleadings of parties who fail to show the pleadings include any facts that were unknown when the original pleading was filed.” *Id.* (quoting *Eckel*, 540 S.W.3d at 488).

Here, the amendment is futile. Negligent misrepresentation is a tort, and therefore the University remains protected by its sovereign immunity. See Section V.C, *infra*. A trial court does not err when it denies a motion to amend a pleading to assert a claim that

fails on its face. *Moore v. Armed Forces Bank, N.A.*, 534 S.W.3d 323, 328 (Mo. App. 2017).

The trial court's order is also justified by Plaintiffs' delay. In their motions, Plaintiffs offered no explanation for their failure to include this legal theory in their original petitions or amended petitions. (*Butterfield*, D30; *Draper*, D68; *Reinsch*, D14; *Browne*, D32; *Jaggie*, D14; *Higginbotham*, D14; *Cummings*, D14). Accordingly, the trial court properly exercised its discretion in denying leave to amend because plaintiffs "did not explain their failure to properly plead a claim for conversion in the Petition, nor did they identify any facts that were unknown when the Petition was filed." *Eckel*, 540 S.W.3d at 488.

Point VII should be denied.

CONCLUSION

The Court should uphold the trial court's dismissal of Plaintiffs' operative petitions against the University with prejudice without leave to amend.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that the Brief of Respondent complies with Rule 55.03 and with the limitations contained in Rule 84.06(b). I further certify that this brief contains 27,598 words, excluding the cover page, certificates required by Rule 84.06(c), and signature block as directed by Rule 84.06(c), and as determined by the Microsoft Word 2010 word-counting system.

/s/ Darci F. Madden

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I electronically filed the foregoing Brief of Respondent with the Clerk of the Court using the Court's electronic filing system, which will send a notice of electronic filing to all counsel of record.

/s/ Darci F. Madden